MAINE REPORTS

119

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MARCH 1, 1920—MARCH 8, 1921

FREEMAN D. DEARTH

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

C9263

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

*HON. WARREN C. PHILBROOK, reappointed April 9, 1920.

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

FREEMAN D. DEARTH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1920

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

STATE OF MAINE *vs.* INTOXICATING LIQUORS,

William G. McAdoo, Director General of Railroads, Claimant.

Penobscot. Opinion March 11, 1920.

Intoxicating liquors. Seizure. Libel. Forfeiture. Appeal by claimant. Imported and entered at port in Chicago, Illinois, for warehousing in bond. Transportation from bonded warehouse in Chicago to warehouse at the port of Bangor, Maine. Duties. Revenue tax. Imposition and collection of duties on imports. Federal authority. Federal control. Waiver or surrender of the Federal Government's rights. Webb-Kenyon Act. Director General of Railroads. Interference by State authorities with Federal authorities. Illegal seizure.

Ninety-one cases of Scotch whiskey were seized at Bangor on October 22, 1918, at the inward freight shed of the Maine Central Railroad Company by the sheriff of Penobscot County. The liquor was duly libelled, claim was duly filed and the liquors were ordered forfeited to the State. An appeal was taken by the claimant to the Supreme Judicial Court and thence brought to the Law Court on an agreed statement of facts.

The liquors seized were a part of a shipment of four hundred cases imported in June, 1917, by the Loma Grande Company of Chicago, Illinois, from Glasgow, Scotland, through the port of New York and entered at the port of Chicago for warehousing in bond, no duties having been paid.

On September 30, 1918, ninety-six of these cases were withdrawn by the Loma Grande Company from the bonded warehouse in Chicago for transportation via the Grand Trunk Railway and rewarehousing at the port of Bangor, Maine. The transportation bond required by the Federal statute was given. The

total amount of duties and revenue tax due and unpaid on the liquor so withdrawn was $1041.69. The liquor was loaded on a car of the Grand Trunk Railway at Chicago and transported under seal affixed by a representative of the Collector of Customs to Bangor, Maine, two transhipments being made en route under the direction of the Customs department. On arrival at Bangor the car was unloaded by permission of the deputy collector and the liquor was placed in the inward freight shed. It was there seized four days later. Neither payment nor tender of the unpaid customs duties thereon was made by the sheriff.

Held:

1. That the exclusive power governing the imposition and the collection of duties on imports is vested in the Federal Government under U. S. Const. Article I, Section 8, Clause 1.
2. This power cannot be interferred with by the State. A State law which in itself is valid as regulating purely internal affairs, is nugatory when it comes into collision with the constitutional provisions and acts of Congress regulating the collection of duties and imports. The collection of duties is as sacred as their imposition.
3. At the time of this seizure the goods were, in the eye of the law, in the custody of the revenue officers of the United States, or their designated representative, as they were being transported in bond from the custom house in one customs district to the custom house in another district for rewarehousing, the duties not having been paid, and the rewarehousing not having been completed.
4. Every provision of the Federal statutes protecting the U. S. Government in its lien was observed in this case, and at no point was the custody of the Government released or withdrawn. While the goods were in transit under bond in the sealed cars they were virtually under Government control.
5. The fact that at Bangor the goods were removed from the car and placed in a railroad freight shed by permission of the deputy collector did not terminate the custody on the part of the Government. They had not reached their destination, the consignee being the Collector of Customs and the depository being the U. S. Custom House. The deputy did not intend to waive or surrender the Government's rights, and he had no authority to do so. Any attempted act outside the scope of his authority would have been void.
6. The Webb-Kenyon Act so-called has no application here. That Act was designed to divest intoxicating liquors of their character as interstate commerce sooner than otherwise would have been the case, but had no effect upon the revenue laws of the United States for the collection of duties on imports.
7. The Director General of Railroads, under all the circumstances of the case, as the representative duly designated by the United States to transport this liquor under bond, and having given an obligation therefor, has sufficient interest to entitle him to appear as claimant.
8. The act of the State authorities in seizing and holding this liquor constituted an interference with the Federal authorities acting within their constitutional rights. It was therefore an illegal seizure.

On October 22, 1918, at the inward freight shed of the Maine Central Railroad Company, at Bangor, Maine, the sheriff of Penobscot County, seized ninety-one cases of Scotch whiskey. The liquor was duly libelled. William G. McAdoo, as Federal Director General of Railroads, operating the Maine Central Railroad, through counsel appeared as claimant. Claim was duly filed and the liquors were ordered forfeited to the State. An appeal was taken by the claimant to the Supreme Judicial Court, and the case thence went to the Law Court on an agreed statement of facts. Claim sustained. Order to issue for the return to the claimant of the liquors seized.

Case stated in the opinion.

Guy H. Sturgis, Attorney General, *and Albert L. Blanchard*, County Attorney, for the State.

Charles H. Blatchford, for claimant.

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

CORNISH, C. J. The general outline of this case is as follows: Ninety-one cases of Scotch whiskey were seized at Bangor on October 22, 1918, at the inward freight shed of the Maine Central Railroad Company by the sheriff of Penobscot County. The liquors were duly libelled and claim was filed by James E. Gibbons, the freight agent of the company at Bangor, for and in behalf of William G. McAdoo, Director General of Railroads, then operating the railroads of the country under a Proclamation of the President of the United States dated December 26, 1917, and the act of Congress of March 21, 1918. Hearing was had in the Municipal Court, and the liquors were ordered forfeited to the State. An appeal was taken to the Supreme Judicial Court for Penobscot County and thence brought to the Law Court on an agreed statement of facts.

From that statement it appears that the liquors seized and libelled were part of a shipment of four hundred cases of Scotch whiskey imported in June, 1917, by the Loma Grande Company of Chicago, Illinois, from Glasgow, Scotland, through the port of New York and entered at the port of Chicago for warehousing in bond, the bond given by the importer bearing date June 27, 1917.

On September 30, 1918, ninety-six cases were withdrawn by the Loma Grande Company from the bonded warehouse at Chicago for transportation via the Grand Trunk Railway, and rewarehousing at

the port of Bangor, Maine. The statutory transportation bond for this rewarehousing was given by the Loma Grande Company. The total amount of duties and revenue tax due on the liquors so withdrawn was $1041.69, and the ninety-one cases seized by the sheriff were a part of the ninety-six cases withdrawn at Chicago.

On September 28, 1918, a "Carriers United States Customs Manifest of Goods Subject to Customs Inspection" had been issued reciting that the goods were shipped by the Loma Grande Company, "in bond via Grand Trunk Ry. consigned to the Collector of Customs at Bangor, final destination, Bangor, Maine, consignee, c-o William McGinnis, W. A. Ross & Bros."

It is inferable from the agreed statement that the Loma Grande Company had sold these ninety-six cases to W. A. Ross & Bros., and they in turn had sold them to William McGinnis, who, after the goods had been duly rewarehoused at the Customs House in Bangor intended that the same should ultimately be sold in this State in violation of law.

The liquor was loaded on a car of the Grand Trunk Railway at Chicago, duly sealed by a representative of the Collector of Customs of that port and moved forward under original seal protection to Island Pond, Vermont, on the line of the Grand Trunk Railway, at which point it became necessary to transfer it to another freight car on the line of the Maine Central Railroad, which car was also duly sealed by a Customs inspector. At North Stratford, N. H. the property was again transferred and sealed by another Customs inspector, this car arriving at Bangor via Maine Central Railroad on October 18, 1918, under the seals so applied at North Stratford. The car was placed for unloading on that day. By permission of the deputy collector at Bangor the car was unloaded by representatives of the claimant and the liquor was placed by them in the inward freight shed of the Maine Central Railroad Company. It was seized at this shed by the sheriff four days later, on October 22, 1918. Neither payment nor tender of the unpaid customs duties thereon was made by the sheriff.

The claimant does not seek to regain the liquor as a common carrier on the ground that its seizure by State authorities was in violation of the commerce clause of the Constitution of the United States, Article 1, Section 8, Clause 3, which vests in the Federal Government the constitutional right to regulate commerce between

the several States. Under that clause and under the Act of Congress of August 8, 1890, the Wilson Act so-called, U. S. Comp. Statutes, 1916, Section 8738, the courts held that the shipment of intoxicating liquors from one State into another was protected from State interference until the interstate shipment had terminated, that is until actual or perhaps constructive delivery to the consignee. *Heyman* v. *Southern Railway Co.*, 203 U. S., 270; *State* v. *Intox. Liquors*, 102 Maine, 385; *State* v. *Intox. Liquors*, 104 Maine, 463. This protection however was withdrawn by the passage of the Act of March 1, 1913, the Webb-Kenyon Act so-called, U. S. Com., Stat. 1916, Section 8739, so that such a claim by a carrier can be no longer maintained.

The claimant rests his case upon another and entirely different ground, namely, the exclusive power of the United States governing the imposition and collection of duties on imports under the Federal Constitution and the Acts of Congress passed in furtherance thereof. Article 1, Section 8, Clause 1, reads: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." This power is vested solely in the Federal Government which can establish such methods for the collection of its duties as it may seem advisable. They are to be self-administered and not to be thwarted or hampered by the State, *U. S.* v. *Snyder*, 149 U. S. at 214, even in the attempted exercise of its police power. *Flaherty* v. *Hanson*, 215 U. S., 515. A State law which, in itself, is valid as regulating purely internal and intra-State affairs is nugatory when it comes into collision with an act of Congress regulating the collection of duties on imports. These fundamental and firmly established principles of law underlie the problem which has been submitted to this court.

The first question, therefore, which arises is whether the act of the State authorities in seizing and holding the liquors in the instant case constituted an interference with the Federal authorities in their constitutional right to collect the duties on these imported goods and to employ every power and means authorized by Congress to enable them to enforce such collection. If the act of the sheriff deprived the Federal authorities of a single remedy possessed by them, even though others remained, it must be held to be an invasion of the Federal domain and therefore nugatory. To permit one remedy or

mode of protection to be taken away would open the door to repeated invasions and to the destruction of all methods for the preservation of its rights of collection. The collection of duties is as sacred a constitutional right as the power to impose them.

In order to answer this vital question of interference or non-interference it is necessary to determine whether at the time of the seizure the goods can be said to have been in any sense in the actual or constructive custody of the United States, either through its Customs officials or other designated agents or representatives, and also whether that custody could be retained until all accrued duties and taxes were paid.

We think both questions should be answered in the affirmative, and, if so, it follows that the act of seizure by the State official was unwarranted.

I. Custody by the United States either through its Customs officials or other designated agents or representatives.

Let us briefly trace these goods from the moment of their importation until their seizure, and ascertain whether at any time and, if so, when, they were out of the actual or constructive custody of the United States Government.

It appears that they arrived at the port of New York, on the steamship Tuscania from Glasgow, Scotland, but were not entered in the New York Custom House. The importer and owner, the Loma Grande Company, being a resident of Chicago, Illinois, preferred to make that port the port of entry, as it had a legal right to do. The goods were therefore shipped to Chicago. The owner then had the right either to pay the duties and take the goods from the possession of the Government, or to withhold payment, enter them in a bonded warehouse, giving a warehouse bond, and leave them in the possession of the Government. It adopted the latter course. The goods were therefore deposited in the warehouse and a warehousing bond was given, with a guaranty company as surety, conditioned within three years either to withdraw the goods on payment of the duties and charges or to export them. This bond is given by the importer simply as further security for the duties, not in payment of them. *U. S.* v. *Lyman*, 1 Mason, 481. The condition of the bond is not directly for the payment of duties but for the withdrawal or exportation of the goods within the three year period "because the Government does not intend either to hold the goods indefinitely or to look

to the goods alone for the payment of the duties or to take the risk of loss that may attend holding them." *U. S.* v. *Georgi*, 44 Fed., 255-257; see also *Clark* v. *Peaslee*, 1 Cliff., 545, 554.

At the time of importation and entry when the duties accrue, a lien therefor attaches with the accompanying right of custody, and a personal debt is also created against the importer. When the goods are warehoused the Government takes in addition the required bond. So that it then has three distinct remedies; a debt against the importer, a lien upon the goods themselves, and a bond for further security. These remedies are independent one of another, and the bond discharges neither the personal debt nor the lien. It is cumulative rather than alternative. *U. S.* v. *Cobb*, 11 Fed., 76; *Mosle* v. *Bidwell*, 119 Fed., 480; *Meredith* v. *U. S.*, 13 Pet., 486.

While, therefore, these goods remained in the bonded warehouse in Chicago they were in the actual custody and exclusive possession of the Government, which possession could not be surrendered, except on exportation, or under a decree of the United States Court, (Customs Reg., Section 731), until all duties and charges were paid. *U. S.* v. *De Visser*, 10 Fed., 642; *Pattison* v. *Gale*, 196 Fed., 5; *Hartranft* v. *Oliver*, 125 U. S., 525, 528; *Guesnard* v. *L. & N. R. R.*, 76 Ala., 453. This rule was recognized by this court in *Peabody* v. *Maguire*, 79 Maine, 584, where it was held that there could be no actual attachment by a State officer of goods held in bond, although of course the consignee as having the general property in the goods, subject to the lien, could be held as trustee under our garnishee or trustee process.

Nor was this lien surrendered by the Government when a portion of the goods was withdrawn from the bonded warehouse at the port of Chicago for transportation to a bonded warehouse at the port of Bangor. Such rewarehousing is authorized by Section 5685 which reads: "Any merchandise, duly entered for warehousing, may be withdrawn under bond, without payment of the duties, from a bonded warehouse in any collection district, and be transported to a bonded warehouse in any other collection district, and rewarehoused thereat; and any such merchandise may be so transported to its destination . . . . over such routes as the Secretary of the Treasury may prescribe" &c.

By its very terms, the merchandise is still held under bond by the Government. The language is, "may be withdrawn under bond" and may be "so" transported, that is transported under bond or as

bonded merchandise over such routes as the Secretary of the Treasury may prescribe. Section 5698 requires that merchandise "shall be conveyed in cars, vessels or vehicles securely fastened with locks or seals under the exclusive control of the officers of the customs." The Government does not intend to release its grip upon the goods themselves. It keeps them, in transit as in the warehouse, "under bond," and so long as imported goods with duties unpaid are under bond they may not be interfered with by State authorities. This we think is a necessary corollary of the powers of the Federal Government.

The fact that in order for an importer or owner to avail himself of this rewarehousing section he must give an additional bond or obligation as provided in Section 5686, in no way affects the existing rights of the Government in the bonded goods themselves while being transported. It neither destroys nor takes the place of the Government lien. It does not purport to do so. For a failure to transport and deliver the bonded merchandise to the collector at the designated port within the prescribed time (here 120 days) the obligor is liable to pay double the amount of the duty. This is simply an additional contract between the parties specifying what the penalty shall be if the goods are not rewarehoused with the collector of the second port, and this requires not merely the bringing of them into the collection district or the nominal delivery of them to some representative of the collector but an actual entry and delivery of them to the collector for rewarehousing. *U. S.* v. *Coppell*, 48 Fed., 367.

Every provision protecting the Government was observed in this case, and every step in the journey from one customs district to the other was under the supervision of customs officials, so that the lien might not be lost. The goods were placed in charge of a carrier which had been designated by the secretary of the treasury. This was the Grand Trunk Railway. The Director General represents both that road and the Maine Central Railroad over which, as a connecting road, the goods were brought to Bangor. The car was sealed by customs officials at Chicago. When it became necessary to transfer the goods at Island Pond, Vermont, and again at North Stratford, N. H. the transfers were made under the inspection of customs officials and by them each car used was again securely sealed. Under that protection the goods reached Bangor. At no point between the departure from Chicago and the arrival in Bangor was the custody

of the Government released or withdrawn, and while the goods were in transit under bond in the sealed cars they were still under Government control. *Galveston &c. Ry. Co.* v. *Terrazas,* (Tex. Civ., App. 1914) 171 S. W., 303.

This control was not affected by what took place on arrival at the Bangor station. The consignee was the Collector of Customs and the depository was the United States Custom House. By permission of the deputy collector the seals of the car were broken and the liquors were removed from the car to the railroad freight shed. This however did not terminate the custody on the part of the Government. It was simply another stage on the journey. *Rhodes* v. *Iowa,* 170 U. S., 412. There was no purpose on the part of the Government to relinquish its right of possession. The agents of the claimant told the sheriff before seizure: "It is in bond, you can't touch it." Moreover the deputy could not waive or surrender the Government's rights even if he had desired or attempted to do so. He had no authority to do so. As a public official he represented the United States within the scope of his authority but not outside it, *U. S. Fid. & Guar. Co* v. *U. S.,* 220 Fed., 592; *Hart* v. *U. S.,* 95 U. S., 316; *Minturn* v. *U. S.,* 106 U. S., 437; *U. S.* v. *Witten,* 143 U. S., 76, and any act outside the scope of his authority was void so far as the Government is concerned.

The liquor was therefore still in bond, still under the Government control, when it was seized by the sheriff. It had not become a part of the common property of the State. The lien for duties still remained in full force and the consequent right of custody to enforce the lien. With this lien for duties went also a lien for the freight charges of the carrier, and the customs officers are authorized by statute to retain the goods until both are paid. In case of forfeiture and sale the carrier is compensated out of the proceeds for its freight charges as well as the Government for its duties. Section 5667, U. S., Cus. Reg., Section 732. All dealings with goods in bond must be subject to the paramount rights of the United States. Here those rights were ignored.

The three cases cited by the learned counsel for the State, we do not regard as adverse to the position here taken. In *U. S.* v. *Coppell,* 48 Fed., 367, a case already referred to and quoted from, an action was brought on the rewarehousing bond and the single point decided was that the mistake or blunder of the inspector of customs at the

port of destination in making a wrong disposition of the goods was no defense. It was held to be one of the contingencies against which the defendant had covenanted. The obligor and not the Government assumed the risks of transportation. That is the limit of the decision.

In *Ferry* v. *U. S.*, 85 Fed., 550, another section of the statutes was under consideration, viz: Section 5677, providing for the refunding of duties paid on goods destroyed while in the custody of the United States. It appeared that under Section 2899 of the former revision an importer cannot receive from the custody of the customs officers any imported merchandise until it has been inspected and appraised and found to be correctly invoiced, unless a bond be given under that section in double the estimated value of the goods, conditioned that it shall be redelivered to the custody of the collector within ten days after the package sent to the public stores has been appraised and reported to the collector. This importer before appraisal, had received and taken these goods to his own warehouse where they were destroyed by fire, and therefore they were held to be in his manual possession and not in the possession and custody of the United States.

That is not this case. But the language of Section 5677, under which that claim was made, throws light upon the conditions under which goods are deemed by Congress to be still within the custody and possession of the Government because it provides for such refunding in case of accidental fire or other casualty while the goods remain in the custody of the customs officers in any public or private warehouse "or while in transportation under bond from the port of entry to any other port in the United States."

The third case, *U. S.* v. *Pingree*, 1 Sprague, 339, Fed. Cas., No. 16050, was reversed upon appeal to the Circuit Court, as appears by a note, 1 Sprague 342. The reversing decision is unreported.

It is our conclusion therefore on this branch of the case that under the Federal statutes then in force, and under all the facts of the case at bar, these liquors while being transported in bond were within the possession and custody of the United States, within the purview of the customs laws at the time of the seizure, with a lien attached for the payment of duties and charges, and therefore were protected from seizure by State authorities.

II. *Effect of Webb-Kenyon Act.*

It is further contended by the State that the legal effect of the Webb-Kenyon Act, making it illegal for carriers to transport intoxicating liquors into States whose local laws prohibit their sale (of which

Maine is one) was to make such liquors contraband on arrival in those States, possessing no rights which the courts are bound to respect.

If these liquors were claimed here under the interstate commerce clause of the Constitution that defense would avail, as we have before stated; but to hold that these imported goods, notwithstanding they were moved in accordance with the customs laws of the United States, became contraband upon entering Maine and subject to local seizure, is in effect to hold that the Webb-Kenyon Act not only regulated interstate commerce traffic but also nullified the revenue laws of the United States, and repealed by implication an important portion of them. This is a result to which we cannot accede. The Webb-Kenyon Act has been construed by courts in many jurisdictions both State and Federal, see notes of decisions, U. S., Comp. St., Section 8739, Vol. 8, page 9538-40, and in no decision have we been able to find even a hint that anything more was effected or intended by its passage than a valid exercise by Congress of the power to regulate commerce between the States under the commerce clause of the Constitution, and to divest intoxicating liquors of their character as interstate commerce sooner than otherwise would have been the case. It brings them within the police power of the State as soon as they cross the State line, thereby supplementing and aiding the prohibitory laws of the State. *State* v. *Seaboard Air Line*, 84 S. E., 283 (N. C.); *State* v. *Grier*, 88 Atl., 579 (Del.). That was the utmost limit of its effectiveness and is in harmony with the title of the original act, which is "An Act divesting intoxicating liquors of their interstate character in certain cases." The Webb-Kenyon Act was absolutely independent of and unconnected with the revenue laws of the United States and the collection of duties upon imports, and it cannot be forced to repeal by implication an essential branch of those laws. Repeal by implication exists in two classes of cases, first, when the later statute covers the whole subject matter of the earlier, especially when additional remedies are imposed, and second, when the later is repugnant to or inconsistent with the earlier. None of these conditions applies here. The revenue acts were passed under one clause of the Constitution, the regulation of interstate commerce, embodied in the Webb-Kenyon law, under another. They neither cover the same subject matter, nor are they repugnant to nor inconsistent with each other. Each moves along in its own sphere unaffected by the other.

At the time this liquor was imported into the United States, which was before the adoption of the 18th or prohibitory Federal amendment and the passage of laws thereunder, it was a legitimate and dutiable article of merchandise which the laws of the United States permitted to be entered at designated ports of entry. This was entered at the Custom House and warehouse in Chicago. Under the then existing laws it could be legally rewarehoused in any other district in the United States, and that rewarehousing was as legal and valid as the original warehousing. The right to rewarehouse did not depend upon whether the new district was or was not within a prohibitory State. To hold that, is to amend and partially nullify Sections 5685, 5686 and all the other sections regulating rewarehousing. There is no such limitation. For illustration, suppose Bangor had been the port of original entry, would it be contended that in 1918 this whiskey, arriving on board a vessel from Scotland, and coming up the Penobscot River, could not have been entered in the Custom House in that city and placed in a warehouse under bond, by complying with the customs laws and regulations? Would it not have been absolutely free from State interference until it had reached its final destination? If it could have been so entered at Bangor directly and originally, then it could first have been entered at Chicago and rewarehoused in Bangor, because the one is as fully protected from State interference as the other. The adoption of the 18th amendment and the enactment of legislation thereunder have changed the situation, because no duties can legally accrue upon the importation of goods prohibited by the Federal Government. As such they are not entitled to be entered at the custom house nor to be bonded. *M'Lane* v. *U. S.*, 6 Pet. at 404. But prior to that adoption and legislation, intoxicating liquors, so far as import duties were concerned, stood on a plane with all other kinds of merchandise in the contemplation of the Federal laws.

III. *Legal Status of Claimant.*

Finally it is claimed by the State that the claimant has no legal standing in this court because he has no legal interest in these proceedings.

The words of the statute defining the qualifications of a claimant are these: "If any person appears and claims such liquors, or any part thereof, as having a right to the possession thereof at the time when the same were seized, he shall file with the magistrate such claim

in writing, stating specifically the right so claimed and the foundation thereof," &c. . . . . R. S., Chap. 127, Sec. 31, and the court passes upon his right "to the custody" of the liquor seized. The claimant may be the owner, or the agent or representative of the owner, or one having a special property in the goods which gives a legal right to their custody as against one having no right. *State* v. *Intox. Liquors*, 83 Maine, 158; *Same* v. *Same*, 112 Maine, 393. This section has been interpreted by our court as follows: The claimant "might show it was the owner, or that it was a carrier still responsible for the liquors to the shipper or consignee, or it might show any other facts which would entitle it to the custody." *State* v. *Intox. Liquors*, 112 Maine, 138, 141.

The claim here does not rest upon ownership, nor upon the rights of a common carrier under duties owed to the shipper or owner, but upon other facts entitling him to the custody, namely, upon his rights as the representative duly designated by the United States to transport this liquor under bond in accordance with the revenue laws, from the possession of the Customs officers in Chicago to the possession of the Customs officers in Bangor. Mr. Gibbons, the party signing the claim, did so for and in behalf of the Director General, and the foundation of his claim was stated to be that said property when seized was in his possession and custody as said agent while it was being transported in bond under the Carriers United States Customs Manifest consigned to the Collector of Customs at Bangor in bond from Chicago for rewarehousing under the provisions of the Federal Statutes and customs regulations. As such designated representative to complete the transportation in bond, he has given an obligation to the United States, conditioned upon the safe transportation and delivery of the goods to the collector at Bangor, and has made himself as Director General liable to pay an amount equal to the duties thereon, $1041.69, in case of non-delivery.

Under the circumstances disclosed in this case we think the Director General may be regarded as a legal claimant. The claim of the United States Government is really before this court through him.

Upon the whole case the conclusion of the court is that the following mandate must be sent down.

Claim sustained.
Order to issue for the return to the claimant of the liquor seized.

HARRY D. SIMPSON, Lib't., *vs.* MAE C. SIMPSON.

Kennebec. Opinion March 11, 1920.

Divorce. Motion to set aside the verdict. Statute governs. Exceptions.

In a libel for divorce for desertion, a jury trial was had under R. S., Chap. 65, Sec. 8, and in answer to submitted questions the jury found the allegation of desertion to be true and that a divorce should be granted. The presiding Justice thereupon signed a decree of divorce, and the libelee then filed a general motion addressed to the Law Court asking that the verdict be set aside and a new trial granted.

Held:

That this court has no authority to entertain this motion. The only remedy under the existing facts was by bill of exceptions.

This is a libel for divorce. After the jury found the allegation of desertion to be true, and a decree was accordingly signed, the libelee filed a general motion to have the verdict set aside, and a new trial granted, on which motion the cause came before the Law Court. Motion dismissed.

Case stated in the opinion.

Carl C. Jones, for libelant.

Harry Manser, for libelee.

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

CORNISH, C. J. This is a libel for divorce. The sole cause alleged is desertion. A jury trial was had under R. S., Chap. 65, Sec. 8, and in answer to submitted questions the jury found the allegation of desertion to be true and that a divorce should be granted. The presiding Justice thereupon signed the decree and the libelee then filed a general motion praying that the verdict be set aside and a new trial granted, on which motion the cause is now before the Law Court.

Counsel for libelant contends at the outset that the Law Court has no authority to entertain this motion, and that the only remedy is by bill of exceptions. This contention is sound. Such power does not subsist in the Law Court either at common law or under the statute.

The common law knows no right of appeal. A single Justice in a court of common law jurisdiction had and has the inherent right to set aside a verdict in an action tried before him. That was the only method by which a new trial could be granted at common law, and it so remained until statutory provisions extended the right of appeal and changed the practice. *State* v. *Hill*, 48 Maine, 24; *Brown* v. *Moore*, 79 Maine, 216. But our Law Court is not a court of common law jurisdiction, and therefore has no inherent power to grant new trials. It is purely a creature of statute and as such can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. It follows that the Law Court has no common law jurisdiction over this motion from the court at nisi prius.

Nor do we find any statute authorizing the procedure taken here. The cases and as the statute itself states, the "only" cases that can come before the Law Court are specified in R. S., Chap. 82, Sec. 46, and these are: "Cases in which there are motions for new trials upon evidence reported by the Justice; questions of law arising on reports of cases; bills of exceptions; agreed statements of facts; cases civil or criminal, presenting a question of law; all questions arising in equity cases; motions to dissolve injunctions issued after notice and hearing or continued after a hearing; questions arising on writs of habeas corpus, mandamus and certiorari, when the facts are agreed on, or are ascertained and reported by a Justice."

The pending cause falls within none of these provisions unless it be the first, "Cases in which there are motions for new trials upon evidence reported by the Justice." The procedure is regulated by R. S., Chap. 87, Sec. 57, viz: "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 Justice or authenticated by the certificate of the official court stenographer." These provisions evidently refer to actions at law in which a verdict has been rendered in the ordinary form, and not to libels for divorce. While proceedings in divorce are civil in their nature as distinguished from criminal, yet they are ecclesiastical in their origin, are regulated

entirely by statute, and cannot be classed as civil actions or cases. This point is fully discussed by Chief Justice Shaw in *Lucas* v. *Lucas*, 3 Gray, 136, where it was held that writ of review, grantable under the Massachusetts statute in all civil actions, would not lie to revise a decree dismissing a libel for divorce.

Another and conclusive reason why this motion cannot lie in the proceedings under consideration is this: A general motion for a new trial in civil actions is made and entered after the verdict of the jury and before the judgment of the court is rendered. Judgment is deferred until a verdict is found and stands unreversed. If the motion is granted in a given case a new trial is had. If the motion is denied the verdict stands and judgment follows automatically. The motion filed in this case follows the ordinary form and reads, "And now said Mae C. Simpson after verdict against her and before judgment, moves that said verdict be set aside and a new trial granted" &c. This is not true. Here the motion was filed after both the findings of the jury and the judgment by the court, because the decree signed by the court was in the nature of a judgment. It was therefore filed not before judgment but after judgment, and the only remedy was by exceptions, to test the correctness of the ruling of the court. The situation is similar to that when a presiding Justice, in an ordinary civil action at law, submits certain findings to the jury, and on the strength of those findings orders judgment for plaintiff or defendant. Under such conditions a question of law is raised and the losing party must seek his remedy not by motion for new trial but through exceptions to the ruling of the court ordering judgment. So here the libelee should have filed exceptions to the ruling of the presiding Justice granting the divorce which constitutes the judgment, making the evidence a part of the exceptions. That was the procedure in the case of *Sweet, Lib't* v. *Sweet*, very recently decided by this court. See also *Scolardi* v. *Scolardi*, 108 At., 651 R. I., (1920). The Law Court is open to exceptions in libels for divorce as in civil actions because R. S., Chap. 82, Sec. 46, expressly includes "bills of exceptions," and there are many such instances; thus on exceptions to rulings on matters of evidence, *Sullivan* v. *Sullivan*, 92 Maine, 84; to dismissal of the libel because it did not present a case within the jurisdiction of the court, *Goodwin* v. *Goodwin*, 45 Maine, 377; *Stewart* v. *Stewart*, 78 Maine, 548; to a ruling sustaining a demurrer, *Holyoke* v. *Holyoke*, 78 Maine, 404.

Thompson v. *Thompson*, 79 Maine, 286, cited by libelant is not strictly in point. That case was heard by the presiding Justice, and not by a jury, and the court held that the finding of facts by the judge could not be attacked by motion, but only by exceptions. "In matters of law the proper practice is to take the case up by exceptions, even though the objection is to the final ruling granting the divorce. In which case the presiding Justice reports the facts as he finds them or in some cases the testimony upon which he grounds his conclusion, and thus is distinctly presented the question, whether as a matter of law he has committed an error." The same practice should follow the signing of the decree in jury tried cases.

The only other statute that needs consideration is R. S., Chap. 65, Sec. 11, which provides that "within three years after judgment on a libel for divorce, a new trial may be granted as to the divorce when the parties have not cohabited, nor either contracted a new marriage since the former trial."

That statute has no application to a motion filed in a pending libel at the term when the divorce is granted. It contemplates a subsequent and distinct proceeding brought on a new petition, served on the other party, entered at a subsequent term, and heard by the court at nisi prius, whence it may be taken to the Law Court on exceptions. It partakes somewhat of the nature of a review of the prior proceedings, enacted perhaps because the ordinary petition for review cannot be invoked. It has been employed to seek a change of alimony, *Merrill, Pet'r* v. *Shattuck*, 55 Maine, 374; to amend decree fraudulently obtained and to alter decree as to alimony, *Henderson* v. *Henderson*, 64 Maine, 419; to annul a decree of divorce fraudulently obtained, *Holmes* v. *Holmes*, 63 Maine, 420; *Lord* v. *Lord*, 66 Maine, 265. In *Hills* v. *Hills*, 76 Maine, 486, the petition so far as it asked to have the merits of the original divorce hearing considered was denied, but so far as alimony and custody were concerned, was entertained because those were "revisable matters." Referring to *Holmes* v. *Holmes* and *Lord* v. *Lord*, supra, Chief Justice Peters said: These "were cases in which the Court recognized the existence of a right not to grant a new trial but to wholly annul a decree for a fraud practiced upon the Court in obtaining a jurisdiction for divorce." This statute does not authorize the motion in the pending case.

In conclusion it should be added that our attention has been called to no reported case, and a diligent search on our part has revealed none where a general motion under like proceedings was brought to and entertained by this court. The fact that these proceedings are unprecedented, and that such practice has never before been adopted nor recognized in this State, is convincing evidence of the accepted professional view of the law.

Motion dismissed.

STATE OF MAINE *vs.* RINALDO DI PIETRANTONIO.

Cumberland. Opinion March 11, 1920.

Refusal to direct a verdict. Exception. Motion to set aside the verdict. Appeal. Waiver.

Indictment for assault upon an officer. Verdict guilty of assault. Upon exception and appeal by respondent it is

Held:

1. The exception to the refusal of the presiding Justice to direct a verdict in favor of the respondent was waived by the filing of the motion before the same Justice to set aside the verdict after it was rendered, as the same question was raised by both.
2. The appeal, authorized by R. S., Chap. 136, Sec. 28, in cases of felony raises the single issue, whether in view of all the testimony the jury were warranted in believing beyond a reasonable doubt that the respondent was guilty. A careful study of the case, aided by arguments of counsel, fails to convince this court that their belief was unwarranted.

Indictment for assault upon an officer. At the close of all the testimony the respondent requested the court to direct a verdict of not guilty on the ground of insufficient evidence. Request refused and exception taken. After verdict, respondent filed a motion, to set aside the verdict on the general ground that it was contrary to the law and the evidence. This motion was denied and the respondent appealed. Exception overruled. Appeal dismissed. Judgment for the State.

Case stated in the opinion.

Carroll L. Beedy, and Clement F. Robinson, attorneys for the State.

Wilbur C. Whelden and Samuel L. Bates, attorneys for respondent.

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

CORNISH, C. J. The indictment in this case charged the respondent with an assault upon an officer.

At the close of all the testimony the respondent requested the court to direct a verdict of not guilty on the ground of insufficient evidence, and to the refusal to so direct an exception was taken. The jury then rendered a verdict of guilty of assault.

After verdict, the respondent filed a motion, asking the presiding Justice to set aside the verdict on the general ground that it was contrary to the law and the evidence. This motion was denied and the respondent filed an appeal to the Law Court.

The exception to the refusal of the court to direct a verdict in favor of the respondent was waived by the filing of the motion to set aside the verdict after it was rendered. Precisely the same question was raised by both. *State* v. *Simpson,* 113 Maine, 27; *State* v. *Davis,* 116 Maine, 260.

The appeal, authorized by R. S., Chap. 136, Sec. 28, in case of felony, raises the single question whether in view of all the testimony the jury were warranted in believing beyond a reasonable doubt that the respondent was guilty. *State* v. *Lambert,* 97 Maine, 57; *State* v. *Albanes,* 109 Maine, 199; *State* v. *Priest,* 117 Maine, 223. The jury that tried the case and saw and heard the witnesses have expressed their belief by their verdict, and a careful study of the evidence, aided by the arguments of counsel, fails to convince this court that their belief was unwarranted.

Exception overruled.
Appeal dismissed.
Judgment for the State.

MARY A. DONAHUE *vs.* THORNDIKE & HIX, Inc.

Knox. Opinion March 11, 1920.

The Workmen's Compensation Act. Employer's rights. Assignment. Election of injured employee. Amendment.

Under R. S., Chap. 50, Sec. 26, if the injured employee claims compensation under the Workmen's Compensation Act, and the same is awarded, the employer having paid the compensation or become liable therefor, succeeds to the rights of the injured employee to recover damages against the person responsible for the injury. No assignment is required by the terms of the law; but the employer, upon paying the award or becoming liable therefor, is at once vested with the injured employee's right of action against the wrong-doer. The injured employee cannot receive directly both payment from the third party and compensation from his employer. In proceeding, however, against the wrong-doer the employer is not limited in his recovery to the amount paid by him; Section 26 permits the employer by an action against the wrong-doer to reimburse himself and, also, to recover for the injured employee a sum over and above the amount for which the employer was absolutely liable, if the evidence should permit such recovery.

The liability of such wrong-doer to pay damages in respect to the injury is not affected by the election of the injured employee to receive compensation under the act.

By Section one, paragraph one of the Workmen's Compensation Act of Maine, the term "employer", if the employer is insured, "includes the insurer unless the contrary intent is apparent from the context or it is inconsistent with the purposes of this act." No contrary intent appears from the context of Section 26, nor is such construction inconsistent with said section or the act. It is accordingly held that the instant action was rightly brought in the name of the injured employee for the benefit of the insurance company which paid the compensation awarded. The liability of the defendant is the same whether the action is for the benefit of the injured employee or the insurer.

The action being in form an action at common law to recover damages for personal injuries caused by the negligence of defendant's servant, it is held that the action can be maintained without either an amendment to the declaration, alleging payment by the insurance company for whose benefit the action is brought, or evidence of payments by the insurance company in compliance with the Workmen's Compensation Act.

This is an action on the case brought in the name of the plaintiff for the benefit of the Fidelity & Casualty Company of New York, claiming to succeed to the rights of the plaintiff to recover for personal injuries sustained by reason of the alleged negligence of a servant of the defendant, under the provisions of the Workmen's Compensation Act of Maine. Defendant filed plea of general issue, without brief statement. At the conclusion of the evidence the case was reported to the Law Court for the determination of all questions of law and fact involved in the case, with the stipulation that in the event defendant is liable, damages to be assessed at three hundred dollars.

Judgment for plaintiff with damages assessed at $300.

Case stated in the opinion.

Rodney I. Thompson, for plaintiff.

Charles T. Smalley, for defendant.

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

MORRILL, J. The decision of this case involves the construction of R. S., Chap. 50, Sec. 26, which reads as follows:

"Sec. 26. When any injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this act or obtain damages from or proceed at law against such other person to recover damages; and if compensation is claimed and awarded under this act, any employer having paid the compensation or having become liable therefor shall be subrogated to the rights of the injured employee to recover against that person, provided, if the employer shall recover from such other person damages in excess of the compensation already paid or awarded to be paid under this act, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action."

On May 2, 1917, the plaintiff was an employee of one Frank L. Newbert, who then was an assenting employer under the Workmen's Compensation Act, and was insured by the Fidelity & Casualty Company of New York against liability under that act; on that day the plaintiff, through the negligence of a servant of the defendant acting within the scope of his duty, received a personal injury by accident arising out of and in the course of her employment.

We think that the above facts are fairly shown by the evidence and that plaintiff is not chargeable with contributory negligence.

The plaintiff elected to receive compensation under the act, and the same was paid by the insurer. This action was then brought; it is in form an action at common law to recover damages for personal injuries caused by the negligence of defendant's servant; in the writ the defendant is summoned to answer unto the plaintiff "in whose name this action is brought for the benefit of The Fidelity & Casualty Co. of New York;" the plea is the general issue, without brief statement; at the conclusion of the evidence the case was reported to the Law Court for the determination of all questions of law and fact involved in the case. The report states:

"Among other questions of law the following are specifically submitted for determination by the Law Court:

Defendant objected, and exceptions were reserved to all evidence tending to show payments to Mary A. Donahue by the Fidelity & Casualty Company, for the benefit of which Company this action purports to have been brought, on the ground that there was no allegation in the declaration of any such payments. The evidence was received de bene, the contention of the defendant being that the action could not be maintained for the benefit of the insurance company without such allegation and proof.

At the close of the evidence the plaintiff offered the following amendment: And plaintiff says that she has received from said Insurance Company in the way of weekly payments and physician's services performed for her at the expense of said Insurance Company, the sum of $300, and at the time of her injury she was in the employ of one F. L. Newbert, who was an assenting employer under the provisions of the Workmen's Compensation Act.

The Law Court to determine (1) whether the amendment was allowable, (2) if the amendment is not allowed whether the evidence of payments by the insurance company was admissible, (3) whether the action could be maintained without either the amendment or evidence of payments by the insurance company in compliance with the Workmen's Compensation Act."

In considering the questions presented it may be premised that the statute is to be construed liberally and with a view to carrying out its general purpose; the act directs the Industrial Accident Commission to so interpret it, (Section 37) and this court has adopted the same

principle of interpretation. *Simmon's case*, 117 Maine, 175, 177. It is evident, also, that we cannot obtain aid from decisions which interpret statutes differing in phraseology from our own.

The language of Section 26 is clear and comprehensive: "When any injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto," the injured employee has the right, at his option, either to claim compensation under the act, or to obtain damages from or to proceed at law against such other person. The injured employee cannot receive directly both payment from the third party and compensation from his employer. If he receives payment from the third party, it would seem that such settlement, if not set aside, would bar his claim for compensation under the act. *Cripp's case*, 216 Mass., 586, 588; *Page* v. *Burtwell*, (1908) 2 K. B., 758. Nor have we to consider the question of election in its different aspects. *Turnquist* v. *Hannon*, 219 Mass., 560, 564; *Labuff* v. *Worcester Cons. Street Ry.*, 231 Mass., 170.

If the injured employee claims compensation under the act, as here, and the same is awarded, the employer having paid the compensation or become liable therefor, succeeds to the rights of the injured employee to recover damages against such other person. No assignment is required by the terms of the law; but the employer, upon paying the award or becoming liable therefor, is at once vested with the injured employee's right of action against the wrong-doer. *McGarvey* v. *Ind. Oil & Grease Co.*, 156 Wis., 580, 581. In proceeding against such other person the employer is not limited in his recovery to the amount paid by him, as seems to have been held in *U. S. Fidelity & Guaranty Co.* v. *N. Y. Railways Co.*, 156 N. Y. Supp., 615; but the section clearly permits the employer by an action against such other person to reimburse himself and, also, to recover for the injured employee a sum over and above the amount for which the employer was absolutely liable, if the evidence should permit such recovery.

The liability of such other party to pay damages in respect to the injury is not affected by the election of the injured employee to receive compensation under the act. The statute is silent as to the plaintiff in whose name, after payment by the employer, or after his liability is fixed, action shall be brought. The Massachusetts Act

in terms provides that it may be brought either in the name of the employee or in the name of the insurer; and in *Turnquist* v. *Hannon*, 219 Mass., 560, the action was brought in the name of the administratrix of the deceased injured employee, for the benefit of the insurance company. In a case under the Illinois Act it was held that an action was properly brought by the employer against such other person; *Marshall-Jackson Co.* v. *Jeffery*, Wis., 166 N. W., 647; so under the Nebraska Act. *Otis Elevator Co.* v. *Miller & Paine, C. C. A.*, 240 Fed., 376. In the latter case the court said: "The action brought by Miller & Paine against the Elevator Company under its right of subrogation must be treated, so far as the right to recover is concerned, just as if the action had been brought by the administrator of the estate of Pettengill" (the injured employee).

We perceive no good reason why the action for the benefit of the employer may not be brought in the name of either the employer or the employee. The essential allegations as to defendant's liability must be the same in either case. In fact it seems a much more simple procedure to bring the action, as was done in the instant case, in the name of the injured employee for the benefit of the party in interest. The cases on assigned choses in action are analagous.

By Section 1, paragraph 1 of the Workmen's Compensation Act (R. S., Chap 50), the term "employer", if the employer is insured, "includes the insurer unless the contrary intent is apparent from the context or it is inconsistent with the purposes of this act." We perceive no contrary intent from the context of Section 26, nor is such a construction inconsistent with said section or the act. The clear intent of the section is that the party paying compensation under the act, or whose liability therefor is fixed, shall succeed to the rights of the injured employee to recover against the wrong-doer. We accordingly hold that this action was rightly brought in the name of the injured employee for the benefit of the insurance company which paid the compensation awarded. In *Marshall-Jackson Co.* v. *Jeffery*, supra, it was held that the right of the employer to enforce the employee's claim did not vest in the employer any such right of action which could pass by subrogation to an insurer of the employer for saving him harmless from loss under the compensation law of Illinois. But the inclusive definition of the term "employer," quoted above, is not found in the Illinois Act.

We come to the questions specifically submitted by the report. We are of the opinion that the amendment offered by the plaintiff was allowable; it did not introduce a new cause of action; as before stated, the liability of the defendant was the same whether the action was for the benefit of the injured employee or the insurer. But we think that the proposed amendment was unnecessary, and the evidence of payment by the insurance company immaterial. The defendant could have no possible interest as to the appropriation of the amount for which it was liable, nor could its liability be affected by the fact that the damages recovered might or might not be divided between the employee and insurer. *Turnquist* v. *Hannon*, 219 Mass., 560, 565; *Otis Elevator Co.* v. *Miller & Paine*, 240 Fed., 376. "Just how the amount recovered in this action shall be divided as between the defendants, Miller & Paine, or the insurance company, is no concern of the Elevator Company."

We are accordingly of the opinion that the action can be maintained without either the offered amendment or evidence of payment by the insurance company in compliance with the Workmen's Compensation Act. In fact evidence of the amount paid might have a tendency prejudicial to the plaintiff upon the question of damages.

In accordance with the terms of the report the mandate must be,

Judgment for the plaintiff.
Damages assessed at $300.

ARTHUR STANLEY

vs.

INHABITANTS OF TOWN OF SANGERVILLE, et al.

Piscataquis. Opinion March 11, 1920.

Libel against towns.

An action to recover damages for writing and publishing a libel may be maintained against a town, or the inhabitants thereof in their corporate capacity.

Action on the case to recover damages for alleged libel. John S. Williams, one of the defendants filed plea of general issue and brief statement. The other defendant, the inhabitants of the town of Sangerville, filed a motion to dismiss as against said inhabitants, which motion was sustained by the presiding Justice, to which ruling the plaintiff excepted. Exceptions sustained. Motion to dismiss overruled.

Case stated in opinion.

C. W. & H. M. Hayes, and Hudson & Hudson, for plaintiff.

J. S. Williams and W. R. Pattangall, for defendants.

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

MORRILL, J. In his writ the plaintiff alleges that the inhabitants of the town of Sangerville and one John S. Williams did write and publish a libel imputing to the plaintiff the crime of larceny, in a writ brought by the inhabitants of said Sangerville against the plaintiff; the alleged libelous language is contained in the declaration of that writ, which in the present writ is set out as follows:

"In a plea of trespass, for that the said defendant (meaning the plaintiff, Arthur Stanley) at said Sangerville, with force and arms took, carried away and stole one Armco metal culvert of the property, goods and chattels of the said plaintiff, (meaning the said inhabitants of Sangerville) of the value of fifty dollars, and disposed of the same

to his own use." The plaintiff further alleges that the word "stole" was not pertinent to the issue in said action was not necessary to the maintenance of said action, and was inserted in said writ maliciously and in bad faith; he also alleges that the defendants delivered the libel to the clerk of the court to which the writ was returnable, there to be made a public record forever.

The inhabitants of Sangerville filed a motion to dismiss the action against them for the reason, "That said action is based on an alleged libel and that no action for damages for libel lies against a town or the inhabitants thereof in their corporate capacity." The presiding Justice sustained the motion. To this ruling the plaintiff has exceptions.

The dual capacity of New England towns as municipal corporations, in the absence of special legislation, is firmly established and has been recognized for many years. *Libby* v. *Portland*, 105 Maine, 370; *Eastman* v. *Meredith*, 36 N. H., 284; *Oliver* v. *Worcester*, 102 Mass., 499; and the same dual capacity has been recognized elsewhere. *Bailey* v. *New York*, 3 Hill, 531.

In their governmental capacity, as political sub-divisions of the State, they discharge certain public duties imposed upon them by the Legislature; and for the better discharge of those duties the inhabitants meet in town meeting for the choice of officers, for action upon reports of such officers, or committees, for the transaction of the necessary business connected with the discharge of the public duties imposed, and for the discussion of public affairs. The town upon such occasions acts in a legislative capacity and as a political body, and no action lies against a town for what is done by it as a political body and as a part of the administration of the government. Thus it was held in *Howland* v. *Inhabitants of Maynard*, 159 Mass., 434, a case relied upon by counsel for the inhabitants of Sangerville, that the town was not liable to an action for an alleged libel contained in the report of a committee appointed by the town, which report was accepted by the town at a town meeting regularly called, and printed and circulated in accordance with a vote passed at said meeting.

But, to use the language of this court in *Libby* v. *Portland*, supra, "the municipality as proprietor is not to be confounded with the municipality as legislator or custodian for the public welfare." The distinction was clearly stated in the oft cited case of *Small* v. *Danville*, 51 Maine, 359. "The several towns in this State sustain the two-

fold character of corporations and political divisions. So far as they may own and manage property, make contracts, sue and be sued, they are corporations; but, in matters pertaining to the preservation of the public health and peace, the making and repairing of highways and bridges, the support of the poor and the assessment and collection of taxes, they are political divisions, established and designed the better to enable the inhabitants to exercise and enjoy portions of the political power of the state."

In its corporate capacity as the owner of property held for its profit and advantage, the rights and liabilities of the town are measured strictly by the laws which determine all private rights and liabilities, and under the same conditions as a private corporation. *Libby* v. *Portland*, supra; *Oliver* v. *Worcester*, 102 Mass., 489, 500; *Woodward* v. *Water District*, 116 Maine, 86, 91. The maxim of respondeat superior may apply to them. 4 Dillon Mun. Corp., 5th Ed. Section 1655, (974).

It does not appear in the writ that the culvert in question was acquired by the town, or was in any way necessary, for the performance of a public duty, or was held in any governmental capacity; nor does it appear that in bringing the trespass action, the town was acting in its governmental capacity. Upon the face of the pleadings the inhabitants of the town of Sangerville in bringing the trespass suit were simply asserting their title to an article of property, which the town unquestionably had the right to own, *Libby* v. *Portland*, supra, and were seeking to recover damages of the present plaintiff for taking and carrying it away. The right to sue is one of the powers of a corporation.

It should be observed that in considering the motion to dismiss we are only concerned with the record as presented. *Richardson* v. *Wood*, 113 Maine, 330; with the offers of proof recited in the bill of exceptions we have no concern; nor can a motion to dismiss be used interchangeably with a demurrer. *Littlefield, et als.* v. *Railroad Company*, 104 Maine, 126. The precise question for decision, then, is whether, as stated in the motion, an action for damages for libel lies against a town or against the inhabitants thereof in their corporate capacity.

We think that such an action may be maintained. It has been asserted with much wealth of argument that a corporation being a mere legal entity is incapable of malice; and that an action in which

malice is a necessary element cannot be maintained against the corporation, but should be instituted against the natural persons concerned in the wrong. But a corporation is liable in damages for the publication of a libel, as for other torts. "The result of the cases is, that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." *Phila. Wilmington & Balt. R. R. Co.* v. *Quigley,* 21 How., 202, Law Ed. Bk. 16, Page 73; *Maynard* v. *Fireman's Fund Ins. Co.,* 34 Cal., 48; *Fogg* v. *B. & L. Railroad,* 148 Mass., 513. The above are actions for libel, and actions against corporations for newspaper libel are frequently found in the reports. In *Reed* v. *Home Savings Bank,* 130 Mass., 443, a mutual savings bank of the type common in this State, was held responsible in an action of malicious prosecution, "the malice of its authorized agents being imputable to the corporation."

We have before us no question of evidence, but simply the question whether, if the proof is sufficient, the action will lie against the town or its inhabitants in their corporate capacity, and upon the authorities cited, we think that the question must be answered in the affirmative.

Exceptions sustained.
Motion to dismiss overruled.

JOHN R. BRADSTREET *vs.* FRANK W. WINTER.

Waldo. Opinion March 22, 1920.

Writ of entry. Adverse possession. Title not acquired by adverse possession under a mistaken idea as to true boundaries. Survey. Lot lines. Disseizin. Plan.

On report. This is a real action to recover possession of a certain parcel of land situate in the town of Palermo.

On motion, the plaintiff filed an informal statement of his title and its origin, setting out that he acquired title by a warranty deed from Jesse C. Bradstreet, which deed is dated May 19, 1882, and that ever since that date he has had open, adverse, continuous, notorious and exclusive possession of the premises described in said suit under claim of right.

Held:

1. It is familiar law that the plaintiff is bound to recover upon the strength of his own title. He has the burden of proving the seizin upon which he counts.
2. One who by mistake occupies for twenty years or more land not covered by his deed, with no intention to claim title beyond his actual boundary, wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line.
3. It is firmly established in this State that the survey must govern when its location can be shown, that when land is conveyed by lot, without further descriptions, that the lot lines determine the boundaries of that lot when they can be located.
4. If the owner of a parcel of land, through inadvertance or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate as a disseizin.
5. When a grant or deed of conveyance of land contains an express reference to a certain plan, such plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed.

The testimony of the plaintiff fails to establish title by adverse possession.

On report. Judgment for defendant. Real action wherein plaintiff demanded a certain parcel of land in the town of Palermo. Plea, the general issue, with a brief statement disclaiming title to a part of land described in the writ, and claiming title to the remainder. At

the conclusion of the evidence introduced by plaintiff, the case was reported to the Law Court to render "such judgment as the rights of the parties require, upon so much of the evidence as is legally admissible."

The case is stated in the opinion.

Carroll N. Perkins, and F. W. Clair, for plaintiff.

Dunton & Morse, and H. C. Buzzell, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, WILSON, DEASY, JJ.

HANSON, J. On report. This is a real action to recover possession of a certain parcel of land situate in the town of Palermo, described as follows:—"Beginning at a stake and stones in the westerly line of lot No. 102 as delineated on plan of Palermo by Bradstreet Wiggin; thence north 24° 55' west, one thousand eight hundred and thirty-one feet to a stone monument set in the ground; thence south 38° 15' east, one thousand thirty-eight feet to a stone monument set in the ground; thence south 27° 27' west three hundred fifty-one feet to the westerly shore of Mud Pond, so-called; thence along the westerly shore of said Mud Pond to its southerly end; thence in a straight line about five hundred twenty feet to the point of beginning."

On motion, the plaintiff filed an informal statement of his title and its origin, setting out that he acquired title by a warranty deed from Jesse C. Bradstreet, which deed is dated May 19, 1882, and that ever since that date he has had open, adverse, continuous, notorious and exclusive possession of the premises described in said suit under claim of right.

The defendant filed a disclaimer to a certain portion of the land described in the plaintiff's writ, and claims title to, and says he was in possession of, only that part of the same which is bounded and described as follows: "Beginning at a point in the westerly line of land described in plaintiff's writ six hundred feet northerly of the stake and stones at the southwest corner of said land; thence in a northerly direction along said westerly line, twelve hundred and thirty-one feet to stone monument set in the ground; thence south 38° 15' east ten hundred thirty-eight feet to a stone monument set in the ground; thence south 27° 27' west three hundred fifty-one feet to shore of Mud Pond; thence along the shore of said pond in a westerly direction to a point intersected by a straight line running from the point of

beginning at right angles with the westerly line of land described in said writ; thence in a westerly direction along said line to the point begun at; and that he was not on the day of the date of Plaintiff's writ, and is not now tenant of the freehold, and was not then and is not now in possession of the residue of the land described in plaintiff's writ, and he disclaims all right, title or interest therein."

The plaintiff in the progress of the case introduced the deeds comprising defendant's chain of title as well as his own. The Wiggin plan referred to in the declaration was not produced at the trial. It is to be gathered from the deeds and grants in the case that prior to the year 1804 there was much confusion, and some dissatisfaction as to the titles near the Sheepscot Great Pond; and steps were taken to adjust the same. The Proprietors of the Kennebec Purchase deeded to Eben Hale Bradstreet, who occupied one of the lots, a lot of land described and bounded as follows, to wit: Southerly by the Great Pond, so-called, thence running northerly and entering the width of the lot as by the plan so as to contain one hundred acres, it being lot No. 102 on plan No. 10, situate in Sheepscot Pond Settlement, so-called, as by plans and description signed by Isaac Pillsbury, surveyor in the office of the Secretary of the Commonwealth. The deed was dated June 5, 1804.

Under this title the predecessors of the plaintiff occupied the "home place" on lot 102 until 1882, when the plaintiff came into possession and ownership by deed from his father, Jesse C. Bradstreet. Prior to 1882, the plaintiff says his father cut a few hoop-poles on the locus, and on that occasion Stephen Chadwick, defendant's predecessor, "came down here and followed us up here, or came up the same way we did, and we were cutting hoop-poles . . . and they got to pawing around this monument and they were talking about it . . . and father says 'this is our monument here.' "

"Q. And what did Mr. Chadwick say to your father?

A. I don't know. I don't know the whole of it. I don't know the whole. I went to work lugging out hoop-poles and he went on somewhere else." . . . .

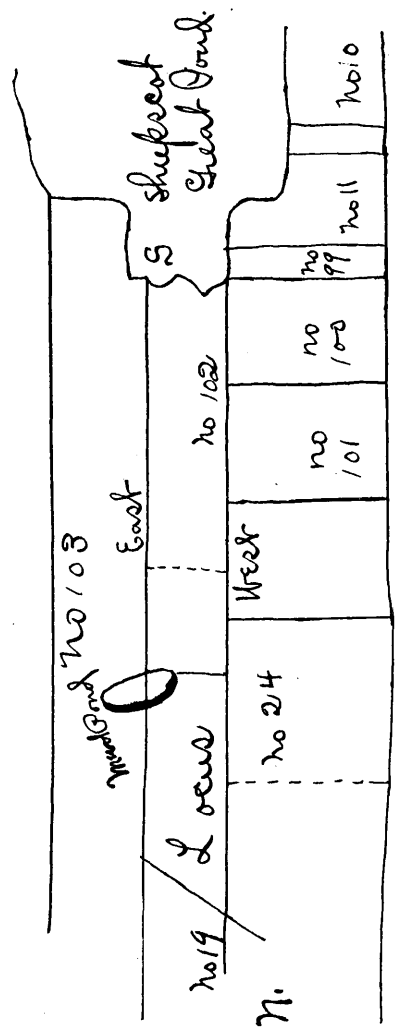
"Q. And did you ever hear them have any conversation about the west line after that?

A. I don't know as I ever did."

The plaintiff's home lot, so-called, was first known as lot 102 of Sheepscot Great Pond Settlement, as delineated upon Plan No. 10,

dated November 30, 1802, and signed by John Pillsbury, Surveyor, and in the case. The actual location of the northerly bound of that lot is the subject of inquiry here, and as counsel for the plaintiff observed in their brief, "wherever the northerly bound of lot No. 102 was one hundred years ago, it must, so far as appears in this case, be to-day."

The plaintiff claims that the southerly line of lot No. 19 is the northerly line of lot No. 102, while the defendant contends that the southerly line of lot No. 19 is the northerly line of lot No. 24, title to which he derived from John M. Brawn, grantee of Margaret Chadwick, widow of Stephen Chadwick, who owned lot No. 24, which defendant says bounded lot 102 on the north.


Shubenacadie Grand Pond
No 103
East
No 102
Weir
No 101
No 100
No 99
No 11
No 10
No 24
No 19
N.

We have attempted to produce a plan, as above, from the evidence, and with the aid of a copy of an ancient plan from the records of the Commonwealth of Massachusetts. The plan offered shows only lots 102, 103, 10, 11, 99, 100 and 101. The lots running northerly from Great Pond, appearing on the plan, do not have a north boundary, nor does the plan show the locus, or Mud Pond. These details, including the south boundary of lot 19, have been supplied by the court surveyor. The plaintiff in his declaration refers to a plan of Palermo by Bradstreet Wiggin, surveyor, but the plan was not used at the trial. A plan of the town in plaintiff's possession was offered by the defendant, but on plaintiff's objection was not permitted to be used. From the plans before us, however, enough is shown for an intelligent understanding of the case.

The plaintiff in his statement of title sets up two claims,—one under a deed, the other, ownership by adverse possession. As to the claim by deed. In the order of the several conveyances, the title came to plaintiff's predecessors as follows: Proprietors of Kennebec Purchase to Eben Hale Bradstreet, conveying a lot of land bounded and described as follows: Southerly by the Great Pond, so called; thence running northerly and entering the width of the lot as by the plan so as to contain one hundred acres, it being lot number one hundred and two on Plan No. ten situate in Sheepscot Pond Settlement, so called, as by the plans and description signed by Isaac Pillsbury, surveyor in the office of the secretary of the Commonwealth. This deed was dated June 5th, 1804. On July 18, 1836, Eben H. Bradstreet conveyed the same lot, as containing one hundred acres "more or less," and likewise one undivided half of lot No. 4, to Hale Bradstreet. June 25, 1846, Hale Bradstreet conveyed the same and other lots to Jesse C. Bradstreet, and on May 19, 1882, Jesse C. Bradstreet conveyed the same to the plaintiff, referring to the first lot as containing one hundred acres "more or less," and using for the first time the following as part of the description,—"on the north by land in part by land formerly owned by the late Stephen Chadwick."

The foregoing completes the plaintiff's chain, and it is manifest that he cannot sustain his claim under deeds because his predecessor bought one hundred acres according to a plan then in existence, and the deed conveys one hundred acres, no more, no less. The side lines were fixed, the length of the lot only was to be determined, and now upon the sketch in the case the northerly bound of the lot is marked

with a dotted line, and it will be observed that it is many rods south of the south line of the locus. The plaintiff had no deed of the locus, nor did his predecessor in title have title, either by deed or prescription.

As to adverse possession. The plaintiff has the burden of showing title by his own acts. He begins his statement by saying that at ten years of age he aided his father at cutting hoop-poles on the locus at a time when Stephen Chadwick, the owner of lot No. 24, "followed them up" and had a conversation with his father about a corner, and while he could not recall anything that Mr. Chadwick said, he did recall that his father said "this is our monument here," and that "the men went away together toward Mud Pond."

Since 1882, the plaintiff testifies to cutting a few hoop-poles and cord-wood and some logs from the lot, and no doubt did cut, but never with the knowledge of the defendant or his predecessor. He states that Mr. Brawn paid him for cord-wood stumpage from the lot, which is no doubt true, but the evidence shows conclusively, and it is evidence from plaintiff's witnesses, that such cutting as Brawn made by consent of the plaintiff, was on the lot disclaimed, and which so far as the case shows has been used by the plaintiff for more than twenty years,—for near the point in question, the point where the plaintiff's son testified to Brawn's cutting cord-wood, and admitting he might be over the line, the plaintiff and John M. Brawn, the predecessor in title of defendant, jointly maintained a pasture fence for years; and that fence extended from the west line of lot 102 to Mud Pond.

The plaintiff offered in evidence a mortgage dated Dec. 20th, 1859, from Stephen Chadwick to Jesse C. Bradstreet, hereinafter referred to.

March 31, 1824, Lott Chadwick deeded to Stephen Chadwick Lot 24, according to a plan by Bradstreet Wiggin, surveyor. November 30, 1865, Samuel Norton, administrator of the estate of Stephen Chadwick, conveyed to Margaret Chadwick, widow of Stephen Chadwick, the same with other lots. April 13, 1869, Margaret Chadwick conveyed the same to John M. Brawn, and on October 30, 1912, John M. Brawn conveyed one hundred acres, more or less, to the defendant. This deed included the locus. But the plaintiff says that the description in the mortgage from Chadwick to Bradstreet includes lot No. 24 and recognizes that it does not extend beyond the line which the plaintiff claims as his westerly line. The description

says, "On the east by Jesse C. Bradstreet's westerly line of his home lot," and this is the only easterly bound in the mortgage, except after running westerly and northerly, he runs his line easterly on land of Linscott to Bear Pond. "Thence, southerly on said Linscott's land to the first mentioned bound;" and offers the mortgage if admissible. The mortgage is admissible and proper to be considered with all the other testimony in the case upon the question at issue, the true location of the north line of lot 102. 16 Cyc., 945. As to part of the description being inconsistent with the defendant's position, we think the evidence clearly shows it is not, for a careful examination of the testimony shows that for several rods lot 24 is bounded on the east by Jesse C. Bradstreet's westerly line, and with that as the first bound, it leaves the easterly boundary undescribed until the last course, as stated by counsel. This was in the year 1859, when Stephen Chadwick gave that mortgage to plaintiff's immediate predecessor. Twenty-three years later, on May 19, 1882, Jesse C. Bradstreet conveyed the Bradstreet homestead property, which was lot 102, to the plaintiff, and he accepted the deed containing the exact language of the deed from proprietors of Sheepscot Great Pond Settlement, and adding the northerly boundary which that deed left undetermined, as follows, "on the north by land in part by land formerly owned by the late Stephen Chadwick, deceased."

It is familiar law that the plaintiff is bound to recover upon the strength of his own title. He has the burden of proving the seizin upon which he counts. *Bussey* v. *Grant*, 20 Maine, 284; *Brown, Jr.* v. *Webber*, 103 Maine, 60. His first entry upon the locus after he acquired title to lot 102, was in 1902 or later. The testimony of his witnesses relates to the same time or later. There is no evidence in the case that the plaintiff, or his predecessors, ever intended to claim beyond the true line. One who by mistake occupies for twenty years or more land not covered by his deed, with no intention to claim title beyond his actual boundary, wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line. *Brown* v. *Gay*, 3 Maine, 126; *Preble* v. *Railroad Co.*, 85 Maine, 260. In *Ilsley et al.* v. *Kelley*, 113 Maine, 497, this court held, that "it is firmly established in this State that the survey must govern when its location can be shown, that when land is conveyed by lot, without further descriptions, that the lot lines determine the boundaries of that lot when they can be located;" and also that "if the owner of a

parcel of land, through inadvertance or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate as a disseizin." When a grant or deed of conveyance of land contains an express reference to a certain plan, such plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed. The proprietors of the *Kennebec Purchase* v. *Tiffany*, 1 Maine, 219; *McElwee* v. *Mahlman*, 117 Maine, 406.

The testimony of the plaintiff fails to establish title by adverse possession.

Judgment for the defendant.

FRED G. HAYDEN *vs.* MANVILLE D. RUSSELL and R. LEE KILLMAN.

Piscataquis. Opinion March 24, 1920.

Unrecorded chattel mortgage. Subsequent purchaser or mortgagee for a valuable consideration holds as against an unrecorded mortgage, even with notice, in absence of fraud.

The statute relating to the effect of recording chattel mortgages in this State has always been construed strictly.

Held:

That in case of personal property a subsequent purchaser or mortgagee for a consideration valid between the parties, as a security or part payment of pre-existing indebtedness, even with notice of a prior encumbrance, unless actual intent to defraud is shown, may hold over the prior encumbrance if unrecorded.

This is an action of trover to recover the value of a horse, on which plaintiff held an unrecorded chattel mortgage to secure the payment of a note for forty-five dollars.

Plea, the general issue. Defendants purchased the horse of one Hersey without notice of the unrecorded mortgage to the plaintiff. At nisi prius the case was submitted to the court on an agreed state-

ment of facts. The court ordered judgment for the defendants, to which ruling the plaintiff took exceptions. Exceptions overruled.

Case stated in the opinion.

Hudson & Hudson, for plaintiff.

W. B. Pierce, for defendants.

SITTING: SPEAR, HANSON, PHILBROOK, WILSON, DEASY, JJ.

WILSON, J. An action of trover to recover the value of a horse, which the plaintiff sold to one Hersey, taking back a note for forty-five dollars in part payment and a chattel mortgage on the horse as security. Hersey was permitted to retain possession of the horse, but the plaintiff failed to record his mortgage. Afterward Hersey sold the horse to the defendants, and received therefor credit to the amount of thirty-five dollars on account of pre-existing indebtedness due them. The defendants took the horse without notice of the unrecorded mortgage to the plaintiff. The case at *nisi prius* was submitted to the court on the above facts by agreement of parties. The court ordered judgment for the defendants. To his ruling exceptions were taken by the plaintiff, and the case is now before this court on exceptions.

The plaintiff contends that under the recording act relating to chattel mortgages, Sec. 1, Chap. 96, R. S., a purchaser to take precedence over an unrecorded chattel mortgage must be a *bona fide* purchaser; that to constitute a *bona fide* purchaser as to prior equities there must be a new consideration moving between the parties; and that merely receiving a conveyance of a chattel in part payment of a pre-existing indebtedness is not sufficient to constitute one a *bona fide* purchaser against a prior unrecorded mortgage.

The question is one of new impression in this State. With respect to conveyances of real estate this court has adopted the rule contended for by the plaintiff, which is the law in most of the other States. *Bragg* v. *Paulk,* 42 Maine, 502, 517. 11 Corpus Juris 518, Section 194, and cases cited. Courts of acknowledged standing, however, have held, even where the recording act declared unrecorded mortgages void against a subsequent mortgagee "in good faith," that a mortgagee whose mortgage was given to secure a pre-existing debt was a "mortgagee in good faith" as to a prior unrecorded mortgage. *Vanaman* v. *Fliehr,* 75 N. J., Eq., 88; also see *Frey* v. *Clifford,* 44 Cal., 335, and *Worley* v. *Met. Motor Car Co.,* 72 Wash., 243, 246.

Neither of the recording acts of this State have ever expressly limited the subsequent purchasers or mortgagees who could take in preference to prior unrecorded conveyances or encumbrances by the words "in good faith" or "for a valuable consideration." Originally they both read substantially alike. Chap. 36, Sec. 1, Laws 1821; Chap. 390, Laws 1839. Their purpose has been held to be the same. *Griffith* v. *Douglass*, 73 Maine, 534. They have been construed, however, along different lines.

There appears to have been no construction by the court of the chattel mortgage recording act prior to the revision of 1841, but the statute relating to the recording of real estate conveyances had already received a liberal construction as to the good faith required of subsequent purchasers in order to take in preference to unrecorded deeds; and even constructive notice of the unrecorded conveyance was sufficient to prevent a subsequent purchaser or mortgagee from holding against it. *Matthews* v. *Demerritt*, 22 Maine, 312. *McKecknie* v. *Hoskins*, 23 Maine, 230; this court apparently following the interpretation of the Massachusetts statute by the court of that State from which our statute was adopted. *Norcross* v. *Widgery*, 2 Mass., 505.

And in the revision of 1841, Chap. 91, Sec. 26, to the recording act relating to real estate, which before provided that no unrecorded deed should be effectual except against the grantor, the Legislature added the further exception: "or persons having actual notice thereof," thus adopting the construction of the court, but limiting it to persons having "actual notice." The recording act relating to chattel mortgages, however, remained as before; that an unrecorded chattel mortgage is invalid except between the parties. Chap. 125, Sec. 32, R. S., (1841).

As a result the court inferred from this that it was the intent of the Legislature that the statute relating to chattel mortgages should be construed literally, and held in *Rich* v. *Roberts*, 48 Maine, 548, that an unrecorded mortgage of chattels was invalid as to a subsequent purchaser or mortgagee even with actual notice of the unrecorded encumbrance. While by reason of the terms of their recording acts, or more liberal construction by the courts, the rule as to the effect of notice is otherwise in most of the States, some of the States with statutes of similar tenor as Sec. 1, Chap. 96, R. S., have construed them strictly. *Long* v. *Cockern*, 128 Ill., 29; *Kohreman* v. *Dunbar*, 152 Ill.,

A. 34; *Franklin Nat. Bank* v. *Whitehead,* 149 Ind., 560; *Longey* v. *Leach,* 7 Vt., 377; *Travis* v *Bishop,* 13 Met., 304; *Bingham* v. *Jordan,* 1 Allen, 373; *Whitney* v. *Browne et al.,* 180 Mass., 597.

In *Rich* v. *Roberts* supra this court said:

"The revised statutes touching the recording of deeds of real estate has changed the former law so that actual notice of an unrecorded deed to persons making claim to the estate subsequent to its delivery from the same source, alone will postpone the latter to the former. In the statutes requiring the record of mortgages of personal property in order to make them effectual there is no such qualification and it cannot be properly inferred that one was intended against the imperative language used."

This case was soon after followed by *Shelden* v. *Connor,* 48 Maine, 584, tho with a dissenting opinion. It has, however, been later recognized as the law in this State: *Atkinson* v. *White,* 60 Maine, 396, 400; *Garland* v. *Plummer,* 72 Maine, 397, 400. Since the Legislature in the five revisions following that of 1841, in view of the above decisions construing this statute, has made no change in it, we must assume it has approved and adopted the strict literal construction placed upon it by the court.

We cannot regard *Shaw* v. *Wilshire,* 65 Maine, 485; *Horton* v. *Wright,* 113 Maine, 439; or *Martin* v. *Green,* 117 Maine, 138, as overruling this doctrine. The question was not in issue in these cases, as in each case there was a *bona fide* purchaser, i. e. a purchaser without notice, who had parted with a valuable consideration.

Until the Legislature shall indicate a different intent, the court will continue to construe this statute strictly. It is, therefore, held: that in the case of personal property, a subsequent purchaser or mortgagee for a consideration valid between the parties—as a security or part payment of a pre-existing indebtedness—even with notice of a prior encumbrance, unless actual intent to defraud is shown, may hold over the prior encumbrance if unrecorded.

Entry will be:

Exceptions overruled.

HARRY W. LOTHROP, Adm'r.

vs.

WOODFORD'S CONGREGATIONAL PARISH, et als.

Cumberland. Opinion March 25, 1920.

Will. Codicil. Contingent interest. Presumption against intestacy one of fact only. Remainderman. Bequest or devise on a contingency, which does not happen, is not effective.

Appeal from decree of sitting Justice on bill in equity praying for construction of a will.

Held:

1. That the bequest and devise to the Woodford's Congregational Parish, having been made expressly on a contingency which did not happen, did not take effect.

Appeal from the decree of a single Justice in a bill in equity, brought by the administrator asking for the construction of the will with codicil, of Eben T. Harmon, having been heard on bill and answer. Appeal dismissed with additional costs to be determined by the court below and to be paid out of the fund in question.

Decree below affirmed.

The case is stated in the opinion.

Snow & Snow, for complainant.

Clifford E. McGlauflin, for Woodford's Congregational Parish.

John H. Pierce, for all other respondents.

SITTING: SPEAR, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

PHILBROOK, J. This is a bill in equity for the construction of the will of Eben T. Harmon. Hearing below resulted in the following findings and decree, from which decree appeal was taken by the Woodford's Congregational Parish.

Findings by the court.

"This case came on to be heard on the sixteenth day of September, 1919, on Bill and Answer, each party being represented by counsel. After hearing the Court makes the following findings:

By a codicil to his will Eben T. Harmon, after giving a life interest in all the residue and remainder of his estate to his wife, gave to Lucy Pettengill a contingent interest in 1-12 of the residue of his estate upon her surviving both himself and wife. In case she failed to survive the testator the Woodford's Congregational Church was made the beneficiary of said 1-12 interest, but in case said Lucy Pettengill survived the testator but did not survive his wife, no disposition of the 1-12 interest was in terms made by the will or codicil.

The church contends that the general intent to dispose of all his property by this codicil is apparent from the whole will and codicil, that the presumption against intestacy should prevail, and to carry out the testator's intent the word "I" should be changed to read, "We," so that no property would then remain undisposed of by the will. The presumption against intestacy, however, is only one of fact,and is overcome by the plain language of a will; and the language in this codicil is clear, if allowed to stand, that the testator either purposely or by omission, has failed to dispose of all his property by the will and codicil under the conditions which have arisen.

After the death of his wife the testator divided his property into five parts. The disposition of two of the parts was vested in the remainderman after the death of the testator, so that in case of the death of the remainderman, provided she survived the testator, before the death of the testator's wife, the legacy passed to the heirs of the remainderman. In other words if she survived the testator, she took a vested remainder. In case, however, the remainderman failed to survive the testator in the first two instances the Woodford's Congregational Church was substituted in the first instance, and the children of the remainderman, in the second instance.

In the two following cases a different provision was made. The remainder in the first taker after the termination of the life estate was made contingent upon the remainderman surviving both the testator and his wife and in case of a failure to survive them both, in the one case the children of the remainderman were to take, and in the other, the Woodford's Congregational Parish.

The providing for both contingencies in other parts of the codicil, viz: of surviving himself and of surviving both himself and wife may be taken as strong, if not conclusive, evidence that the testator knew or was advised of the different results attached to such provisions and that in any case they were made advisedly, and that for some reason

unknown to the court and known only to himself the testator did not provide for the disposal of this part of his estate in the contingency which has happened.

In the face of the use of the same contingency in other parts of the codicil as exists in the clause in question, though no intestacy would result in any other case, we do not feel that the general intent to dispose of all his property is so clear, or the presumption against intestacy is so strong as to warrant the court in making such a change as is necessary to carry out the contentions of the church.

Reasonable costs to be paid out of the fund in question, to be determined by the court.

Decree in accordance with the above findings."

The decree, based upon these findings is as follows: "This cause came on to be heard this day on bill and answer and was argued by counsel; and thereupon consideration thereof it is ordered, adjudged and decreed, as follows, viz:

The bequest and devise to the Woodford's Congregational Parish under the clause of the will in question, having been made expressly on a contingency which did not happen, did not take effect, and therefore no effective disposition of said one-twelfth having been made, said one-twelfth part thereof became intestate property and descended to those entitled to the same under the Statute of Distribution at the time of the decease of said Eben T. Harmon.

Reasonable costs to be paid out of the fund in question to be determined by the Court."

After careful consideration of the contentions of the parties we are of opinion that the findings of the court below are correct and we adopt them.

Appeal dismissed with additional costs to be determined by the court below and to be paid out of the fund in question.

Decree below affirmed.

STATE OF MAINE *vs.* HIRAM W. CHADWICK.

Knox. Opinion March 25, 1920.

Guilt or innocence at common law not determined by degree of care. Mala prohibita. Criminal intent. Doing the act charged under the statute is the only essential fact. Time of seizure governs as to length of lobsters.

Complaint charging illegal possession of short lobsters. Exceptions to the refusal of the presiding Justice to give the following instructions:

"1. If from all the evidence, or from reasonable and proper inferences to be drawn therefrom, you are satisfied that any or all of these 109 lobsters were of legal length when put into the car from which they were taken by the wardens then the defendant is not guilty as to such of those lobsters as you are convinced were of lawful length at the time they were placed in the car.

2. Defendant has the right, if he uses all reasonable precautions to prevent a violation of the law, to have in his possession lobsters that may seem to be of unlawful length, if in that possession he exercises all proper and reasonable care to avoid a violation of the law and did not have such lobsters in his possession with any apparent intention of violating the law or had them in his possession under circumstances as would indicate that he had no apparent intention of violating it.

3. If you find that the lobsters in question were of lawful length when put into defendant's car, then they were at that time the property of the defendant, and no law could deprive him of any of those lobsters without just compensation therefor."

The third request was not urged at the hearing before this court. As to the others the respondent's brief says that they are offered as bearing upon the degree of care exercised by the respondent in the selection of lobsters to be placed in his car.

Held:

1. At common law the degree of care used by the respondent in doing criminal acts does not enter into the question of his guilt or innocence, although a different rule might apply to a statutory offense if an act mala prohibita was made so because it was negligently done.

2. Neither does the question of intent enter into the offense charged against the respondent under the statute. The axiom "actus non facit reum, nisi mens sit rea" does not always apply to crimes created by statute, and therefore if a criminal intent is not an essential element of a statutory crime it is not necessary to prove any intent in order to justify a conviction.

3. The illegal possession of short lobsters constitutes the crime, and the normal turpitude or the purity of the motive by which it was prompted, as well as knowledge or ignorance of its character, are immaterial circumstances on the question of guilt. The degree of care with which the act may have been done, or the intent with which it was done, are alike immaterial. The only fact to be determined in such cases is whether the defendant did the act.
4. It matters not what the measurement of the lobsters might have been when caught; the statute speaks in the present tense, viz: The length at time of seizure, not at some previous time.

Defendant was found guilty under R. S., Chap. 45, Sec. 35, of illegal possession of short lobsters. The presiding Justice refused to give certain instructions, to which refusal defendant took exceptions.

Exceptions overruled. Judgment for the State.

Case stated in the the opinion.

Henry L. Withee, Attorney for the State.

Rodney I. Thompson, for defendant.

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

PHILBROOK, J. The defendant has been found guilty of violation of the provisions of R. S., Chap. 45, Sec. 35, which provides a penalty for buying, selling, giving away, exposing for sale, or possessing for any purpose any lobster less than a certain length ascertained by measuring from the end of the bone of the nose to the center of the rear end of the body shell. The case arose prior to the amendment found in Public Laws 1919, Chap. 184, Sec. 8, which provides a different method of measurement.

The lobsters were taken from a receptacle admittedly in the care and under the control of the defendant. The case is before us upon a bill of exceptions from which we quote; "As bearing upon the degree of care exercised by the defendant in the selection of the lobsters in the car, and the right of possession of said lobsters, and the property of the defendant therein in consequence of said care, defendant's counsel requested the presiding Justice to instruct the jury as follows:—

If from all the evidence, or from reasonable and proper inferences to be drawn therefrom, you are satisfied that any or all of these 109 lobsters were of legal length when put into the car from which they

were taken by the wardens then the defendant is not guilty as to such of those lobsters as you are convinced were of lawful length at the time they were placed in the car.

Defendant has the right, if he uses all reasonable precautions to prevent a violation of the law, to have in his possession lobsters that may seem to be of unlawful length, if in that possession he exercises all proper and reasonable care to avoid a violation of the law and did not have such lobsters in this possession with any apparent intention of violating the law or had them in his possession under circumstances as would indicate that he had no apparent intention of violating it.

If you find that the lobsters in question were of lawful length when put into defendant's car, then they were at that time the property of the defendant, and no law could deprive him of any of those lobsters without just compensation therefor.

Which several instructions the presiding Justice refused to give, in supplement to his charge that the issue of the case was whether the respondent, at the time charged in the complaint, had in his possession lobsters of illegal length as defined by said statute, to which refusal defendant then and there excepted and prays that his exceptions may be allowed."

We have quoted the exceptions at length in order that the defendant's claims therein may be fully understood. The requested instructions, as we have seen, were presented as bearing upon (1) the degree of care exercised by the defendant in selection of lobsters, (2) the right of possession, (3) the property of the defendant therein, in consequence of said care. The third requested instruction was not pressed in argument and is not now relied upon, if we correctly interpret the defendant's brief. It would seem, therefore, that the requested instructions, as now urged upon our attention, bear more particularly upon the degree of care exercised by the defendant in selection of lobsters.

The first requested instruction, including the element of initial care in selection of lobsters, in effect asks that the defendant be exonerated if the lobsters were of legal length when placed in the car, or receptacle, regardless of their measured length when seized by the wardens.

We are not aware of any principle of common law which declares that the degree of care used by the accused enters into the question of guilt or innocence, although a different rule might apply to a statutory offense if an act mala prohibita was made so because it was negligently done. The statute under consideration certainly con-

tains no reference to negligence of the violator either directly or by implication. While not akin to negligence, intent may be the real ground upon which the defendant relies. At common law a crime possessed the element of an evil intention together with an unlawful action. The maxim is "actus non facit reum, nisi mens sit rea." In plain English the principle contained in the maxim is, a crime is not committed if the mind of the person doing the unlawful act is innocent, and therefore a guilty intent must be proved. But the maxim does not always apply to crimes created by statute, and therefore if a criminal intent is not an essential element of a statutory crime it is not necessary to prove any intent in order to justify a conviction. *State* v. *Huff*, 89 Maine, 521. Many instances might be cited where Legislatures, in our own and other States in the exercise of police power, have prohibited the performance of some particular act and provided penalties to be inflicted for violation of the prohibition. The doing of the prohibited act constitutes the crime, and the moral turpitude or the purity of the motive by which it was prompted, as well as knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt. The only fact to be determined in such cases is whether the defendant did the act. *State* v. *Rogers*, 95 Maine, 94. The statute under consideration is one of the instances where our Legislature, in the exercise of police power, has prohibited doing certain acts. The above consequences follow. The degree of care with which the acts may have been done, or the intent with which they have been done, are alike immaterial.

But in his first request the defendant introduces another element relating to time, claiming that if the lobsters were of legal length when put into the car, not when they were seized, then the defendant must be found not guilty. This same case has been before us upon demurrer. *State* v. *Chadwick*, 118 Maine, 233, and the court fully negatived this claim, when it said "it now matters not what their measurement may have been when alive or when caught." The statute deals with the present tense, viz., the length at the time of seizure, not at some previous time.

The second requested instruction also deals with degree of care and intent, but what we have already said makes further discussion of those elements unnecessary.

Exceptions overruled.
Judgment for the State.

NATHANIEL E. GORDON, In Equity,

vs.

THE TEXAS COMPANY, et al.

Cumberland. Opinion March 24, 1920.

Bankruptcy proceedings. Individual estates of partners held for partnership liabilities after individual liabilities are satisfied. Proof of partnership debt may be filed after individual liabilities are satisfied. A judgment entered up after the commencement of bankruptcy proceedings is barred by a discharged in bankruptcy.

Prior to March 30, 1918, the plaintiff and Cleon E. Webster were co-partners in business under the firm name of Webster & Gordon. The partnership had been dissolved before that time. On that date the plaintiff, in his individual capacity only, upon his voluntary petition, was adjudicated a bankrupt in the District Court of the United States for the District of Maine. On the 31st day of October, 1918, he received his discharge from all debts and claims which were provable against his estate by virtue of the acts of Congress relating to bankruptcy, and which existed on the 27th day of March, 1918, on which day the petition for adjudication was filed by him, excepting such debts as were by law excepted from the operation of a discharge in bankruptcy. In his list of creditors, filed with the petition for adjudication, is to be found the following: "The Texas Co., 1914 Portland. 131 Preble St., Portland, Me. Judgment against Cleon L. Webster and Nathaniel E. Gordon as co-partners under the name and style of Webster & Gordon $1215.45."

At the time of the filing of the petition, on which said adjudication in bankruptcy was made, a suit was pending on said debt in the Superior Court within and for the County of Cumberland, in the State of Maine, entitled *The Texas Company* v. *Webster & Gordon*, in which the said Cleon L. Webster and the said Nathaniel E. Gordon were described as formerly co-partners under the firm name and style of Webster & Gordon, and in which action judgment was entered for the plaintiff on the 29th day of March, 1918, for $1215.49 with interest from date of the writ, and an execution issued thereon April 3rd 1918.

On October 25th 1918, the Texas Company procured an alias execution on said judgment, placed the same in the hands of Frank M. Hawkes, the other defendant in this bill of equity, who was a deputy sheriff, and caused a seizure to be made of certain property claimed to be the property of the plaintiff.

The plaintiff claims that the debt due the Texas Company was among those affected by his discharge in bankruptcy and prays that the defendants may be restrained and enjoined from carrying their seizure into further effect.

Both defendants filed answer and demurrer. The demurrers were overruled, to which ruling exceptions were taken by both defendants. Upon hearing the court decreed a writ of permanent injunction to issue enjoining and restraining the defendants from taking any action to complete the seizure and levy made upon the individual property of the complainant, as set forth in his bill, and from attempting in any way whatsoever to satisfy the judgment above set forth out of the individual property of the complainant. From this decree appeals were seasonably taken.

The defendant company had notice of the bankruptcy proceedings and examined the bankrupt before the referee.

Held:

1. That individual estates of partners, in the absence of sufficient partnership assets to meet the debts thereof, are held for payment of partnership debts, provided such individual assets are not consumed in payment of individual liabilities.
2. That partnership debts are provable against the individual estate of a partner, although postponed in payment until after the individual debts are paid in full.
3. That a debt provable in bankruptcy, although merged in a judgment entered up after the commencement of bankruptcy proceedings, still remains the same debt on which the action was brought, and that such a judgment is discharged by the debtor's discharge in bankruptcy. A different rule has been announced by this court in discussing provisions under a State insolvency law but not in discussing the provisions of a national bankruptcy act.
4. Since partnership debts are provable against the individual estate of a partner, it follows that a discharge in individual bankruptcy proceedings is effectual as to such claims, since the more recent Bankruptcy Acts provide that a discharge shall relieve a bankrupt from all of his provable debts.

Bill in equity brought by plaintiff against defendants to restrain and enjoin them from attempting to satisfy a judgment against Cleon L. Webster and Nathaniel E. Gordon as co-partners under the name and style of Webster & Gordon, for $1215.45, out of the individual property of the plaintiff, he having been discharged in bankruptcy as an individual in proceedings instituted by a petition for adjudication, filed prior to the date when said judgment was entered up against said co-partnership. Both defendants filed answer and demurrer. The demurrers were overruled, to which ruling exceptions were taken by both defendants. The court decreed that a writ of permanent injunction to issue. From this decree defendants took an appeal.

Exceptions overruled. Appeal dismissed with costs. Writ of perpetual injunction to issue.

Case stated in the opinion.

Emery G. Wilson, for complainant.

M. E. Rosen, for respondents.

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

PHILBROOK, J. Prior to March 30, 1918, the plaintiff and Cleon E. Webster were co-partners in business under the firm name of Webster & Gordon. The partnership had been dissolved before that time. On that date the plaintiff, in his individual capacity only, upon his voluntary petition, was adjudicated a bankrupt in the District Court of the United States for the District of Maine. On the 31st day of October, 1918, he received his discharge from all debts and claims which were provable against his estate by virtue of the acts of Congress relating to bankruptcy, and which existed on the 27th day of March, 1918, on which day the petition for adjudication was filed by him, excepting such debts as were by law excepted from the operation of a discharge in bankruptcy. In his list of creditors, filed with the petition for adjudication, is to be found the following: "The Texas Co. 1914 Portland. 131 Preble St., Portland, Me. Judgment against Cleon L. Webster and Nathaniel E. Gordon as co-partners under the name and style of Webster & Gordon $1215.45."

At the time of the filing of the petition, on which said adjudication in bankruptcy was made, a suit was pending on said debt in the Superior Court within and for the County of Cumberland, in the State of Maine, entitled *The Texas Company* v. *Webster & Gordon,* in which the said Cleon L. Webster and the said Nathaniel E. Gordon were described as formerly co-partners under the firm name and style of Webster & Gordon, and in which action judgment was entered for the plaintiff on the 29th day of March, 1918, for $1215.49, with interest from date of the writ, and an execution issued thereon April 3d, 1918. On October 25th 1918, the Texas Company procured an alias execution on said judgment, placed the same in the hands of Frank M. Hawkes, the other defendant in this bill of equity, who was a deputy sheriff, and caused a seizure to be made of certain property claimed to be the property of the plaintiff.

The plaintiff claims that the debt due the Texas Company was among those affected by his discharge in bankruptcy and prays that the defendants may be restrained and enjoined from carrying their seizure into further effect.

Both defendants filed answer and demurrer. Replica tion followed. The demurrers were overruled, to which ruling exceptions were taken by both defendants. Upon hearing the court decreed a writ of permanent injunction to issue enjoining and restraining the defendants from taking any action to complete the seizure and levy made upon the individual property of the complainant, as set forth in his bill, and from attempting in any way whatsoever to satisfy the judgment above set forth out of the individual property of the complainant. From this decree appeals were seasonably taken. The decisive question may be found in the consideration of the appeal, viz., did the discharge in bankruptcy relieve the complainant from liability upon the partnership debt due the Texas Company.

The law is too well settled to require citation of authorities that individual estates of partners, in the absence of sufficient partnership assets to meet the debts thereof, are held for payment of partnership debts, provided such individual assets are not consumed in payment of individual liabilities.

It is also true that recent cases support the modern rule that partnership debts are provable against the individual estate of a partner, although postponed in payment until after the individual debts are paid in full. Note to *Horner* v. *Hamner*, L. R. A., 1918 E page 471, and cases there cited. This modern rule grows out of and is in harmony with U. S. Comp. Stat. Section 9589, sub-division g, which declares that "The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshall the assets of the partnership estate and individual estates so as to prevent preference and secure the equitable distribution of the property of the several estates."

Before proceeding further we deem it necessary to refer to a contention raised by the defendant in its demurrer growing out of the fact that the Texas Company's original debt has been merged into a judgment which post-dated the adjudication of bankruptcy. Reliance is placed upon *Jordan* v. *MacKenzie*, 113 Maine, 58. The opinion in that case was based upon *Emery et al, appellants*, 89 Maine, 544, but we fear the fact has been overlooked that these Maine opinions

were discussing cases arising under State insolvency laws and not under national bankruptcy acts. In the Emery case our court was careful to say "Nor do we go further than to hold the doctrine herein enunciated applicable to insolvency proceedings under the insolvent law of this State, and not to proceedings under the bankruptcy law of the United States." The doctrine referred to, and relied upon in the case at bar, is that if, after proceedings in insolvency have been instituted, judgment is recovered upon a debt provable under those proceedings, the original debt is thereby merged in the judgment, so far as to defeat any claim for an allowance under it against an insolvent estate, and the judgment is not provable against the estate of the debtor, because it did not exist at the time of the initiation of insolvency proceedings. That a different rule might be held to apply under the national bankruptcy act was also admitted in *Emery et al*, appellants, supra, and citation was therein made to *Boynton* v. *Ball*, 121 U. S., 457, where, under the Bankruptcy Act of 1867, the Federal Court held that a debt provable in bankruptcy, although merged in a judgment entered up after the commencement of bankruptcy proceedings, still remains the same debt on which the action was brought, and that such a judgment is discharged by the debtor's discharge in bankruptcy. In the Bankruptcy Act of 1898, U. S. Comp., St. 1916, Section 9647, under the heading "Debts which may be proved," is to be found this provision, viz., debts "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of entry of such judgments." In his work on Bankruptcy, 4th. Ed. page 449, Mr. Collier declares that this clause gives statutory recognition to the doctrine of *Boynton* v. *Ball*, supra, which settled a controversy under the law of 1867 that outlasted the statute itself. Hence it follows, in the case at bar, that the debt of the Texas Company, under the evidence and stipulations, although a debt against the partnership of Webster and Gordon, and reduced to judgment after filing the petition in bankruptcy, was provable against the individual estate of Gordon, provided costs and interest, after filing the petition, and up to the time of entry of judgment, had been credited. Collier on Bankruptcy, 4th. Ed., page 449.

Since this was a provable debt against the plaintiff's individual estate was it affected by his discharge "from all debts which are made

provable, by the bankruptcy act, against his estate." In answer to this question we quote from the note to *Horner* v. *Hamner*, supra. "It seems to follow from the fact that joint debts are provable in an individual proceeding, that a discharge therein is effectual as to such claims, since the more recent Bankruptcy Acts provide that a discharge shall relieve a bankrupt from all of his provable debts." After conceding that there has not been complete harmony among decided cases, the annotator concluded that "the late cases, in the main, support the right of the individual bankrupt to a discharge from firm debts.

In re Kaufman, 136 Fed. Rep., 262, a case decided in the District Court for the eastern district of New York in 1905, and frequently cited with approval, presents facts and law, peculiarly applicable to the case at bar. The bankrupt filed his individual petition, although previously he had been a member of a partnership. With his petition he filed a schedule of creditors, in which were individual creditors and creditors of the partnership. Notice was sent to all creditors whose names appeared in the schedule. A partnership creditor, although in receipt of notice, did not prove his claim against the individual estate of the bankrupt. The bankrupt was examined and in due time, upon his individual application, was discharged from all debts and claims which were made provable by the bankruptcy act against his estate and which existed on the date of filing his individual petition. The court held that the creditor above referred to was permitted, if he had any claim against the individual estate of Kaufman, growing out of partnership relations, to prove such claim; and upon his failure to do so his right to collect from Kaufman a judgment against the partnership was foreclosed by the discharge of Kaufman as an individual. The court also declared that the creditor had full opportunity to prove his claim against the bankrupt, as an individual, which he neglected to do, and in default thereof the creditor was "debarred from thereafter claiming that the estate of the individual, or the individual himself, is liable for the payment" of the claim. The Circuit Court of Appeals for the Second Circuit cited the Kaufman case *In re Diamond*, 149 Fed. Rep., 407, and declared full concurrence in the reasoning and conclusion therein expressed.

In *New York Inst.* v. *Crockett*, 102 N. Y., Supp., 412, 17 Am., Bankr. Rep., 233, it was held that, since partnership debts are provable against the individual estate of a bankrupt partner, they are

discharged by a complete, unlimited discharge of the bankrupt's provable debts, at least when the business has no assets, and the creditor had notice of the proceedings; and this, although the debt was scheduled without any reference to the co-partnership. To the same effect is the opinion in *Berry Bros.* v. *Sheehan*, 101 N. Y., Supp., 371, 17 Am. Bankr. Rep., 322.

In the case at bar, as we have seen, the Texas Company's claim was sheduled in the plaintiff's list of creditors. That company appeared before the Referee in Bankruptcy and examined the plaintiff. It had full opportunity to prove its claim against the individual estate of the plaintiff, and if it failed to do so, we must hold that under the decisions above cited it is debarred from any attempt now to collect its claim from the plaintiff individually or from the plaintiff's estate.

Our conclusion renders further discussion of the exceptions unnecessary.

Exceptions overruled.
Appeal dismissed with costs.
Writ of perpetual injunction to issue.

CHARLES O. BANCROFT, et als.,

vs.

MAINE STATE SANATORIUM ASSOCIATION, et als.

Cumberland. Opinion March 26, 1920.

Trust. Rule against perpetuities. Forfeiture. Failure of specific trust. Resulting trust by implication of law. Cy pres. General charitable purposes excluded.

On February 28, 1910, Eleazer D. Chamberlin of Newton, Massachusetts, placed in the hands of three residents of Portland, Maine, a fund of two hundred thousand dollars, under a declaration of trust signed by the trustees, the purpose being to invest and reinvest said fund and to pay over semi-annually the net income thereof to the Maine State Sanatorium Association, of Hebron, solely for running expenses, for the period of forty years and then to pay over the principal fund freed from all trusts, but subject to certain conditions.

On October 1, 1911, and each alternate October 1 thereafter, the trustees were to ascertain whether the Association was free from debt which it had not sufficient cash or good bills receivable to off-set. If not, the trustees were to give notice in writing to the Association and if such deficit was not discharged within three months thereafter, then said fund with its accumulations should be paid over to Eleazer D. Chamberlin, if living, and if not living, then in equal shares to Theodore Chamberlin and Walter S. Fox or to their then heirs at law.

The trustees paid over the income to the treasurer of the Association until October, 1915, when the Association conveyed all its property, real and personal, including its right, title and interest in this endowment, to the State of Maine, and the State has continued to maintain and manage the Sanatorium since that time under R. S., Chap. 146. The donor died testate on August 7, 1914, and Walter H. Roberts was appointed sole executor in Maine on September 26, 1917.

Upon a bill in equity brought by the endowment trustees asking for a construction of the trust and a determination of the party or parties to whom the fund should now be paid, it is held,

1. That the validity of the trust in favor of the Association is not controverted, although the legal title was to remain in the trustees for a period of forty years before it could be conveyed to the beneficiary and then only on the prescribed conditions as to freedom from debt. That fact does not however offend the rule against perpetuities because it is the time of vesting and not the period of

continuance that concerns that rule. On February 28, 1910, the legal title vested in the trustees and the beneficial title in the Association, this latter however subject to being divested on the occurrence of the event specified.

2. In determining whether a forfeiture for non-payment of indebtedness should occur at any time, the broadest possible powers and discretion were conferred upon the trustees, and in the absence of bad faith, fraud or mere arbitrary action on their part their conclusions were final and binding upon all parties in interest.

3. The trustees found that no forfeiture took place, on October 1, 1911, October 1, 1913, or October 1, 1915, and after a full and careful examination of all the testimony considered in the light of the declaration of trust, their finding is held to be correct in fact and conclusive in law. No forfeiture was created.

4. There was however a failure of the trust due to the transfer of all the property of the Association to the State and the consequent cessation of business on the part of the Association. There was an implied condition that the Association should continue in operation and carry on its own work in its own way. The State, since the transfer, has maintained and managed the institution through a board of trustees appointed by the Governor. The Association for whose sole benefit the gift was made has virtually ceased to exist.

5. As the trust was limited to that particular Association, and that Association was not intended as a mere conduit for the application of the fund to a general charitable purpose, the failure of the cestui que trust worked a failure of the trust itself. Under such circumstances in this class of gifts, if the donee fails the gift itself fails. In whom then is the title, the trust having failed?

6. Theodore Chamberlin and Walter S. Fox are not entitled to the fund under the limitation over because the only event which could cause their contingent interest to materialize was a previous forfeiture, and no forfeiture has occurred. A discussion of the validity of the limitation over as offending the rule against perpetuities is therefore not involved.

7. The claim of the State of Maine cannot be sustained. The Sanatorium Association had no assignable interest in the fund and therefore its attempted assignment to the State was futile.

8. Nor can the doctrine of cy pres be successfully invoked in behalf of the State. In order to apply that doctrine two prerequisites must exist, first a failure of the specific gift, and second, a general charitable intent disclosed in the instrument creating the trust. The first element exists here but not the second. A general charitable purpose is clearly excluded.

9. It follows that this fund now belongs to the estate of the donor as a resulting trust. The specific trust having failed a trust results by implication of law to the executor under the will. His claim is therefore sustained.

10. Under the circumstances of this case it is proper and it is therefore ordered that costs and reasonable counsel fees be fixed by the sitting Justice who shall make the final decree, be paid by the executor, and charged by him in his account of administration.

Bill in equity to determine the ownership of a fund of two hundred thousand dollars and accrued interest amounting to more than thirty thousand dollars, in the hands of the plaintiffs as trustees. There were several defendants. On written motion said bill was dismissed in so far as it was brought against Walter H. Roberts, Walter S. Fox and Theodore Chamberlin, executors of the will of Eleazer D. Chamberlin, appointed in Massachusetts, and also said bill was dismissed in so far as it was brought against Hannah Williams, deceased, without costs in each instance. The bill was amended on written motion by inserting two additional paragraphs. Said bill as amended was further amended by striking out in the commencement of said bill as amended the words "and Frank E. Williams and George H. Williams of said Boston, heirs-at-law of said Eleazer D. Chamberlin."

Bill taken pro confesso, for want of appearance, as to defendants, Maine State Sanatorium, Olive Ann Bickford, Gardner Chamberlin, Frederick Eleazer Horne, and Frank B. Williams and George H. Williams, executors of the will of Hannah Williams.

The case was heard upon bill, answers, replications and evidence. At the conclusion of the evidence, by agreement of parties, the case was reported to the Law Court for determination upon bill, answers, replications, stipulations and so much of the evidence as was legally admissible.

Bill sustained. Decree in accordance with opinion.

Case stated in the opinion.

Harry R. Virgin, for complainants.

Guy H. Sturgis, Attorney General, for State of Maine.

Ropes, Gray, Boyden & Perkins, C. R. Clapp and Verrill, Hale, Booth & Ives, for Walter S. Fox and Theodore Chamberlin.

Hollis R. Bailey and Sidney St. F. Thaxter, for Walter H. Roberts, executor.

Thomas L. Talbot, for Walter H. Roberts, and Walter S. Fox, trustees.

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

CORNISH, C. J. Eleazer D. Chamberlin a wealthy citizen of Newton, Massachusetts, on February 28, 1910, placed in the hands of Charles O. Bancroft, Charles H. Payson and Franklin C. Payson, all

of Portland, Maine, a fund of two hundred thousand dollars in trust for the uses and purposes and subject to the conditions, limitations and stipulations expressed in a certain declaration of trust of that date, signed by said trustees.

The uses and purposes were as follows: "To invest and reinvest said fund in interest bearing securities and property and to pay over the net income thereof semi-annually, and oftener if the trustees for the time being so determine, to the treasurer for the time being of the Maine State Sanatorium Association, a corporation located at Hebron in the State of Maine, for the period of forty years from the date hereof, and then to pay over the principal comprising said fund to the said Maine State Sanatorium Association freed from all trusts. Said payments of income and principal, however, are subject to the conditions, limitations and stipulations herein stated and set forth."

Among the conditions, limitations and stipulations set forth in the declaration of trust are the following:

"Third:—Said trust and fund shall be known as the 'E. D. Chamberlin Endowment Fund,' and the principal of said fund shall always be kept intact and no part of said principal shall be expended or used for the purposes of said Sanatorium, and no loan of any part of said fund shall ever be made to said Sanatorium Association."

"Fourth:—All income paid over to or for the benefit of said Sanatorium Association shall be used by it solely for the annual running expenses of said Sanatorium Association for the cure and prevention of tuberculosis at Hebron in its present location, and no part of said income shall be used for construction purposes, or for the purchase of real estate, furnishings, for interest, or for any other purpose whatever except that above stated."

"Eighth:—And in compliance with the express direction of said Eleazer D. Chamberlin, the donor of this fund, no part of said income or of said principal fund shall be paid over to or for the benefit of said Maine State Sanatorium Association after October 1, 1911, except as hereinafter provided unless said Maine State Sanatorium Association shall on said date be wholly and absolutely free from debt of every kind, which it has not sufficient cash in hand or bills receivable from solvent persons or corporations to fully off-set, and no part of said income or of said principal shall be paid over to or for the benefit of said Sanatorium Association after October first of each alternate year after 1911 except as hereinafter provided, unless said

Sanatorium Association shall on said date be wholly and absolutely free from debt of every kind, which it has not sufficient cash in hand or bills receivable from solvent persons or corporations to fully off-set, and so on until said fund has been paid over to said Sanatorium Association as above provided at the end of the said forty (40) year period, or said fund has been paid over as hereinafter provided."

"Ninth:—The trustees hereunder for the time being shall satisfy themselves that no such indebtedness exists on the dates above mentioned, in any way or manner which seems best and conclusive to them or they may accept the sworn statements of the officers of said Sanatorium Association of its financial condition as true; but no income from said fund or no part of the principal of said fund shall be paid to said Sanatorium Association unless the trustees of said fund for the time being are unanimously of the opinion that upon the dates above specified no indebtedness against said Sanatorium Association exists as outstanding which it has not sufficient cash in hand or bills receivable from solvent persons or corporations to fully off-set."

"Tenth:—If at any of the times above mentioned, the trustees for the time being are of the opinion that the said Sanatorium Association is indebted in sums for which it has not cash in hand or bills receivable due from solvent persons or corporations to off-set the same, said trustees shall give notice in writing to said Sanatorium Association of said opinion, and in case that within three (3) months thereafter, said indebtedness is not paid and cancelled and satisfactory evidence thereof submitted to said trustees in writing by said Sanatorium Association, then said principal fund and any accumulations thereof shall forthwith be paid over to said donor, Eleazer D. Chamberlin, if living, and if not living, said fund and its accumulations shall be paid over in equal shares to Theodore Chamberlin of Concord, Massachusetts, nephew of said Eleazer D. Chamberlin, and Walter S. Fox of Boston, Massachusetts, or to their then heirs at law, said heirs at law taking by right of representation, for their own use, freed from all trusts. Said Sanatorium Association shall be entitled to receive said payments of income or principal if said trustees are satisfied that all said indebtedness has been paid or cancelled within said three (3) months' period."

"Eleventh:—The conclusions of the trustees for the time being on all the foregoing matters shall be final and binding upon all parties interested in said trust fund, but said trustees are authorized in case

of doubt as to their duties, or rights, or the rights of the beneficiaries to petition the Courts for instructions and further orders."

The Maine State Sanatorium Association, the beneficiary under this declaration of trust, was a corporation organized under the general laws of this State on December 26, 1900, its purposes being, as the certificate of organization recites: "to establish and maintain a public institution or institutions for the isolation, treatment and cure of persons affected with pulmonary disease, and to exert its influence toward the lessening of the prevalence of tuberculosis." The Association had established such an institution at Hebron, had acquired a large amount of property both real and personal, and was in active and full operation when this trust gift was made by Mr. Chamberlin.

The trustees named in this trust agreement entered upon the discharge of their duties immediately after its execution, received and managed the trust funds and paid over the income to the treasurer of the Association until October, 1915, when the Association conveyed all its property, real and personal, to the State of Maine, together with all its right, title and interest in the Chamberlin Endowment Fund, and the State of Maine has continued to maintain the Sanatorium since that time under the provisions of Public Laws, 1915, Chap. 351, now R. S., (1916), Chap. 146. After this transfer to and assumption of management by the State, the trustees of the Chamberlin fund made no further payment of income to the Sanatorium except the sum of $613.69 on October 14, 1915, representing coupons matured and paid on or prior to October 11, 1915, together with interest on bank balance. The fund with its accumulated income amounts now to more than two hundred and thirty thousand dollars.

Mr. Chamberlin died at Boston, Massachusetts, testate on August 7, 1914. Walter H. Roberts of Harvard, Massachusetts, was duly appointed sole executor in Maine on September 26, 1917, and Walter H. Roberts and Walter S. Fox were appointed trustees under the will in the Commonwealth of Massachusetts.

The trustees of the Chamberlin fund bring this bill in equity asking for a construction of the declaration of trust, a determination of the question whether the interest of the Sanatorium therein and in the income has terminated, a determination of the rights of the respective claimants to said fund and its accumulations and full instructions as to their duties as trustees in the premises.

All parties in interest are before the court and the several claimants have asserted in their answers and have reasserted in argument the bases of their several claims. These claimants are three in number, viz: First, Walter S. Fox and Theodore Chamberlin in their individual capacities by reason of the limitation over contained in the tenth clause of the declaration of trust; second, the State of Maine as intervenor, and third, Walter H. Roberts as executor of the will of Eleazer D. Chamberlin, in the legality and validity of whose claim Walter H. Roberts and Walter S. Fox, as trustees under the will, join.

The various propositions involved in the decision of this case can best be considered and determined under the following general heads.

First: The validity of the trust as between the donor and the Sanatorium Association

Second: The termination of the trust through forfeiture.

Third: The termination of the trust through failure.

Fourth: The present ownership of the trust fund.

I. Validity of the trust as between the donor and the Sanatorium Association.

The validity of the trust as between the donor and the Sanatorium Association is not controverted. We are not now considering the validity of the limitation over to Theodore Chamberlin and Walter S. Fox or to their heirs at law in case of forfeiture for non-payment of indebtedness by the Sanatorium provided in item ten of the declaration of trust. That is a distinct legal proposition. But, so far as the trust created in favor of the Association itself is concerned it is not and cannot be successfully attacked. The rule against perpetuities or as it is less frequently but more expressively termed, the rule against remoteness, is defined as follows: "It is the grant of property wherein the vesting of an estate or interest is unlawfully postponed. The law allows an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints and void, and estates or interests that are dependent on them are void." *Pulitzer* v. *Livingston*, 89 Maine at 364; *True R. E. Co.* v. *True*, 115 Maine at 541. In the case at bar there was no postponement so far as the trustees and the Association were concerned. Upon the delivery of the securities to the trustees and the execution of the declaration of trust by them, the legal title at once vested in

them and the beneficial title in the Association. True the legal title was to remain in the trustees or their successors for a period of forty years before it could be conveyed to the beneficiaries, and then only on the prescribed conditions as to freedom from indebtedness. But that fact did not offend the rule against perpetuities. It is the time of vesting and not the period of continuance, it is the beginning and not the ending which concerns that rule. 21 R. C. L., page 291; Gray on Perpetuities, Section 205; *Pulitzer* v. *Livingston*, 89 Maine, 359, 365; *Andrews* v. *Lincoln*, 95 Maine, 541; In *re Johnston's Est.*, 185 Pa. St., 179, where the trustees were to hold for seventy-five years.

In the pending case the legal estate vested in the trustees on February 28, 1910, and a valid trust was thereby and then created. So far as the beneficial interest was concerned that vested in the Association at once, subject however to be divested on the happening of a certain event. It was subject to forfeiture, to a condition subsequent, dependent upon the financial condition of the institution at certain specified periods; and this brings us to the second stage in our inquiry.

II. Was there a forfeiture?

The donor evidently did not intend to give his assistance to this institution unless it kept itself free from indebtedness of every kind. The declaration of trust so states. The income from the fund was to be devoted solely to the annual running expenses, and it was left to the institution itself or to its friends to provide whatever additional amount might be necessary to meet and discharge all indebtedness, as often as once in two years, and to begin the next two-year period with a clean slate or with quick assets in the form of cash in hand or good bills receivable sufficient to meet all outstanding indebtedness. The first test date was October 1, 1911, and the others followed in alternate years thereafter, viz: October 1, 1913, October 1, 1915, and so forth, during the entire term of forty years. But in determining the existence of such indebtedeness and also its subsequent discharge, the broadest possible powers and discretion were conferred upon the trustees, upon whose integrity, judgment, broadmindedness and desire to carry out his wishes Mr. Chamberlin obviously reposed the most implicit confidence. They were to satisfy themselves of the facts in any manner which might seem best to them and their conclusions were to be final and binding on all parties in interest. When the trustees were satisfied, the donor was satisfied, and so were the conditions of the trust. It was legally competent for the donor to

give this latitude to the trustees, and in the absence of bad faith, fraud or mere arbitrary action on their part, it is the duty of the court to accept their conclusions as final, and thus give effect to the wishes of the creator of the trust. Estate of Wells, 156 Wis., 294; *Read* v. *Patterson*, 44 N. J. Eq., 211; *Larkin* v. *Wikoff*, 75 N. J., Eq., 462, affirmed 78 At., 1134; *Tabor* v. *Brooks*, L. R., 10 Ch. Div., 273. Let us now consider the facts of the pending case on the question of forfeiture. Three periods are under discussion.

The financial condition of the Sanatorium Association on October 1, 1911 was found by an Audit Company and reported to the Chamberlin trustees as showing an excess of liabilities over cash and good bills receivable amounting to $596.53. But the report also showed that there was in the hands of the trustees $1786.12 of income from said fund which had accrued prior to October 1, 1911, and had not been paid over. Upon this state of facts, the trustees on November 1, 1911, unanimously passed a resolution declaring that "on the first day of October, 1911, no indebtedness against the Maine State Sanatorium Association existed as outstanding which it had not sufficient cash in hand or bills receivable from solvent persons or corporations to fully off-set." This resolution was both warranted in fact and conclusive in law. Had the trustees paid over to the treasurer of the Association on September 30, the accrued income in their hands belonging to the Association, there would have been an actual surplus of $1189.59, instead of a book deficit of $596.53. The fact that this income was not paid on or prior to that date did not cast on the Association the burden of raising the $596.53 from other sources, before it could have any portion of the $1786.12. The trustees properly found that this income in reality formed a part of the quick assets of the Association and should be treated as such. To hold otherwise would be to attempt to manufacture a forfeiture out of a situation farthest from the intention of the donor, whose wishes they were attempting to effectuate. The decision of the trustees of November 1, 1911, must stand.

The second forfeiture claimed, not by Mr. Chamberlin, nor by the trustees of the fund at the time or now, but by the executor and trustees of the estate in the present proceedings, was in October, 1913. At a meeting of the trustees held on October 21, 1913, they examined and accepted the report of an Audit Company showing a deficit of $4,144.23 existing on October 1, and they therefore gave written

notice to the Association that unless said indebtedness was paid and cancelled and satisfactory evidence thereof submitted to the trustees within three months from said October 21, 1913, said trust fund would be paid over to the parties named in the tenth article of the declaration of trust. After the receipt of this notice the trustees of the Association raised the required amount by private subscription and paid it over to the treasurer of the Association, and the treasurer under date of January 17, 1914, notified the trustees of its receipt and the full payment of the indebtedness due on October 1, 1913. The plaintiff trustees were unanimously satisfied under these circumstances that the debts had been paid, that no forfeiture had been incurred, and therefore none was claimed by them.

This action of the trustees is attacked first on the ground that the actual indebtedness was $5539.45 instead of $4144.23, and that because the difference, $1395.22 was paid on October 22, 1913, by the endowment trustees from accrued income in their hands on October 1, such payment was in violation of the declaration of trust, and therefore the indebtedness of October 1, 1913, was never paid according to the requirements of the declaration of trust, and by its terms the fund reverted to the donor.

This is the same point that was raised against the discharge of the indebtedness of October 1, 1911, namely, the payment by the trustees of income accrued and in their hands on October 1, but not paid over until later, and the same rule applies here as there. The payment was fully justified, the finding of the trustees warranted in fact and conclusive in law.

In the second place it is claimed that the indebtedness should have been discharged within three months from October 1, the test date, instead of three months from October 21, the date of notice, and therefore that the payment on January 17, 1914, was seventeen days too late, and a forfeiture resulted ipso facto. We think the plain purport of the agreement is that the payment must be within three months of the date of the notice. Article ten provides that "said trustees shall give notice in writing to said Sanatorium Association of said opinion and in case that within three months thereafter said indebtedness is not paid" &c. The word "thereafter" obviously refers to the time of notice. This is the reasonable as well as the literal construction. The Sanatorium was to be given three months in which to meet the deficit. In the ordinary course of business the

audit could not be completed until some time after October first, and to arbitrarily fix October 1 as the date of the beginning of the time of redemption without regard to the notice would shorten the period and thwart the intention of the donor. The construction put upon the instrument by the trustees was correct, and this without regard to their plenary and conclusive power already considered. The trustees themselves, knowing all the facts, did not declare a forfeiture, and their action was apparently acquiesced in by Mr. Chamberlin, who was then living, was doubtless aware of the situation in a general way, and who signified no disapproval so far as the evidence discloses. He would probably have been surprised at the suggestion that after October 1, 1911, and especially after January 1, 1914, up to the time of his death, August 7, 1914, this fund belonged to him because of these alleged forfeitures. Again, the judgment and finding of the trustees in regard to the discharge of the indebtedness existing on October 1, 1913, must stand.

The third forfeiture is alleged to have taken place in 1915, and this is claimed by Theodore Chamberlin and Walter S. Fox to whom the limitation over ran in case of forfeiture after the death of Eleazer D. Chamberlin. On October 5, 1915, the trustees having received the report of the Audit Company that the net indebtedness on October 1, 1915, was $2,612.53, gave the required written notice of the fact to the president and trustees of the Association as before. On the same date and at the same meeting the attention of the endowment trustees was called to the fact that the Association in consideration of $15,000 had sold and conveyed all its property and assets to the State of Maine by deed and bill of sale dated and delivered on that day in accordance with an agreement dated September 11, 1915, the State assuming the payment of all outstanding indebtedness. Under date of December 15, 1915, the president and treasurer of the Association sent to the endowment trustees a statement to the effect that all said indebtedness had been paid and cancelled. Upon the strength of this statement the endowment trustees again found that their request had been complied with and satisfied themselves that the indebtedness of October 1, 1915, had been paid and cancelled. They therefore declared no forfeiture in this instance, and again their decision must stand.

Forfeitures are not favorites of the law; still less are they favorites of equity, and a declaration by this court of forfeiture of this two

hundred thousand dollar trust fund either in 1911, 1913 or 1915, for any of the trivial reasons alleged, in view of all the facts in the case and the plenary power lodged in the trustees, could not be justified. The trustees evidently performed their duties with a deep sense of their responsibility, and with the utmost good faith. Their attitude is well-voiced by Mr. Franklin C. Payson when he says: "We didn't have in mind any subsequent legal proceedings and we tried to conduct the trust in a way that would meet the obligations of the trustees and the wishes of the donor. We were not trying to 'pick up pins'." This last phrase obviously refers to the incisive language of Chief Justice Peters in *Woodbury* v. *Marine Society*, 90 Maine, at page 23, when he closed the opinion with the original maxim, "Equity does not stoop to pick up pins." To the query then, did a forfeiture take place as provided in the trust agreement, our answer is in the negative.

III. Was there a failure of the trust caused by a transfer of all the property of the Association to the State of Maine on October 5, 1915, and the consequent cessation of business on the part of the Association?

This question must be answered in the affirmative. The object of the donor's bounty was limited to this particular donee, the Maine State Sanatorium Association, a private corporation which had established and maintained the Hebron institution. He had faith in private rather than public management, as the evidence shows, and he created this trust fund "solely" for the benefit of this Association. There was an implied condition that the Association should continue in operation and carry on its own work in its own way. After Mr. Chamberlin's death the Association disposed of all its property, ceased to have any control over the institution or its policy, ceased to exercise any of the functions of a corporation, and virtually became extinct, although it did not go through the technical procedure of dissolution. Such dissolution would have been appropriate, *Van Oss* v. *Petroleum Co.*, 113 Maine, 180, but it would not have changed the situation. It would have been but legal interment. Already the spirit had departed from the body, and the living, active corporation for whose sole benefit Mr. Chamberlin had made this gift had in fact ceased to exist. *Stone* v. *Framingham*, 109 Mass., 303. The State of Maine since that time, as the owner of the property, has maintained and managed the institution along with other State institutions of the same character, carrying out its own policies through a board of

trustees appointed by the Governor in accordance with the provisions of R. S., Chap. 146. The reason for such transfer was undoubtedly a valid one in the judgment of a majority of the Sanatorium trustees, namely, the apparent impossibility of continuing the institution without substantial appropriations from the State. The State had changed its policy of assistance in 1915, and instead of continuing to aid private institutions of this character had created a State Board of Trustees for Tuberculosis Sanatoriums, in order that such institutions might come within the ownership and control of the State, and therefore the Legislature had appropriated only six thousand dollars for Hebron Sanatorium for 1915, and had made no appropriation for 1916.

The legal consequence of this wholesale transfer of property and withdrawal from management is clear. As the trust was limited to that particular corporation and that corporation was not intended as a mere conduit for the application of the fund to charitable purposes, the failure of the cestui que trust worked a failure of the trust itself. Under such circumstances in this class of gifts, if the donee fails, the gift itself fails. *Esterbrooks* v. *Tillinghast*, 5 Gray, 17; *Stratton* v. *Physio-Medical College*, 149 Mass., 505, 508; *Coe* v. *Washington Mills*, 149 Mass., 543, 548; 1 Perry on Trusts, Section 160. This is analogous in principle to the rule that when a trust is so indefinite or uncertain, *Murdock* v. *Bridges*, 91 Maine, 124; *Haskell* v. *Staples*, 116 Maine, 103, or so impracticable, *Gilman* v. *Burnett*, 116 Maine, 382, that it cannot be executed, or the trust fails because of the death of the beneficiary, *Dodge* v. *Dodge*, 112 Maine, 295, then the trust terminates.

IV. In whom is the title to this Fund?

The remaining question is, in whom is the title to this fund now that the trust has failed?

1. Theodore Chamberlin and Walter S. Fox in their individual capacities assert a claim based upon article ten in the declaration of trust. This provides, as we have already seen, that if the Association was in debt on October first on any alternate year and after notice thereof in writing from the trustees of the fund did not within three months thereafter free itself therefrom and submit to the trustees in writing satisfactory evidence of the payment and cancellation of the debt, then the fund and its accumulations should be paid over to Eleazer D. Chamberlin, if living, and if not living, then to Theodore

Chamberlin and Walter S. Fox in equal shares or to their then heirs at law, etc. It is by virtue of this limitation over that Messrs. Chamberlin and Fox maintain their claim.

The question of whether this limitation over is or is not void as offending the rule against perpetuities, has been argued elaborately and with great learning on the part of counsel, but we are unable to see how that question is involved in the present discussion.

The contingent interest in Chamberlin and Fox, under the terms of the declaration of trust, could take effect only on the happening of one event, the failure on the part of the Association to discharge its indebtedness after due notice from the trustees. That is the expressed condition and the only condition under which the contingent interest could materialize. But, as we have already seen, that event did not happen. All indebtedness was met and discharged to the satisfaction of the trustees. They were the parties clothed with the power to declare a forfeiture for the specified cause, and this they have never done because the cause did not arise. The court cannot do what the trustees under the provisions of the trust agreement could not do. We can enforce the terms of the trust but we have no power to manufacture new terms to be inserted in the trust. We cannot order payment of this fund to Messrs. Chamberlin and Fox if the trustees could not have done so. If the agreement had stated that if for the reason specified, or for any other reason or cause whatever, the trust should terminate, and the fund should be paid over to the holders of the contingent interests, then the trustees could have so disposed of it and the court could in this proceeding instruct them to that effect provided the limitation over was valid. But the agreement does not so state. It provides for the payment on a single contingency and that contingency has not happened. It is impossible for us to work out of or into this agreement any intention on the part of Eleazer D. Chamberlin as to the course the fund should take in case the Sanatorium Association ceased to do business and therefore the trust failed. Probably Mr. Chamberlin had no intention whatever in regard to that situation because he did not anticipate that such an event might happen. He provided for one event and one only, and to that all parties are limited. Our sympathy might make it easy for us to send the fund in case of a failure of trust for an independent and unexpressed cause, to the same parties who might have taken it were the limita-

tion valid, in case of a forfeiture of the trust on the single condition expressed, but we know of no rule of legal or equitable construction which will permit us to so decree.

Apart therefore entirely from the question of the validity of the limitation over, upon which we express no opinion, because such opinion would be merely in the nature of dictum, we hold that Messrs. Chamberlin and Fox are not entitled to this fund, as the only possible contingency which might vest title in them has not and never can arise.

2. The State of Maine bases its claim upon two distinct grounds: First because of the assignment to it by the Sanatorium Association under date of October 5, 1915, of all its right, title and interest in and to this endowment fund; and second by virtue of the cy pres doctrine. Neither contention can be sustained.

The Sanatorium as the beneficiary had no assignable interest in this fund. It was given no such power by the trust agreement. It was the recipient of the bounty under certain conditions, but it could not transfer that bounty to another. The attempt was futile. *Harvard College* v. *Society, &c.*, 3 Gray, 280; *Cary Library* v. *Bliss*, 151 Mass., 364; *Harvard College* v. *Attorney General*, 228 Mass., 396.

Nor can the doctrine of cy pres be successfully invoked. That doctrine has been so recently and so fully considered by this court that an extended discussion here is unnecessary. *Doyle* v. *Whalen*, 87 Maine, 426; *Brooks* v. *Belfast*, 90 Maine, 318; *Hospital Ass'n.* v. *McKenzie*, 104 Maine, 320; *Allen* v. *Nasson Inst.*, 107 Maine, 120; *Lynch* v. *So. Cong. Church*, 109 Maine, 32; *Gilman* v. *Burnett*, 116 Maine, 382. The general principle running through all the cases is that in order to apply the cy pres doctrine, there must be two prerequisites, first, a failure of the specific gift, and second, a general charitable intent disclosed in the instrument creating the trust. The first element exists here. There has been a failure of the specific gift for want of a donee. The second element cannot be discovered either in the trust instrument itself or in the circumstantial facts in the light of which that instrument is to be interpreted.

So far as the instrument is concerned such general charitable purpose is carefully excluded. The gift is to this particular institution, the net income to be paid over to its treasurer for the time being, nor can it even be used for all the purposes to which the Sanatorium might devote it, but it is limited solely to the annual running expenses

of the said Sanatorium Association, and it cannot be used for the purchase of real estate, furnishings, interest "or for any other purpose whatever except that above stated." The fund is to bear the name of the donor, as a part of the assets of this institution. In case of forfeiture for non-payment of debts, the fund was to go to individuals named. Every paragraph of the declaration is consistent with the intent of a particular charitable gift and inconsistent with any general purpose to make this benefaction to the general cause of anti-tuberculosis.

The circumstances emphasize this view. Mr. Chamberlin had become interested in this Hebron institution as early as 1905, when he visited it and observed its work. He made a gift of $15,000 to it at about that time for general purposes, and another gift of $10,000, and later of $40,000 for an administration building. Then he seems to have lost interest in it for a time as it became heavily involved in debt. This debt in the early part of 1910 amounted to $60,000, and Mr. Chamberlin, perhaps through the influence of friends of the institution, renewed his interest, and offered to pay $15,000 or one-quarter of the outstanding indebtedness if the friends of the institution would raise the balance of $45,000, and then when the debts were paid, he offered to place this fund of $200,000 in trust as an endowment. These steps were all taken, the debt was paid, and the endowment perfected. He asked that his nephew be made a member of the Board of Hebron trustees and that was done.

It is difficult to conceive of a situation where the personal element in the gift stands out in a stronger light than it does here, and it is impossible to escape the conclusion that the cy pres doctrine has no application. To attempt to apply it would be to defeat rather than to further the donor's design. This case falls in line with *Brooks* v. *Belfast,* and *Gilman* v. *Burnett,* supra. The claim of the State of Maine cannot be sustained.

3. The claim of the Executor.

It follows from what has been said that this fund now belongs to the estate of the donor as a resulting trust. *Brooks* v. *Belfast,* 90 Maine, 318-332; *Fitzsimmons* v. *Harmon,* 108 Maine, 456; *Haskell* v. *Staples,* 116 Maine, 103; *Gilman* v. *Burnett,* 116 Maine, 382, 388; *Hopkins* v. *Grimshaw,* 165 U. S., at 356. The specific trust having failed, a trust results by implication of law to the executor under the will. His claim is therefore sustained.

Under the circumstances of this case it is proper, and it is hereby ordered, that costs and reasonable counsel fees be fixed by the sitting Justice who shall make the final decree, be paid by the executor, and charged by him in his account of administration.

Decree in accordance with opinion.

JOHN L. BAKER *vs.* HARRIS B. SNOW.

Cumberland. Opinion March 26, 1920.

Trespass quare clausum. Prescriptive title. Distinction as to admissibility of evidence, where claim is based on prescriptive title, and where by grant.

Action of trespass quare clausum. Heard on exceptions and general motion for new trial.

Held:

1. In cases where a party seeks to sustain a prescriptive title to real estate, payment of taxes assessed upon land, by the party, may be offered to show the character of the occupation. But where, as in the case at bar, the trespass is upon land which the plaintiff claims to own by grant, such evidence is inapplicable and was properly excluded.
2. The defeated party fails to sustain the burden of showing that the verdict of the jury was clearly wrong.

Action of trespass quare clausum. Defendant pleaded general issue. Verdict for defendant. Plaintiff filed exceptions to the exclusion of certain evidence which he offered, and also filed a general motion for new trial. Exceptions overruled. Motion overruled.

Case stated in the opinion.

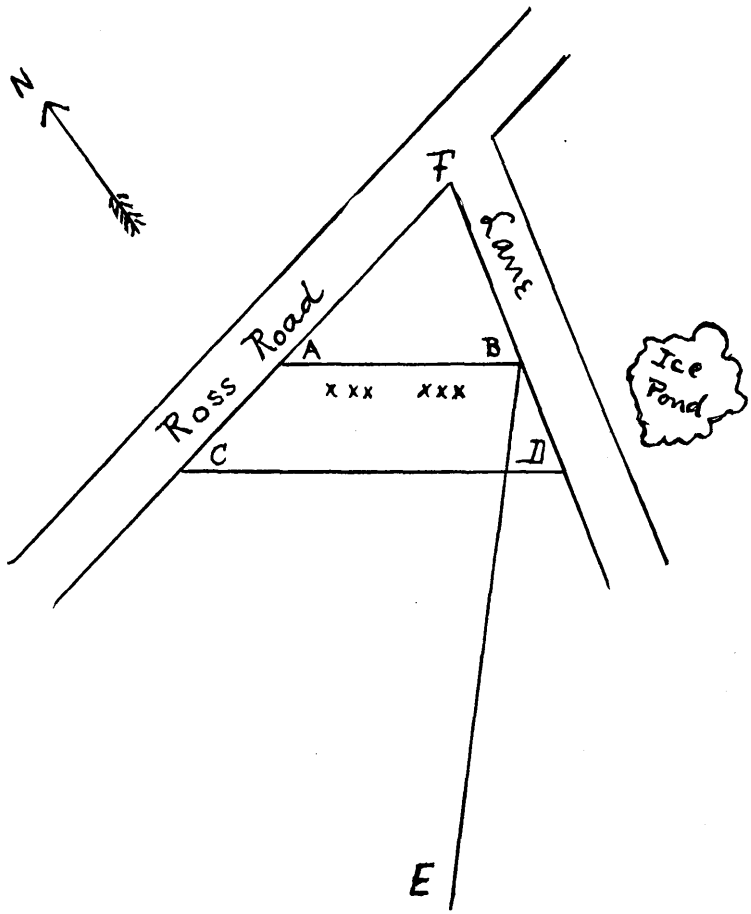
Leroy Haley, and R. P. Hanscom, for plaintiff.

A. F. Moulton, for defendant.

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

PHILBROOK, J. This is an action of trespass quare clausum and arose from the fact that the defendant cut certain trees on land which the plaintiff claimed to own. Verdict having been rendered for the

defendant, the case comes to this court on plaintiff's general motion for new trial and upon his exception to the exclusion of certain evidence which he offered. The following sketch will approximately illustrate the contentions of the parties.



The plaintiff introduced a warranty deed, dated December 1, 1841, from Solomon Harford to Isaac C. Barker, father of the plaintiff, and an excerpt from the will of the father devising the Harford land to the plaintiff. The westerly bound of the land described in the Harford deed was the "Town Road," which here appears as the "Ross Road."

The plaintiff claims that the southeasterly line of the land conveyed by Harford to the father, and by the father devised to the plaintiff, is the line BE, and that the northeasterly bound of the same land is the line AB. He also claims to have acquired by prescription the adjacent triangular lot ABF.

The defendant, conceding nothing as to the true location of the plaintiff's southeasterly line, insists that CD is the true location of the plaintiff's northeasterly line, and further insists that the plaintiff has gained no prescriptive rights in any land northerly of that northeasterly line.

The location of the trees which were cut down by the defendant is indicated by crosses on the sketch, a location which is southerly from the line claimed by the plaintiff as the northeasterly line of land devised to him by his father, and consequently not at all on land which he claimed by prescription.

The exceptions. Several exceptions were reserved during the presentation of evidence, but only one is now relied upon. After a large amount of testimony had been offered by the plaintiff, much of which related to his claim of prescriptive ownership of the triangular lot, he offered to show by the assessors of the town where the land was situated that he had paid taxes on the triangular lot. This evidence was excluded and the exception taken which is here relied upon. The rules of law relating to the evidential effect of payment of taxes by a person claiming land by prescription have been so recently stated by this court in *Smith* v. *Booth Brothers*, 112 Maine, 308; *Daly* v. *Children's Home*, 113 Maine, 528, and *Holden* v. *Page*, 118 Maine, 242, that reference to those cases is sufficient excuse for not here restating those rules. Moreover such restatement would in no way be applicable to the plaintiff's exception because he was not asserting trespass upon land to which he made claim by prescription, but upon land to which he distinctly and emphatically made claim by devise from his father. If the trespass had been committed north of the line AB, and upon land which the plaintiff claimed to own by prescription, we might be properly called upon to discuss the correctness or incorrectness of the ruling by which the assessors' testimony was excluded. Such is not the case. The trespass was committed upon the southerly side of the line AB, upon land which the plaintiff claimed by grant and not by prescription. The evidence of payment of taxes had no application, based upon the plaintiff's own claims, and was properly excluded.

The motion. The evidence is voluminous, confusing, and contradictory. No exceptions were taken to the charge of the presiding Justice and we must assume that the instructions upon matters of law were correct, clear and applicable to the facts. With the aid of those instructions, upon the several contentions as to the true location of the northerly line of the land which plaintiff acquired by devise from his father, and as to prescriptive claims upon the one side and the other, the jury found in favor of the defendant. We cannot say that under our well established rules in such motions the verdict should be disturbed.

Exceptions overruled.
Motion overruled.

NEW ENGLAND MILK PRODUCERS' ASSOCIATION

vs.

OMER R. WING.

Androscoggin. Opinion March 27, 1920.

Factor, commission merchant, or agent. Bankruptcy. Discharge. Liability to principal. Proceeds not paid over. Not in fiduciary capacity.

A factor, commission merchant, or agent who has sold property of his principal and has failed to pay over to him the proceeds, is held not to owe him a debt in a fiduciary capacity.

Assumpsit for money had and received. Plea, the general issue and an amended brief statement, wherein defendant alleged that he was adjudicated a bankrupt under the bankruptcy laws of the United States, on a petition therefor, within four months of the date of the writ and attachment thereon, and had received his discharge in bankruptcy. At the conclusion of the testimony the defendant requested the presiding Justice to direct a verdict in his favor, which

request was refused, pro forma, and defendant took exceptions. Verdict for plaintiff for $3,233.52. Exceptions sustained. Judgment for defendant.

Case stated in the opinion.

McGillicuddy & Morey, for plaintiff.

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

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

PHILBROOK, J. For a statement of the issues in this case we rely upon the language of the bill of exceptions, contained in the record, prepared by the defendant, and agreed to by the plaintiff.

"This is an action of assumpsit for money had and received. The plaintiff is a corporation under the laws of Massachusetts with an established place of business at Greene in the County of Androscoggin. In the early part of 1917 the plaintiff commenced doing business at said Greene. The defendant was then conducting a country grocery store in the same town. He was not a member of and was not interested in the plaintiff association.

Several months later, to wit, in July 1917, the plaintiff through its authorized officers made an oral agreement with the defendant. By the terms of the agreement, the defendant was to become plaintiff's agent for the sale and distribution of its grain; plaintiff was to deliver to defendant certain quantities of grain and he would in turn resell same in smaller lots to the individual farmers in the vicinity of Greene; he was to collect the proceeds therefor and, after deducting his commission, to pay over the balance to the plaintiff; he was to receive, as his compensation, a commission of three cents per bag.

This agreement was carried out until the following January. The plaintiff had delivered several quantities of grain to defendant and he had at short intervals made payments of the proceeds, after deducting his commission, to plaintiff.

In the early part of January 1918 a controversy arose as to the amount due from defendant . . . . On the tenth of January 1918 this suit was brought to recover the aforesaid balance, and on the same day an attachment was made in favor of plaintiff on the writ.

On the 27th day of April, 1918, three months and seventeen days after the date of the attachment, and after the contracting of the debt sued for, the defendant was duly and regularly adjudicated a

bankrupt in the District Court for the District of Maine and on the 12th day of July, 1918 received, from said court, his discharge, under the provisions of the United States Bankruptcy Law of 1898 and amendments thereto, discharging him from all provable debts.

The plaintiff corporation was regularly and duly listed as a creditor of defendant in his schedules and actually received the proper notice from the Bankruptcy Court in ample time to prove its claim and have it allowed.

The defendant duly pleaded his discharge in bankruptcy as a bar to this action. No request for a special judgment was made by plaintiff and no claim is made that the discharge was not regularly and properly pleaded or that the bankruptcy proceedings were not regularly or properly conducted.

At the conclusion of the testimony the defendant duly requested an instruction to the jury, that upon the testimony and pleadings in this case the plaintiff was not entitled to a verdict against the defendant, and that the jury should return a verdict in his favor. This requested instruction was refused, pro forma, and an exception was duly allowed to defendant.

Throughout the trial the defendant relied upon his discharge in bankruptcy as a bar to this action and in refusing the requested instruction and allowing the exception, it was the purpose and intention of the presiding Justice, as well as the intention of the parties in this case, to determine by the Law Court, the following proposition; is the discharge in bankruptcy a bar to the rendition of a judgment or verdict against the defendant.

The parties agree that if the discharge in bankruptcy is a bar to this action judgment should be rendered for the defendant."

The defendant relies solely upon his exceptions, claiming a finding in his favor on the ground that his discharge in bankruptcy absolves him from the plaintiff's debt. The latter contends to the contrary, claiming certain technical deficiencies in the bill of exceptions, which, we do not discuss in detail, but relying largely upon the ground that the debt was not barred by discharge in bankruptcy because it falls within the provisions of that section of the act which except from discharge such debts as "were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

As to the sufficiency of the exceptions we note that they contain this statement "it was the purpose and intention of the presiding Justice, as well as the intention of the parties in this case, to determine by the Law Court the following proposition; is the discharge in bankruptcy a bar to the rendition of a judgment or verdict against the defendant. We shall take parties at their word, hold them to their purpose and intention, and decide the issue upon the grounds upon which they rested in presenting their case to us.

The plaintiff urges fraud upon the part of the defendant. Under the terms of the bankruptcy act the fraud must be perpetrated while the bankrupt "is acting as an officer or in any fiduciary capacity." No claim is made that the defendant was acting as an officer of the plaintiff company. Interpretation of the expression "fiduciary capacity" in bankruptcy acts has been repeatedly made, and with unvarying unanimity by federal and by State courts. We need quote only the following: "This court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841 and has since been repeated many times under subsequent acts" *Crawford* v. *Burke*, 195 U. S., 176; 49 Law. Ed., 147, and cases there cited, to which the court, after citing federal cases, adds the following "as well as in the state courts too numerous to mention."

Our own court in *American Agricultural Chemical Company* v. *Berry*, 110 Maine, 528, adopts the rule, stating it in this language, "Thus a factor, commission merchant, or agent who has sold property of his principal and has failed to pay over to him the proceeds, is held not to owe to him a debt created in a fiduciary capacity." Further citation of authorities is unnecessary. The mandate, under the agreement in the bill of exceptions, must be,

Exceptions sustained.
Judgment for defendant.

MARTHA B. BENNER *vs.* HOWARD A. BENNER.

Lincoln. Opinion March 26, 1920.

Trespass. Necessary allegations.

Under Sec. 9, Chap. 100, R. S., only owner of the property injured can maintain an action, hence ownership is an essential allegation.

In alleging ownership of real estate, "land of", or "property of", or "the buildings of" is the approved form of allegation.

To allege a removal of horse-stalls, cribs, cow-chain holders or partitions in buildings belonging to the plaintiff is not a sufficient allegation of ownership of the horse-stalls, etc., as they might have been fixtures that, as between landlord and tenant, the defendant had a lawful right to remove.

To break glass that is a part of a building is a separate and distinct cause of action under the statute above referred to, and the allegation that the glass was "in the windows in the barn" of the plaintiff is a sufficient allegation that the glass was a part of the building.

An action of trespass brought under Sec. 9, Chap. 100, R. S., to recover damages for injury by defendant to plaintiff's real estate. Defendant filed a general demurrer, which was overruled by the presiding Justice, and defendant excepted. Exceptions overruled.

Case stated in the opinion.

George A. Cowan, for plaintiff.

Rodney I. Thompson, for defendant.

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

WILSON, J. An action of trespass brought under Sec. 9, Chap. 100, R. S., alleging that the defendant without license of the plaintiff tore out and carried away certain horse-stalls, cribs, and cow-chain holders in a stable, and also the partition walls from the hen-house, on certain premises described in the declaration and "broke out the glass in the windows in the barn on said premises."

The defendant filed a general demurrer, and as a ground of his demurrer contends that the ownership of the property carried away and destroyed is nowhere alleged to be in the plaintiff.

Under Sec. 9 of Chap. 100, it is only the owner who may bring an action, hence ownership is an essential allegation. The defendant first contends that alleging the defendant to be a tenant at sufferance on land of the plaintiff is not a sufficient allegation of ownership of the land by the plaintiff. We think it is. "Land of—," "the certain barn of—," is the approved form even in criminal pleading in alleging ownership of real property. Heard on Criminal Pleading, page 200; Davis Criminal Justice, page 30; *Com.* v. *Harney*, 10 Met., 422; *Com.* v. *Williams*, 2 Cush., 582.

The declaration in this case, however, should go further, and allege ownership of the property carried away, and that the glass broken was a part of a building owned by the plaintiff. In respect to the horse-stalls, cribs, cow-chain holders in the stable or the partition walls in the hen-house on the premises, the declaration is, we think, clearly insufficient. While the ownership of the land and buildings is sufficiently alleged to be in the plaintiff, it nowhere appears that the horse-stalls, cribs, cow-chain holders, or the partition walls removed were the property of the plaintiff, or were a permanent part of the buildings of the plaintiff, and were not the property of the defendant, which as tenant he would have a lawful right to remove. As to these items, all the facts alleged in the declaration might be true and yet the plaintiff have no cause of action.

The declaration, however, sets forth another ground of damage, viz.—That the defendant wilfully and knowingly "broke the glass in the windows in the barn on the premises." This alone sets forth a cause of action under Sect. 9, Chap. 100, R. S., and the demurrer was, therefore, properly overruled.

The defendant contends that to sustain an action on this ground the glass must appear to be a part of a building owned by the plaintiff, and in this respect the declaration is faulty. But the ownership of the buildings is sufficiently alleged to be in the plaintiff, and to hold that the language of this declaration is susceptible of any other construction than that the glass broken was a part of the barn of the plaintiff seems like too much of a refinement to be adopted as a rule of pleading in a modern system of jurisprudence.

The language in *Com.* v. *Bean,* 11 Cush., 414, may have been clearly open to the objection raised in that case; as the charge was simply the breaking "of glass in a building." Here the glass broken is "in the windows" in the plaintiff's barn. The primary definition of a window is "an opening in a building for light and air, usually closed by casement or sashes containing some transparent material as glass." Webster's Dictionary. Bouvier Law Dict. Glass in a window, then, is glass in the openings of a building designed to admit light and air, and when there it becomes part of the building. *Wing* v. *Wing,* 66 Maine, 62. *Farrar et al.* v. *Stackpole,* 6 Maine, 154, 157. *Roderick* v. *Sanborn,* 106 Maine, 159. The question here is not of removal, but of wilfully breaking. To wilfully break glass in a window of a building will render one liable to the owner of the building under the section of the statute above referred to.

Entry will be:

Exceptions overruled.

EDITH M. SWEET, Libl't. *vs.* ROBERT J. SWEET.

Cumberland. Opinion March 26, 1920.

Evidence warrants decree. Condonation. Express or implied promise. Rule as to number of witnesses one of practice, not inflexible.

Upon exceptions to a decree of divorce from the bonds of matrimony, for the cause of extreme cruelty, the question presented is whether as a matter of law the evidence warrants the decree.

The court is of the opinion in the instant case that it does. Condonation of the libellee's cruelty, by subsequent cohabitation, was upon the condition, express or implied, of good behavior on his part and kind treatment of the libellant.

The rule that a divorce is not to be granted upon the uncorroborated testimony of the libellant is a rule of practice, and not an inflexible rule of law.

Libel for divorce alleging cruel and abusive treatment and extreme cruelty. At the conclusion of libellant's evidence, libellee waiving his

privilege to testify or offer evidence, moved to dismiss the libel, which motion was overruled and a divorce decreed for extreme cruelty. Libellee excepted to ruling and decree. Exceptions overruled.

Case stated in the opinion.

F. W. Hinckley, for libellant.

H. E. Nixon, for libellee.

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

MORRILL, J. The libellant has obtained a decree of divorce from the bonds of matrimony between herself and the libellee, for the cause of extreme cruelty. The libellee offered no evidence; his motion that the libel be dismissed was overruled and a decree in favor of the libellant entered; to this ruling and decree the libellee has exceptions.

The question is thus presented whether as a matter of law, the evidence, which is made a part of the bill of exceptions, warrants the decree. We do not hesitate to say that it does.

After an unhappy married life of about eighteen years the troubles of the parties culminated in 1917. The evidence shows personal violence inflicted upon the libellant by the libellee in February or March of that year of a nature constituting extreme cruelty. If their later cohabitation until September of that year was a condonation of his cruelty, it was upon the condition, express or implied, of good behavior on his part and kind treatment of her.

In September, at the time of their final separation, her testimony shows that he knocked her down, tried to push her upon a hot stove and left a bruise over her eye.

It is true that her testimony as to the occurrences in February or March is alone corroborated; but the rule of not granting a divorce upon the uncorroborated testimony of the libellant is a rule of practice, and not an inflexible rule of law. The libellant was a competent witness, and there is no rule of law to prevent a finding of fact solely upon her testimony, if her credibility is established to the satisfaction of the presiding Justice. *Robbins* v. *Robbins,* 100 Mass., 150.

Exceptions overruled.

TRUMAN M. SHAW, Admr. *vs.* M. A. BUBIER.

Androscoggin. Opinion March 26, 1920.

Promissory note. Statute of limitations. A new acknowledgment or promise. R. S., Chap. 86, Sec. 100. Debt must be acknowledged, and a willingness to pay expressed.

The plaintiff relies on the following letter to toll the statute of limitations:
Oct. 25.
Dear Sir:
All sick with new desese. Bee down the first of the week and fix it up with you.

M. A. BUBIER.

Held:

That the letter, which was found by the presiding Justice to refer to the note in suit, is not a sufficient acknowledgment, from which the law will imply a promise to pay, to remove the bar of the statute of limitations.

Assumpsit on a promissory note given by defendant's intestate to plaintiff's intestate, payable on demand. Plea, the general issue with a brief statement invoking the statute of limitations, as a bar to recovery. Heard by the justice of the Superior Court, without a jury, reserving right of exception. The presiding Justice ruled that a certain letter signed by defendant removed the bar of the statute of limitations, to which ruling defendant excepted. Judgment for plaintiff for $262.15. Exceptions sustained.

Case stated in the opinion.

McGillicuddy & Morey, for plaintiff.

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

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

MORRILL, J. The plaintiff relies on the following letter to toll the statute of limitations:

"Oct. 25.

Dear Sir:

All sick with new desese. Bee down the first of the week and fix it up with you.

M. A. BUBIER."

The action is upon a promissory note and was heard by the Justice of the Superior Court, without a jury, with the right of exception reserved. The presiding Justice ruled "that the letter of M. A. Bubier to plaintiff's attorney, having reference, as I find it does, to the note sued upon, is a sufficient acknowledgment, with implied promise to pay, to remove the bar of the statute of limitations." To this ruling as to the effect of above letter, the defendant has exceptions.

Upon a careful consideration of the findings of facts and the authorities relied upon by the careful and learned justice, we are of the opinion that the exceptions must be sustained.

The statute of this State, R. S., Chap. 86, Sec. 100, provides that no acknowledgment or promise is sufficient to take the case out of the operation of the statute of limitations, "unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby."

That this statute is to be construed strictly in favor of the bar which it was intended to create and not liberally in favor of a promise, acknowledgment or waiver, is settled by a line of decisions beginning with *Perley* v. *Little*, 3 Greenleaf, 97, collected in *Gray* v. *Day*, 109 Maine, 492, 496.

It is not every acknowledgment, although in writing, that is sufficient to remove the bar of the statute; to have that effect, it must be an acknowledgment that "the debt is due, made under such circumstances and in such terms as reasonably and by fair implication to lead to the inference that the debtor intended to renew his promise of payment, and thus make a new and continuing contract. But it is not enough to prove an admission of the debt, if it is accompanied by circumstances which repel such inferences, or leave it in doubt whether the debtor intended to make a new promise." *Krebs* v. *Olmstead*, 137 Mass., 504; *Lord* v. *Jones*, 108 Maine, 381. This court has said: "The terms must be such that the court itself will infer a new promise from them. . . . . The acknowledgment must be of an existing legal cause of action. It must show a recognition of a legal obligation and an intention, or at least a willingness to be bound by it. It must be an acknowledgment of a legal debt, a legal duty. A mere acknowledgment that a cause of action once existed is not enough. A full acknowledgment of all the facts alleged by the plaintiff will not suffice unless there appears also a recognition

of the legal duty." *Johnston* v. *Hussey*, 89 Maine, 488, 494. When such an acknowledgment is shown, the law will imply a promise to pay. *Lord* v. *Jones*, 108 Maine, 381, 383.

Do the terms of the defendant's letter authorize the court to infer a promise to pay? We think they do not.

Examination of the International, Century and Standard Dictionaries does not disclose any definition of the transitive verb "to fix," in the sense of adjusting or doing anything by way of payment. In the Century Dictionary the phrase "to fix up" is defined as, "(a) To mend, repair, contrive, arrange; (b) same as to fix out;" i. e. to set out, display, adorn, supply, fit out. In the Standard Dictionary the phrase "to fix up" is defined as "to mend or fit out." In the new Standard Dictionary, 1913, this statement is found: "Up is often added, and the expression is applied even to matters of business, as 'Fix that matter up somehow,' i. e. make some kind of agreement or adjustment that may dispose of it."

We think that it is in this latter sense that the recipient of the letter in question would ordinarily understand the phrase "fix it up with you." The phrase stands alone without any words to strengthen or explain it. It does not mean absolutely to pay; it does not even recognize the note as a legal debt; it may mean "I will attempt to compromise it with you." It may be construed as equivalent to saying: "You hold my note, which I do not owe; but I am willing to make some settlement to avoid litigation." An attorney receiving such a letter would expect, we think, some proposition for a settlement, not payment in full. In *Aston* v. *Aston*, 188 Ill., App., 12, the following letter was relied upon to avoid the statute:

"Embden Ill. Sept. 9 1910

"Well, Tom, in regard to the notes you sent over to collect, I will come over as soon as I can and we will fix it up some way, if I can't come through the week will come over some Sunday.

From Brother—J. R. ASTON."

The court said: "This expression either by itself or in connection with the other parts of the letter does not show either an acknowledgment of the debt or an unqualified willingness and intention to pay it.

It amounts to a statement that their matters would be explained when they meet, and as was said in *Wachter* v. *Albee*, 80 Ill., 47, and in *Ennis* v. *Pullman Palace Car Co.*, 165 Ill., 161, the language used 'we will fix it up some way,' cannot be held to be a promise to pay the debt."

In the instant case we think the letter cannot be construed as an acknowledgment of an existing cause of action, or as showing a recognition of a legal obligation and an intention, or at least a willingness, to be bound by it. In *Lord* v. *Jones*, 108 Maine, 381, relied upon in support of the ruling, the language was, "Now can't I fix it with you by giving you my note for the amount and then I will take it up as soon as I can, and I will do it before October 1st,"—a distinct recognition of an existing debt, an expressed willingness to pay it, a proposal to give a new note for the old one, and an express promise to pay the new note by a time certain; these elements are wanting in the instant case.

We, therefore, hold that the statute of limitations is a bar to the action.

Exceptions sustained.

CHARLES SAWYER, et al., In Equity *vs.* ANNIE L. D. SAWYER.

York. Opinion March 26, 1920.

Mingling trust funds. Must be identified or susceptible of identification, or followed in kind.

A bill in equity by beneficiaries under a testamentary trust, alleging that a deceased trustee sold real estate of the trust, mingled the proceeds with his own property, and later transferred all his property, both real and personal, to the defendant, cannot be maintained, after the death of the trustee, who was entitled to the income of said trust estate for life, to reach such proceeds in the hands of defendant, it being admitted by plaintiffs that said proceeds cannot be followed in kind, or be identified or susceptible of identification.

Bill in equity seeking restoration to beneficiaries, the plaintiffs, trust funds which have been mingled with other property or lost, so that they can not be followed in kind, or identified or susceptible of identification. Defendant interposed a demurrer, which was sustained. Plaintiffs excepted. Exceptions overruled. Bill dismissed with costs.

Case stated in the opinion.

Emery, Waterhouse & Paquin, and Franklin R. Chesley, for plaintiff.

N. B. & T. B. Walker, for defendant.

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

MORRILL, J. Sarah E. Sawyer, late of Saco, Maine, died October 22, 1902, leaving a will which has been duly proved and allowed, by which she devised her homestead on Beach Street, in the city of Saco, in the following manner:

"3d. I give and devise to my husband, John Q. Sawyer, the house and lot on Beach Street in said Saco where we now live in trust as follows:

He to have the use of the same so long as he lives and said Lucy to have a home therein for the same time.

If he shall desire to sell and convey the same, he shall have the power so to do without license of probate court.

He shall then hold the proceeds of said sale in trust. Either to invest and use the income for himself or to purchase, if he wishes another home to be held in trust for himself and Lucy as above provided in regard to our present home.

4th. At the decease of my husband, I give, bequeath and devise to my son Charles and said Lucy and their heirs, to be divided equally between them whatever real or personal property may then be held by my husband under the third clause of this Will."

Her husband, John Q. Sawyer, was appointed executor of said will, and entered into possession of said homestead. On November 3, 1906, he sold the property for $3600; on January 29, 1912, said John Q. Sawyer conveyed all his property both real and personal, to his second wife, the defendant. He died December 19, 1916.

This bill in equity has been instituted by the plaintiffs, who are the "Charles" and "Lucy" mentioned in items three and four of said will, to impress upon the real and personal property so conveyed by John Q. Sawyer a trust in their favor for the payment of said sum of $3600 and interest thereon from the death of John Q. Sawyer.

There is no allegation in the bill that any part of the property which John Q. Sawyer conveyed to the defendant on January 29, 1912, or any part of the alleged trust fund, is now in the hands of the defendant, or that the alleged trust fund is susceptible of identification. The concluding allegation of the bill is:

"And the plaintiffs allege that they have a valid and just claim in the sum of thirty-six hundred dollars upon the funds which were realized from the sale of the homestead place of the late Sarah E. Sawyer and which said sum was wrongfully transferred to the defendant and wrongfully and knowingly received by the defendant, and ought now in Equity and good conscience to be returned to the plaintiffs."

To this bill a demurrer was interposed; the sitting Justice held that "the bill cannot be maintained unless the plaintiffs are able to identify said trust fund in the hands of the defendant. There being no allegation in the bill that trust fund is now in the hands of the defendant or that the plaintiffs would be able to identify it, the demurrer is sustained. Plaintiffs may amend, upon payment of

costs, by inserting an allegation in their bill that the alleged trust funds are now in the hands of the defendant and are susceptible of identification."

The plaintiffs have elected to stand upon their bill, and have argued exceptions to the ruling of the sitting Justice; in their bill of exceptions the position of the plaintiffs is thus stated: "Plaintiffs contend that John Q. Sawyer mingled the sum of thirty-six hundred dollars into his own property and so transferred it to this defendant; and that said thirty-six hundred dollars cannot be followed in kind or be identified or susceptible of identification."

We are of the opinion that the exceptions must be overruled. It is settled law that the identity of the trust fund having been lost the beneficiaries can stand in no better position than other creditors of John Q. Sawyer. *Hodge* v. *Hodge*, 90 Maine, 505, 512; *Cushman* v. *Goodwin*, 95 Maine, 353, 358; *Little* v. *Chadwick*, 151 Mass., 109; *Lowe* v. *Jones*, 192 Mass., 94, 100. The bill does not present the case of a mixed fund created by the trustee, by depositing the trust funds in a bank mingled with his own funds, as in *Hewitt* v. *Hayes*, 205 Mass., 356, or as was suggested might be the case in *Cushman* v. *Goodwin*, 95 Maine, 353, 358. As was said in *Little* v. *Chadwick*, supra, "The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails."

Exceptions overruled.
Bill dismissed with costs.

JOHN C. TIBBETTS, et als. *vs.* SAMUEL M. HOLWAY, et al.

Washington. Opinion March 27, 1920.

Mixed action. Record title. Title by adverse possession under R. S., Chap. 110, Sec. 18. What constitutes "recorded deeds" within the purview of the statute. Color of title.

Action to recover a tract of uncultivated land in the town of Wesley.

The plaintiffs have the better record title. The defendants claim title by possession under R. S., Chap. 110, Sec. 18.

It is in effect conceded that for more than twenty years the defendant maintained such occupancy of the lands as the statute requires and paid all taxes assessed thereon.

The question at issue is whether the defendant during such period claimed the lands under recorded deeds.

The defendant's claim has been under the following instruments recorded more than twenty years before the beginning of the action. (1) Tax deed from treasurer to Town of Wesley (admittedly invalid as a conveyance). (2) Release of right, title and interest Town of Wesley to J. I. (3) Similar release J. I. to defendants. No question is raised as to the sufficiency of description.

Held:

That the instruments above described are "recorded deeds" within the purview of the statute.

The presiding Justice having so ruled and the case brought to this court on the plaintiffs exceptions, the entry must be, exceptions overruled.

A mixed action to recover a tract of uncultivated land in the town of Wesley, containing approximately eight hundred acres, and also to recover for value of the trees and timber cut and removed from said tract by the defendants. Plea, the general issue, with a brief statement claiming title by adverse possession under R. S., Chap. 110, Sec. 18. Plaintiffs claimed title as heirs at law of Otis S. Tibbetts, their father, who, it is admitted by the parties to the action, was seized in fee simple of the demanded premises in 1864, and died intestate on June 28, 1879, without having given any deed of said real estate. The cause was heard by the presiding Justice without a jury upon agreed facts, no evidence having been introduced. The question at issue was as to whether the defendants during the period

of their occupancy claimed said real estate under "recorded deeds" within the purview of the statute. The presiding Justice as a matter of law ruled that the deeds were of such a character as to satisfy the statute and ordered judgment for the defendants. The plaintiffs excepted. Exceptions overruled.

The case is stated in the opinion.

C. B. and E. C. Donworth, and Frank B. Miller, for plaintiff.

W. R. Pattangall, and O. H. Dunbar, for defendants.

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

DEASY, J. Mixed action, writ dated June 25, 1918.

The land involved is an uncultivated tract in the town of Wesley.

The plaintiffs are conceded to have the better record title.

The defendants claim title by adverse possession under R. S., Chap. 110, Sec. 18 which limits to twenty years the beginning of actions for the recovery of uncultivated lands in incorporated places.

In effect it gives title to persons who by themselves or their predecessors have for twenty years or more (1) claimed said lands under recorded deeds (2) paid all taxes assessed thereon, and (3) held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of such lands in this State.

No evidence was offered. The facts are agreed upon. A stipulation between the parties, in effect, concedes possession as alleged for more than twenty years with all the elements of possession required by the statute, and expressly admits that all taxes assessed on the demanded premises since 1890 have been paid by the defendants.

The only issue concerns the plaintiff's deeds. From the stipulation and bill of exceptions it appears that the defendants claim title under a chain of three conveyances all duly recorded in Washington County more than twenty years before the beginning of this action, to wit: (1) Tax deed dated Nov. 28, 1864 from Treasurer to Town of Wesley, (admittedly invalid as a conveyance). (2) Release deed of right, title and interest, dated July 25, 1868, from Selectmen of Wesley to John Inglee et al. (3) Release deed of right, title and interest, dated August 4, 1890 from John Inglee et als to defendants.

The plaintiff contends that the instruments above described are not such "recorded deeds" as the statute contemplates. The presiding Justice ruled as a matter of law that the deeds are of the requisite

character to satisfy the statute and ordered judgment for defendants. The plaintiff excepted. The only question submitted is whether the instruments above specified are recorded deeds within the purview of the statute. No question is raised as to the sufficiency of the descriptions.

A release deed of right, title and interest in land "is not a grant of the land itself or of any particular estate in the land." *Hill* v. *Coburn*, 105 Maine, 452. It does not purport "to convey an actual title." R. S., Chap. 78, Sec. 14. Until 1904 when changed by statute a conveyance by such an instrument was subordinate to a prior unrecorded deed. *Hooper* v. *Leavitt*, 109 Maine, 73. Its production does not prove prima facie title. *Tibbetts* v. *Estes*, 52 Maine, 570. *Savage* v. *Holyoke*, 59 Maine, 346. When the adverse character of the occupancy is disputed the form of deed is material. Possession under a warranty deed or even a grant of the land is more consonant with an adverse claim than is a holding under a mere release. In the case at bar however, no question is raised as to the adverse quality of the defendants' possession.

A release deed is subject to the above, and perhaps other infirmities. But it is a deed. Courts so class it. The statute so denominates it. (R. S., Chap. 78, Sec. 20). Men generally so understand it. All definitions of the term include it. It is a legitimate, though humble member of the Deed family. To hold that the word "deed" as used in R. S., Chap. 110, Sec. 18, does not include release deeds would be to interpolate an exception or qualification into the statute, thus invading the province of the Legislature.

But recorded deeds have from the earliest times been relied upon (though not as essential) in establishing possessory titles to cultivated lands. As used they give character to the claim and color of title. It is argued that the Legislature employed the term "recorded deeds" with reference to its time-honored use in the proving of possessory titles to *cultivated* lands and that in providing for the gaining of titles by possession to *uncultivated* lands intended it to have the same meaning, and to be subject to the same qualifications.

If this be true authorities relating to color of title are relevant and many such authorities hold that deeds to give color of title "must purport to convey title."

Knight v. *Campbell* (Iowa), 39 N. W., 831; *Hall* v. *Law*, 102 U. S., 466; *Nelson* v. *Davidson*, (Ill.), 43 N. E., 363; *Wood* v. *Conrad*, (S. D.), 50 N. W., 97; 1 Cyc., 1085.

On the other hand there are numerous authorities supporting the proposition that "color of title is anything in writing connected with the title which serves to define the extent of the claim. It is wholly immaterial how imperfect or defective the writing may be, considered as a deed, if it is in writing and defines the extent of the claim it is a sign, semblance or color of title."

Street v. *Collier*, (Ga.), 45 S. E., 296; *Aldrich* v. *Griffith*, (Vt.), 29 At., 378; *Safford* v. *Stubbs*, (Ill.), 7 N. E., 655. *McConnell* v. *Street*, 17 Ill., 253.

See also *Hornblower* v. *Banton*, 103 Maine, 377; *Kelley* v. *Jones*, 110 Maine, 363.

The better and more logical opinion would seem to be that a release deed of right, title and interest notwithstanding it is "not a grant of the land itself" is effectual to give color of title. It may not lend strong support to the adverse character of the occupancy when that is called in question but it quite as effectually as even a full warranty deed, "gives boundary to the possession." *Minot* v. *Brooks*, 16 N. H., 376.

Moreover the defendants' claim to the land has been not under the release deeds merely, but under the tax deed, the effect of which is presumably not limited by the words "right, title and interest." A release deed transmits all claim and title whether inchoate or consummate which the releasor possesses. The situation is the same as if the tax deed had run directly to the defendants. According to the weight of authority and we think of reason also, a tax deed though void as a conveyance gives good color of title. Some of the many cases thus holding are collated in 1 Cyc., 1095, and 1 R. C. L., 716.

The plaintiff cites *Lord* v. *Lord*, 12 Maine, 88; *Coe* v. *Persons Unknown*, 43 Maine, 432; *Walker* v. *Lincoln*, 45 Maine, 67; *Stetson* v. *Bangor*, 60 Maine, 313 and *Hall* v. *Coburn*, 105 Maine, 437. In these cases releases were adduced for the purpose of making title by deed. They have little bearing upon the pending case wherein title is claimed not by deed, but by possession.

Our conclusion is that whether the term "recorded deeds" as employed in the statute is to be construed literally or as impliedly qualified so as to include only such recorded deeds as, under established rules give color of title, the entry must be,

Exceptions overruled.

HANNAH O'BRION, by guardian

vs.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY.

Cumberland. Opinion March 28, 1920.

Assumpsit. Accident insurance. Alleged false representations. Elements necessary to constitute same. Must be made with knowledge of their untruthfulness. Alleged breach of general provisions. Death accidental. Differentiation between condition and cause.

In an action of assumpsit upon an accident insurance policy brought in behalf of the beneficiary to recover the sum of five thousand dollars for the death of the assured, James H. O'Brion, alleged to have been caused by accidental injury, and before the Law Court on report it is

Held:

1. That the assured made no false representations material to the acceptance of the risk or to the hazard assumed by the company.
2. That there was no violation of the general provision of the policy giving the company the right to examine the body and make an autopsy, nor of the provision giving the company the right to be present if any autopsy were made and to have timely notice thereof.
3. That the death of the assured resulted solely from the accident. Even if the assured at the time of the accident was afflicted with Bright's disease that was merely a condition and not a cause, and had nothing to do with the accident nor with the death which followed within a few hours thereafter.

An action of assumpsit upon an accident insurance policy to recover five thousand dollars for the death of the assured, James H. O'Brion, the plaintiff, being the beneficiary named in the policy. Plea, the general issue, with a brief statement, which was amended and plaintiff filed a counter brief statement. By agreement of the parties, the case was reported to the Law Court, upon so much of the evidence as was legally admissible for such decision as the law and the evidence required. Judgment for plaintiff for $5,000, with interest from date of writ.

Case stated in the opinion.

Henry C. Sullivan, and William A. Connellan, for plaintiff.

David E. Moulton, and William H. Gulliver, for defendant.

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

CORNISH, C. J. This is an action of assumpsit upon an accident insurance policy brought in behalf of the beneficiary to recover the sum of five thousand dollars for the death of the assured alleged to have been caused by accidental injury. The policy was issued to James H. O'Brion, the assured, on June 19, 1915, for the term of one year and renewed on June 19, 1916, for another year. The beneficiary was Hannah O'Brion, a woman about eighty years of age and the mother of the assured. The automobile accident which the plaintiff claims caused the fatal injury, occurred on the afternoon of Sunday, November 26, 1916, and death ensued on the morning of the next day, November 27, 1916. The case is before the Law Court on report.

The defendant by way of brief statement, set up four distinct grounds of defense, and these will be considered in their order, as pleaded.

1. False representation by the assured in item 17 of the application, viz: "My habits of life are correct and temperate; I am in sound condition mentally and physically; my speech or hearing is not impaired. I have not lost the sight of either eye, nor have I had a cataract or any disease of either eye; I have never had disorders of the brain, paralysis, fits, or any deformity." The policy contains the usual stipulation that the right of recovery shall be barred in the event that any one of the statements or representations material to the acceptance of the risk or the hazard assumed by the company is false. That such a stipulation is held to be valid and binding needs no citation of authorities. Two facts however must concur to give it force; first, the statement must be untrue as of the time when made, and second, it must be material either as regards the acceptance of the risk or as regards the hazard assumed by the company. If either element is lacking the stipulation fails.

The statement made by this applicant on June 19, 1915, lacks the first element because it was not false. The evidence shows that the

assured was a man forty-four years of age, unmarried, a dentist in the city of Portland and in active practice up to the very day of the accident. His associates and intimate friends knew him as a man of most exemplary habits, a total abstainer from the use of intoxicating liquors, and so far as they were able to determine in good health. His brother, Dr. Dennis J. O'Brion, who is a practicing physician in Portland, testified that James' health was "all right" and he had never known of his complaining of any illness whatever except on one occasion. That was in 1911 when the assured complained to him of pain in the right loin, and suspecting it might be caused by renal colic, the physician had X-ray pictures taken at the Maine General Hospital. These pictures however were negative in character and, after the administering of a laxative, the trouble disappeared and did not recur. No other instance of illness or treatment by a physician from June, 1911, to the day of the accident, a period of over five years, appears in the evidence, with the exception of a slight injury to the wrist in 1915, from which he quickly recovered. In view of this history it is evident that the assured cannot be charged with making false statements in answering item 17.

The counsel for defendant relies in opposition upon the condition found at the post mortem examination, indicating as he claims, the existence of Bright's disease. The exact condition and its significance are matters of controversy between the two physicians, but in any view they weigh but little against the positive and uncontradicted testimony as to his general condition of health when the application was signed. His statement was made honestly, truthfully and in accordance with the facts as he knew them. Under such circumstances the law does not require the applicant to wait until an autopsy has been performed upon his body before the truth of his statement can be accepted at its full force.

2. In the second place it is pleaded that a false statement as to a material fact was made under item 19 of the application, viz: "I have not been disabled, nor have I received medical advice or treatment, nor had any local or constitutional disease during the past five years except as follows: In February, 1915, for injured wrist lasting two weeks."

This paragraph however is marked in the application with a star referring to a foot-note in which the company specifies that this statement is "only required for health insurance." The policy under consideration was for accident not for health insurance, and therefore

this statement was entirely immaterial. In fact this point, though raised in pleading, is not pressed in argument.

3. A breach of general provision number 8 in the policy which reads:

"Where not forbidden by statute any medical adviser of the Company shall have the right and opportunity (1) to examine the person of the insured in respect to any injury as often and in such manner as he requires during the pendency of the disability: (2) to examine the body or make an autopsy in case of death, and (3) to be present if any autopsy be made, timely notice of which must be given to the Company."

The breach now complained of is that the company "was not accorded the right or opportunity to examine the body or to make an autopsy following the death or to be present in case any autopsy was made, nor was the company notified of any autopsy."

The facts as to the autopsy made in this case are briefly these: Dr. Dennis O'Brion, physician, brother of the assured, thinking that the death was caused by the criminal negligence of the driver of the automobile, was determined to set in motion the necessary legal machinery to bring the guilty party to justice. As soon as he heard of James' death he went to his mother's house and under his direction the body was removed to an undertaker's room. Then he applied to the County Attorney and requested that an autopsy be made. That official declined to order one, but after several interviews and upon the continued insistence of the brother, he finally told the medical examiner, Dr. Conneen, that the law gave the medical examiner the right to hold the autopsy if he deemed it necessary, and if he did deem it necessary he should go ahead and perform it. Accordingly the medical examiner performed the autopsy on the afternoon of November 27, at the undertaking rooms, and was assisted by Dr. O'Brion and the undertaker's assistant. This was in accordance with the statute providing for autopsies by medical examiners, which requires that they be made "in the presence of a physician and one other discreet person." R. S., Chap. 141, Sec. 3. When the autopsy was completed the medical examiner made the required official report to the County Attorney and Attorney General.

These facts show no violation of either clause (2) or clause (3) of paragraph 8 of the policy. Clause (2) gives the company itself the right to make an autopsy and that privilege has not been denied here.

But the request must be made either directly or indirectly of the beneficiary, who is the sole party in interest in the enforcement of the policy, and it must be made within a reasonable time. *Welle* v. *U. S. M. Ac. Ass'n.*, 153 N. Y., 116; *Am. Emp. L. Co.* v. *Barr*, 68 Fed., 873; *Johnson* v. *Bankers Mut. Cas. Ins. Co.*, 129 Minn., 18, L. R. A., N. S., 1915 D., 1199, and note. No such request was made by this defendant of Mrs. O'Brion, the beneficiary, nor of anyone else as representing her, at any time, and therefore there has been no denial of its contract right. And further, no act of the beneficiary prevented or hindered the company from making such request if it had seen fit so to do.

Nor has clause (3), which requires timely notice to the company of a proposed autopsy been violated. The autopsy contemplated by that provision is unofficial, one made at the instigation of the beneficiary, and then it is only fair, as prescribed, that seasonable notice thereof be given to the company. Here however no autopsy was made at the instigation of the beneficiary or at her request. It is very doubtful whether in her condition of age and feebleness she fully comprehended that one was to be made when the body was removed from her house to the rooms of the undertaker. She testifies that she supposed it was to be prepared for burial, and she protested against its removal even for that purpose. She had no part in the proceedings. The brother was wholly responsible therefor, and therefore no notice could be given by her. Nor was one required even if she had known, because it was an official autopsy made by an officer of the State in behalf of the State and under the restrictions provided by statute. Only such persons could be present as the medical examiner under the statute should see fit to admit. The parties to this controversy were entire strangers to that proceeding and could claim no rights therein. This ground of defense therefore is without merit.

4. Finally the defendant contends that the death of the assured resulted from causes other than through accidental means.

This is a question of fact and from the evidence and circumstances we find no difficulty in reaching the conclusion that the accident was the sole cause of the death. Without rehearsing the testimony in detail it is sufficient to say that the serious nature of the accident itself, the overturning of the automobile with O'Brion beneath it, the excruciating pain in the head complained of by him during the night which opiates were almost powerless to relieve, the injury upon

the crown of the head manifested by the bruise upon the scalp, the effusion of blood into the occipital region, the opinion of Dr. O'Brion that death was caused "by compression of the brain due to cerebral hemorrhage," the official report of the medical examiner, Dr. Conneen, that the cause of death was "Cerebral hemorrhage and concussion (shock) caused by accident, contributing causes kidney and heart lesions," together with the stubborn fact that death actually resulted in twelve or fifteen hours after the accident, with no intervening cause whatever, lead to but one conclusion, death by accident. Reason and common sense will permit no other.

As opposed to these facts the defendant suggests two theories; first that death may have been caused by overdoses of morphine administered by Dr. O'Brion. But this theory is annihilated both by the physician who administered them and by the medical examiner who says he found at the autopsy no evidence of morphine poison.

The second suggested cause is Bright's disease, evidences of which the medical examiner says he discovered in the post mortem examination. Both physicians agree that one kidney contained a capsulated stone, but as to the existence of Bright's disease they are at variance. However, even granting that the assured was afflicted with that disease, it did not affect the situation here nor the legal liability of the defendant under this accident policy. Whatever the condition, it was simply a condition and not a cause. It had nothing whatever to do with the accident nor with the death which so closely followed. It was not the proximate moving cause of the fatal injuries. *Bohaker* v. *Ins. Co.*, 215 Mass., 32; *Collins* v. *Casualty Co.*, 224 Mass., 327; *Moon* v. *Order of Com'l Trav.*, 96 Neb., 65, A. & E. Ann. Cas., 1916 B, 222 and note; *Hall* v. *Gen. Ac. Co.*, 16 Ga. App., 66; 85 S. E., 600; *Driskell* v. *U. S. Health &c. Ins. Co.*, 117 Mo. App., 362, 93 S. W., 880. That Bright's disease, if it existed, had no connection with the death is admitted by the medical examiner, a witness for the defendant, whose final word, after a protracted direct and cross examination was this: "the direct and immediate cause of his death was the accident. It was in my estimation." Further discussion is unnecessary. The theories of the defendant are factless.

The entry should be,

Judgment for plaintiff for $5,000, with interest from date of the writ.

GILBERT G. PALMER et al. *vs.* SOLON LUMBER COMPANY.

Somerset. Opinion March 29, 1920.

Written contract. Subsequent modification by oral agreement. Jury erred.

In November 1917, the plaintiffs contracted in writing to cut and haul a quantity of lumber for the defendant at $10 per M. In Feb. 1918 the parties by oral agreement, the terms of which are in dispute, modified the written contract. The plaintiffs say that the defendant agreed to satisfy all of the plaintiffs outstanding obligations incurred in connection with the operation, without any limitation as to amount, and also to pay the entire cost of completing the same. The defendants contention is that the plaintiffs at the request of Mr. Starbird, president of the defendant corporation, made a list of their outstanding bills. This is admitted by both parties. The list amounted to something less than one thousand dollars. Mr. Starbird corroborated by three witnesses says that relying on this list, and on the assurance of the plaintiffs that the list was substantially correct and complete he agreed to pay the outstanding bills not exceeding $1200.

Something more than $1200 of the plaintiff's bills have already been paid by the defendant. The suit is brought to recover the amount of other and additional bills and the jury verdict is for the plaintiff for $708.22.

A careful examination of the testimony convinces a majority of the court that the jury manifestly erred.

The material testimony on both sides comes from interested but apparently honest witnesses. The flat contradiction is undoubtedly due to the infirmity of human memory, or to the failure of the parties to reach a precise understanding.

The testimony on the part of the defendant is more positive and convincing and more consistent with facts and circumstances and with the probabilities of the case. The finding of the jury was unwarranted.

Assumpsit. Plea, the general issue. The plaintiffs contracted in writing to cut and haul a quantity of lumber for defendant. Subsequently, within a year, the parties by oral agreement, the terms of which are in dispute, modified the written contract. Verdict for plaintiff for $708.23, which was set aside on motion by defendant. New trial granted.

The case is stated in the opinion.

Lyman L. Walton, and Clayton E. Eames, for plaintiffs.

Butler & Butler, for defendant.

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

CORNISH, C. J., SPEAR, HANSON, WILSON, DEASY, JJ., concurred. MORRILL, J., dissenting.

DEASY. J. In November, 1917 the parties to this suit entered into a written contract whereunder the plaintiffs agreed to cut and haul for the defendant 500 M. or more of lumber for which service the defendant promised to pay $10 per M.

On Feb'y. 6, 1918 when about 575 M. had been cut and a little more than half of the same hauled to the mill, the plaintiffs owing to severe weather conditions, and other obstacles had become financially involved. On that day the parties met and a new deal was made, but not reduced to writing. As to what the new contract, or modification of existing contract was, the parties are at variance:—The plaintiffs say that the defendant agreed to assume and pay all of the unsatisfied obligations incurred by the plaintiffs in connection with the operation, and also to pay all bills accruing in the completion of it. On the other hand A. W. Starbird, president of the defendant corporation, corroborated by his wife and two sons, says that the plaintiffs assured him that the unpaid bills on Feb'y. 6th did not amount to more than $900 or $1000. And that he, relying on this assurance, agreed to pay the bills but expressly limited his liability to $1200, being $2 per M. addition to the price originally agreed upon, for an estimated total cut of 600 M.

No question is raised as to the consideration for the defendant's new promise, and it is not disputed that the defendant has paid at least $1200 in addition to the amount required by the written contract.

The jury verdict is for the plaintiffs for seven hundred eight dollars and twenty-two cents.

The burden was on the plaintiffs to prove the correctness of their version. A careful examination of the evidence convinces the court that the jury manifestly erred in finding this burden sustained.

Too great importance may have been attached to the evidence of several witnesses for the plaintiff who testified to hearing Mr. Starbird say in substance that he had agreed to pay all the bills. This testimony is nearly if not quite as consistent with the defendant's version of the contract as with the plaintiffs. If Mr. Starbird relying upon the plaintiff's assurance that the outstanding bills amounted to not more than $1200, promised to pay debts not exceeding that amount, he naturally and almost inevitably, in speaking of the matter to third parties, before learning the facts, would have said that he had agreed to pay all the bills.

Other than that above referred to the evidence in the case on both sides relating to the February agreement comes from interested, but apparently honest witnesses. The flat contradiction is undoubtedly due to the infirmity of human memory, or to the failure of the parties to reach a precise understanding. The testimony on the part of the defendant is more positive and more consistent with facts and circumstances and with the probabilities of the case. The finding of the jury was unwarranted.

Motion sustained.
Verdict set aside.
New trial granted.

METCALF AUTO COMPANY, in Equity *vs.* ARTHUR R. NORTON.

Franklin. Opinion March 30, 1920.

Lease. Option to release at expiration. Term of years defined. Rule as to interpretation to be given to language susceptible of two constructions.

A lease of a garage from the defendant to the plaintiff contained the following clause: "With the privilege on the part of the lessee to release at the end of said term said premises for a term of years to be agreed upon at the same rental of $400 a year."

At the end of the original term the plaintiff claimed the right to elect and did elect by written notice to renew the lease for two years. The defendant contends that in the absence of a mutual agreement fixing length of new term the plaintiff has no right to any additional term. The plaintiff says that the agreement to renew for a term of years to be agreed upon gave it the legal right to a renewal for a period of at least two years that being the shortest period comprehended in the phrase "a term of years".

Held:

That the plaintiff's contention is sound.

If the language of a contract is reasonably susceptible of two constructions, that interpretation should ordinarily be adopted which gives the words some meaning rather than another which leaves them meaningless.

A lease or agreement to lease for years or for a term of years is a good lease or agreement for two years. For more than this there is no certainty; for less there can be no sense in the words.

Bill in equity seeking to enjoin defendant from instituting proceedings of forceable entry and detainer against plaintiff to get possession of a garage occupied by plaintiff under a lease with option of releasing for a term of years at expiration of term. Questions of law having arisen, the parties agreeing thereto, the case was reported to the Law Court for its determination upon bill, answer, replication, and evidence. Bill sustained. Decree in accordance with the opinion.

The case is stated in the opinion.

Frank W. Butler, for plaintiff.

Elmer E. Richards, for defendant.

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

DEASY, J. On May 4, 1914 the defendant leased a garage to the plaintiff for five years. The lease contains the following clause: "with the privilege on the part of the lessee to release at the end of said term said premises for a term of years to be agreed upon at the same rental of $400. a year."

On May 5, 1919 the plaintiff elected to renew the lease for two years and gave the defendant written notice of such election.

On May 27th 1919 the defendant by letter declined to renew lease for any further period putting his refusal on the ground "that there is no privilege of renewal unless the same is agreed upon by both parties."

Undoubtedly a contract to make or renew a lease is of no legal effect if the premises to be leased or the term or the rental is left to be determined by subsequent agreement of parties. In this case the property to be leased and the rental are clearly specified. The defendant says that the term of the renewal was left indefinite. He maintains that the phrase "a term of years to be agreed upon" means no more than "a term to be agreed upon."

The complainant on the other hand says that "a term of years" means not less than two years and that the renewal clause has the same effect as if it had provided for an extension for two years and as much longer as the parties might agree.

The plaintiff's contention is sustained by reason and authority. If the language of a contract is reasonably susceptible of two constructions, that interpretation should ordinarily be adopted which gives the words some meaning rather than another which leaves them meaningless. See 9, Cyc. 586.

"The natural and legal, as well as the literal and grammatical construction of the words 'any terms of years' must be a period of time not less than two years." Ex parte Seymour, 14 Pick., 40.

"A lease 'for years' without any number being fixed is for two years certain." Washburn Real Property, 5th Ed. Vol. 1, page 471.

"If a man make a lease for years without saying how many it is a good lease for two years; for more than this there is no certainty and for less there can be no sense in the words." Taylor's Landlord

& Tenant 9th Ed. Sec. 77; Woodfall's Landlord & Tenant Vol. 1, page 55; See *Boston Clothing Co.* v. *Solberg* (Wash.), 68 Pac., 715.

It is true indeed as urged by the defendant's counsel that the common law definition of estates for years comprehends and includes any fixed term however short.

We believe however, that the parties in making this lease and contract used the word "years" in its common and ordinary sense and not in its sense as employed in the common law classification of estates.

Bill sustained.
Decree in accordance with this opinion.

WALTER B. CROSSMAN *vs.* BANCON & ROBINSON COMPANY, et als.

Penobscot. Opinion March 30, 1920.

Action of deceit. Necessary and essential elements in action of deceit. What plaintiff must prove.

The plaintiff in his brief states the case as follows: "This is an action for deceit in which the plaintiff seeks to recover from his former business associates for taking advantage of his alleged defective mental condition and purchasing his half interest in the business for less than its fair value, the measure of damages claimed being the fair value of plaintiff's half interest in the business and the amount which defendants paid him. The jury returned a verdict for the plaintiff . . . . and in answer to questions propounded by the Chief Justice, presiding, found that on the date when the plaintiff signed the instrument accomplishing the transfer of his interest he 'did not then have sufficient mental capacity to transact that particular business with intelligent understanding of what he was doing and a rational judgment in relation thereto.'

Defendants bring the case to this court on motion in the usual form, and exceptions to the refusal of the chief justice to direct a verdict for the defendants."

The defendant made no affirmation representations, the only ground upon which the plaintiff seeks to maintain his action is that the defendant dealt with him knowing he was incompetent to do business.

Held:

1. That forms of action that are well established and approved by long usage, should be adhered to.
2. That the action of deceit is as old as the jurisdiction of the State, and as well defined as any form of action known to our course of procedure.

3. That the elements are various, every material one of which must be proved to sustain the action.
4. That proof of any of the material allegations is wanting in the report of the evidence in the present case.

An action of deceit. Plea, the general issue. Plaintiff sought to recover from his former business associates for taking advantage of his alleged defective mental condition in purchasing his half interest in the business for less than its fair value. Verdict for plaintiff for seven thousand and thirty-five dollars. In answer to questions propounded by the Chief Justice presiding, the jury found that on the dates when plaintiff signed the instruments transferring his interest he "did not then have sufficient mental capacity to transact that particular business with an intelligent understanding of what he was doing and a rational judgment in relation thereto." Defendants filed a motion in the usual form for new trial, and also exceptions to the refusal of the Chief Justice presiding to direct a verdict for the defendants. Exceptions sustained.

Case stated in the opinion.

Pattangall & Locke, H. J. Chapman, and H. J. Preble, for plaintiff.

L. C. Stearns, and Ryder & Simpson, for defendants.

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

SPEAR, J. The plaintiff in his brief states the case as follows: "This is an action for deceit in which the plaintiff seeks to recover from his former business associates for taking advantage of his alleged defective mental condition and purchasing his half interest in the business for less than its fair value, the measure of damages claimed being the difference between the fair value of plaintiff's half interest in the business and the amount which defendants paid him. The jury returned a verdict for the plaintiff . . . . and in answer to questions propounded by the Chief Justice, presiding, found that on the dates when the plaintiff signed the instrument accomplishing the transfer of his interest he 'did not then have sufficient mental capacity to transact that particular business with intelligent understanding of what he was doing and a rational judgment in relation thereto.'

Defendants bring the case to this court on motion in the usual form, and exceptions to the refusal of the chief justice to direct a verdict for the defendants."

Conceding that the verdict could be allowed to stand upon the questions of mental capacity and the amount of damages, we then have left the real issue in the case,—can an action of deceit, as a matter of law, be sustained upon the testimony? Upon this issue it is not necessary to consider the testimony at any length. It is conceded that the defendant made no affirmative representations. Nor did it solicit the purchase of the property. The plaintiff said: Q. Where did you first discuss with Mr. Robinson if at all, the proposition of selling out your interest in the property? A. Well, some time when I was to the island. One day I can remember that I said to him, "Give me $5000. and you can have all I got. Let me go. I thought they were after me." With reference to a later conversation with Robinson the plaintiff testified: He said to me at that time, "I would give it to you quick enough, but you ain't fit to do business. It wouldn't stand law."

Mr. Robinson, upon this phase of the case testified as follows: "He said I have decided to leave Bangor and I want you to take my interest in this business. . . . Now I said, Walter, I don't want to buy out your interest in this business. I want you to stay. . . . This is Saturday. You go home; you think it over, and on Monday morning when you come to the office I will ask you whether you have decided to stay or sell, and I want you to say that you have decided to stay." This evidence discloses the inception, the object and the spirit of this transaction. Instead of leading the plaintiff on to sell, the defendant discouraged him but was importuned to buy.

The plaintiff contends that this evidence, coupled with the fact that the plaintiff was incompetent to do business and that the amount paid was inadequate, brings the case within the form of an action for deceit, as defined in this State.

It is the opinion of the court that this contention cannot be sustained.

A careful examination of the able brief of the plaintiff presents no decision or principle of law, that can be regarded as a precedent for the form of action in the present case. The lack of precedent has been frequently held to be a strong argument against innovation, especially in making judicial made changes in the forms of action.

In *Anthony* v. *Slaid*, 11 Met., 290, in an opinion by Chief Justice Shaw it is said: "That there is no precedent for such an action, where there must have been many occasions for bringing it, if maintainable, is a strong argument against it." *Wellington* v. *Small*, 3 Cush., 148; *Lamb* v. *Stone*, 11 Pick., 527.

But the plaintiff invokes the old and wise maxim, that, in law, for every wrong there is a remedy. It is equally old and wise that there are prescribed forms of procedure. Unless the established rules of pleading and practice are observed confusion and uncertainty would take the place of intelligible and orderly procedure. With respect to this rule, our court have said, in *Flanders* v. *Cobb*, 88 Maine, 488. "The remedies and forms of action which have been afforded to parties, and which have been sanctioned by long usage and approved by the highest authorities should be adhered to, and it is not the province of the court, upon the reason of supposed convenience or occasional hardship, to dispense with them, and to substitute one for another, varying the rights of one or both of the parties."

This decision, which is the well settled law under our mode of procedure, is directly applicable to the law and facts in the case at bar. The action of deceit is as old as the jurisdiction of the State and as well defined as any form of action known to our course of procedure.

It should be observed that we are not concerned with the merits. We are dealing with the form of action as a matter of law. Our inquiry is, can the merits be reached in this form of action? Every right does not have the same remedy. Nothing is better settled than the requirement that the pleadings shall set forth the elements to be proved to sustain the particular form of action by which redress is sought; and that, to sustain the action, every essential element must be proved by affirmative evidence. A right is not without a remedy because it fails by mistake of legal process. It often happens that precisely the same right, upon its merits, must be sought by different remedies. For instance: The provisions of a contract under seal must be enforced by an action of covenant broken. It cannot be enforced by assumpsit. The provisions of the very same contract not under seal, are enforced by assumpsit, and cannot be enforced by covenant broken. Yet they both invoke precisely the same merit and carry the same damages. The distinction may seem technical, yet our courts have observed and enforced it. In certain cases trover will lie to recover the value of property when assumpsit,

under precisely the same facts, and involving the same amount of damages, will not lie. Trespass de bonis will lie for invading the realty and carrying away timber severed thereform, but will not be the remedy for injury to the realty by the same act of entry. The reverse, however, would be a full remedy. And thus might be enumerated many instances when one form of procedure may be employed while a different form involving the same state of facts will be faulty. In fact it is no uncommon experience that an action may be abated for want of proper form. And thus it is that rights must be redressed by an observance of the proper legal remedy, otherwise legal procedure would become a mere medley of forms emanating from the ignorance or caprice of the pleader.

Reverting now to the elements necessary to be proved to meet the requisites of an action of deceit, we find them well stated in the plaintiff's brief, so far as they go, as follows: "There must be alleged and proved then, (1) a material representation which is (2) false and (3) known to be false, or made recklessly as an assertion of fact without knowledge of its truth or falsity and (4) made with the intention that it shall be acted upon and (5) acted upon with damage." In addition to these elements it must also be proved that the plaintiff (6) relied upon the representations (7) was induced to act upon them and (8) did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity. Every one of these elements must be proved affirmatively to sustain an action of deceit.

Proof of a single one of these elements is manifestly wanting in the report of the evidence. The only affirmative representation claimed by the plaintiff to have been made by Mr. Robinson was the truthful one, according to the plaintiff's own theory, that "You are unfit to do business. It wouldn't stand law." But the plaintiff, at the time, did not believe he was unfit to do business and persisted in his purpose to sell. The frank declaration of the defendant directly to the plaintiff that he was unfit to do business cannot, by any interpretation we are able to give, be construed into an attempt, on the part of the defendant, to deceive. On the contrary, it appears more like blunt, if not offensive frankness.

A further consideration shows a lack of affirmative proof (1) that the defendant made any false representation; (2) that the defendant acted upon any representation made by the defendant; (3) that he

relied upon any representation even as to price, having at the beginning fixed his own price; (4) that he was induced to act on any representation, but rather insisted upon selling that he might be able to leave the city, which he did. There is no controversy about these facts. The only ground upon which the plaintiff seeks to maintain his action is that the defendant dealt with him knowing he was incompetent to do business. But this is not sufficient to maintain this action. Moreover this case does not present a right without a remedy.

The plaintiff under the well settled rules of law, had ample remedy for relief from this or any other contract entered into by him while in a condition of mind which rendered him incompetent to understand the nature of his transactions.

But as above observed, the facts proved in this case cannot be fitted into the form of an action for deceit, without subverting the purpose and abrogating the form of this long established rule of pleading. For the action of deceit was not intended to be made easy to prove. Its purpose was to restrain law suits in commercial and trading transactions so that every time a party, through reliance upon opinion, or trade talk, or without taking pains to inquire for himself, got the bad end of a bargain he should not be permitted to fly to the courts for redress. Hence the purpose and form of the action, and proof of all the necessary elements, have always been adhered to with strictness, with the avowed design of abridging instead of enlarging the field of litigation.

Exceptions sustained.

FRANCES D. BURRILL, Executrix, *vs.* JULIA A. GILES, Executrix

Hancock. Opinion March 29, 1920.

Bill in equity under R. S., Chap. 92, Sec. 22. Accommodation promisor. Failure of consideration. Justice and equity do not require relief sought. Phrase "adverse party" under R. S., Chap. 87, Sec. 117, paragraph II and VI defined.

This is a bill in equity brought by the executrix of the will of Charles C. Burrill, late of Ellsworth, Maine, deceased, and now prosecuted by an administratrix D. B. N. against Julia A. Giles, executrix of the will of Jeremiah T. Giles, late of Ellsworth. The bill is brought under R. S., Chap 92, Sec. 22, to obtain equitable relief from the bar of the statute, requiring suits to be brought within 20 months from the filing of the affidavit by the executrix that she has given notice of her appointment.

In this form of proceeding it is incumbent upon the plaintiff to prove that "justice and equity" require the application of the statute.

To this averment the defendant answered: "That said note was given wholly for the accommodation of Charles C. Burrill. The defendant is the executrix, widow and residuary legatee of said Jeremiah T. Giles." This answer puts directly in issue the averment of "justice and equity," in the plaintiff's bill. Upon this issue, against objection, Mrs. Giles was permitted to testify, although the plaintiff had not taken the stand to testify.

A question of procedure arises in this case which it may be not unprofitable to consider. In the progress of the trial exceptions were taken to the admission of the testimony of the widow, and executrix of the defendant estate. The case, however, comes up on appeal without stating or even alluding to the ground of the exceptions. So far as the appeal goes no exceptions appear; nor should they. They are found only by a reference to the development of the testimony in the trial of the case.

In law the rule is that exceptions must be clearly stated and show a grievance or they will not be entertained. This is not the practice, however, in equity. The differentiation in this regard between the rule in law and in equity is found upon the requirement that every finding in equity must be expressed in the form of a decree by the sitting Justice; that this decree absorbs all that transpired in the trial which will be shown by the testimony.

Held:

(1) That when exceptions appear in the record of a case in equity, they are not to be considered as a matter of law, upon which the decree may or may not be

overturned, but in determining whether there is sufficient legal evidence to sustain the decree, regardless of the merits of the exceptions.

(2) That under R. S., Chap. 87, Sec. 117, paragraphs II and VI, the phrase "adverse party" always means the living party, whether plaintiff or defendant.

(3) That when both plaintiff and defendant are representative, either may take the initiative in testifying to facts happening before the death of which the representative has personal knowledge.

(4) That the purpose of paragraph VI is to enable the opposite party, whether representative or adverse, to call the plaintiff as a witness, and at the same time inhibit the "adverse party" from claiming the right to testify as he might had the plaintiff voluntarily taken the stand.

(5) That paragraph VI does not inhibit the representative party, when the opposite party, from claiming such right.

(6) That the fact that the representative party defendant was the widow and residuary legatee of her decedent did not debar her from testifying.

This is a bill in equity brought by the executrix of the will of Charles C. Burrill, and prosecuted by Sarah Burrill Tatley as administratrix, d. b. n against Julia A. Giles, executrix of the will of Jeremiah T. Giles, under R. S., Chap. 92, Sec. 22, seeking relief from the statute requiring suits against a decedent's estate to be brought within twenty months from the filing of affidavit by executrix of having given notice of her appointment. The payment of a note given by said Jeremiah T. Giles to said Charles C. Burrill is involved. Defendant claims that the note was given wholly as an accommodation to said Charles C. Burrill.

The cause was heard upon bill, answer, replication and proofs, and the presiding Justice found that said note was without consideration having been given solely for the accommodation of said Charles C. Burrill, and dismissed the bill. Plaintiff appealed. Appeal dismissed with costs.

Case stated in the opinion

D. E. Hurley, for plaintiff.

Ryder & Simpson, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, MORRILL, WILSON, JJ.

SPEAR, J. This is a bill in equity brought by the executrix of the will of Charles C. Burrill, late of Ellsworth, Maine, deceased, and now prosecuted by an administratrix d. b. n. against Julia A. Giles, executrix

of the will of Jeremiah T. Giles, late of Ellsworth. The bill is brought under R. S., Chap. 92, Sec. 22, to obtain equitable relief from the bar of the statute, requiring suits to be brought within 20 months from the filing of the affidavit by the executrix that she has given notice of her appointment.

It is unnecessary to go further with the statement of facts, as the decision of the case turns upon the admissibility of certain evidence touching the merits of the case, regardless of an observance of the other technical requirements of the statute. In this form of proceeding it is incumbent upon the plaintiff to prove that "justice and equity" require the application of the statute.

To this averment the defendant answers and says: "That said note was given wholly for the accommodation of Charles C. Burrill and that her decedent was not indebted to said Burrill thereon. The defendant is the executrix, widow and residuary legatee of said Jeremiah T. Giles." This answer puts directly in issue the averment of "justice and equity," in the plaintiff's bill. Upon this issue, against objection, Mrs. Giles was permitted to testify, although the plaintiff had not taken the stand to testify. At this juncture the final issue is correctly expressed in the plaintiff's brief as follows: "The whole case hinges upon the testimony of Mrs. Giles, the defendant and the first question for the court to determine is, whether or not Mrs. Giles, the executrix of the estate of Jeremiah T. Giles is a competent witness under the laws of our State, when the plaintiff herself does not testify or offer herself as a witness."

A question of procedure arises in this case which it may be not unprofitable to consider. In the progress of the trial the plaintiff took exceptions to the ruling of the presiding Justice in admitting the testimony of the widow, and executrix of the defendant estate, against the objection of the executrix of the plaintiff estate. The case, however, comes up on appeal without stating or even alluding to the ground of the exceptions. So far as the appeal goes no exceptions appear; nor should they. They are found only by a reference to the development of the testimony in the trial of the case.

In law exceptions must be clearly stated and show a grievance or they will not be entertained. This is not the practice, however, in equity. In *Redman* v. *Hurley*, 89 Maine, 428, this question was fully considered. The differentiation in this regard between law and equity is founded upon the requirement that every finding in equity

must be expressed in the form of a decree by the sitting Justice; and that this decree absorbs all that transpired in the trial, and incorporates all that is shown by the testimony. The court says, page 434. "The verdict below is advisory only. The court there might grant a decree, following the verdict or directly against it, as the equity of the case might require, *Metcalf* v. *Metcalf*, 85 Maine, 473."

"The soundness of verdicts in actions at law are first determined before judgment. Not so in equity; because some decree should follow the trial either upon the verdict or against it, and therefore when a cause in equity comes up on appeal, it comes up for final decision, unless the court shall otherwise order,—which is rarely the case—and the regularity of procedure upon the trial to the jury becomes wholly immaterial. The cause in the Appellate Court is heard anew and the admission or exclusion of evidence is of no consequence, except so far as it shall be considered competent for consideration on appeal. The motion and exceptions, therefore, need not be considered here; for the vital question is whether there is sufficient legal evidence to sustain the decree below, which carries with it a presumption in its favor."

Accordingly as exceptions appear in the record of a case in equity, they are not to be considered as a matter of law, upon which the decree may or may not be overturned, but only in determining whether there is sufficient legal evidence to sustain the decree regardless of the merits of the exceptions. In the present case the rights of the parties depend solely upon the testimony of the defendant testatrix. If legal evidence the decree was unquestionably right; if not legal evidence, without any adequate evidence to sustain it.

Two objections are raised to the right of the defendant executrix to testify as a witness on her own motion, (1) That she should have been excluded under R. S., Chap. 87, Sec. 117, as an "adverse party," and not entitled to testify unless the plaintiff executrix had first taken the stand; (2) that as widow and legatee of her decedent she should have been excluded under the same statute.

In discussing these contentions it should be borne in mind that both the plaintiff and defendant are representative parties.

Paragraph II of Section 117, employs language general enough to allow either the representative party plaintiff or the representative party defendant to take the initiative in offering testimony. It reads: "In all cases in which an executor, administrator or other

representative of the deceased person is a party, such party may testify to any fact admissible upon rules of evidence happening before the death of such person; and when such person so testifies the adverse party is neither excluded nor excused from testifying in reference to such facts." This provision does not limit the right of either representative party. It is broad enough to allow either to take the initiative in testifying to facts happening before the death. It has been so decided. *Haskell* v. *Hervey*, 74 Maine, 192, is a case in which both plaintiff and defendant are representative parties. In construing the language of this statute the court say: "The language is most general. It applies in all cases where an executor, administrator or representative of a deceased party is a party. The plaintiff assuredly was such. The wisdom of the statute is apparent, as without it material and important evidence necessary for the purpose of justice might otherwise be excluded."

But the plaintiff contends that paragraph II should be construed in connection with paragraph VI, which provides: "In all actions brought by the executor, administrator or other legal representative of a deceased person, such representative party shall not be excused from testifying to any facts admissible upon general rules of evidence happening before the death of such person if so requested by the opposite party. But nothing herein shall be so construed as to enable the adverse party to testify against the objection of the plaintiff when the plaintiff does not voluntarily testify."

In casually reading paragraph VI we are apt to regard the defendant "the adverse party" whether he appears in an individual or representative capacity; but such is not the case.

"The adverse party," who is precluded from testifying under paragraph II, and by the last clause of paragraph VI of the statute, unquestionably means the living party, whether plaintiff or defendant. When the plaintiff is the representative party, the living defendant is "the adverse party." When the representative party is defendant, the living plaintiff is "the adverse party." When both parties are living, either may fully testify, when both parties are representative, either may voluntarily testify as to "one or more facts happening before the death of which the representative party has personal knowledge." *Hall* v. *Otis*, 77 Maine at page 126.

The manifest purpose of paragraph VI was to enable "the opposite party" to call the plaintiff to testify. The meaning of the statute is

somewhat obscure. It will be noted that "the opposite party" may call the plaintiff as a witness, but that the "adverse party" only in such a case, is inhibited from testifying.

A proper analysis of the phrases "the opposite party" and "the adverse party" seems to make the purpose of the statute clear. The phrase "the opposite party" is broader than the phrase "the adverse party." "The opposite party" may be a living party, or a representative party, defendant; but "the adverse party" means only the living party. If the defendant is the representative party, then the invoking of the statute opens no door, not already open, for the defendant could voluntarily testify under paragraph II without waiting for the plaintiff to first take the stand. The last clause of paragraph VI therefore applies only when the defendant is "the adverse party." Accordingly if "the opposite party" is "the adverse party" then the last clause of the paragraph, enacted for that sole purpose, comes in and inhibits him from claiming that the door has been opened to him to testify, upon the ground that the plaintiff has testified at his behest. Moreover, what possible reason could be suggested for giving a representative plaintiff the right to voluntarily testify against a representative defendant, and not give the same voluntary right to the defendant. If there is any distinction it is certainly in favor of the defendant whose decedent's estate has been compelled to come into court. Two estates contesting in court should be on an equal footing.

The plaintiff cites *Burleigh* v. *White, Admr.*, 64 Maine, 25; *White* v. *Brown, Admr.*, 67 Maine, 196; *Holmes, Admr.* v. *Brooks*, surviving partner, 68 Maine, 416; in support of this contention. But the necessary inference from these cases is the other way. All the defendants were representative parties. The court held that the living plaintiff, "the adverse party," could not testify unless the representative party had first offered himself as a witness. The whole force of the inference is that the representative party could have taken the initiative as a witness, as well if defendant, as if plaintiff, and that by so doing he would then have opened the door to "the adverse party" to testify, within the limitations of the statute, whether plaintiff or defendant.

Coming now to proposition (2), was the defendant precluded from the right to testify because she was the widow and residuary legatee of her decedent?

Under the statute a wife cannot testify to facts within her personal knowledge, happening before the death, to which her husband could not testify. But her incapacity as wife is based upon the ground of public policy. See *Walker* v. *Sanborn*, 46 Maine, 470, where the reasons are fully discussed. In that case it is also decided with the reasons therefor, that the widow may testify as to facts happening before the death of her husband, in a suit by or against a representative party, whether of his estate or any other estate. The court say: "The exclusion, on this latter ground, (confidential communciations) rests not upon the nature of the evidence, but upon the source or mode in which the knowledge is obtained by the husband or wife. If obtained from any other sources, and not by reason of the existing relations, or from confidential communications, then the reason also ceased; and, after the death of the husband, the wife may testify as to the knowledge of the facts thus acquired. The test is to be applied to the manner of acquiring information, rather than to the nature of the facts disclosed by the witness." From an examination of the testimony it will be seen that the information from which Mrs. Giles testified to certain facts, was obtained in precise accord with the rule above laid down. She sat by and heard the conversation between the deceased parties as to the purpose of the note in suit. She should not be excluded from testifying because she was the widow of her decedent.

Nor can she be precluded because she was interested as residuary legatee. *Haskell* v. *Hervey*, 74 Maine, 192. *Rawson Admr.* v. *Knight*, 73 Maine 340.

Her evidence was ample to sustain the decree.

Appeal dismissed with costs.

ROBERT L. ERVIN *vs.* WILLIAM E. COLBY & TRUSTEE.

Kennebec. Opinion March 29, 1920.

Option. Attempted acceptance by telegram. Terms of contract not met. Expiration.

This is an action of assumpsit in which the plaintiff seeks to recover the sum of seven hundred dollars, as commission for procuring a sale of ice for the defendant.

The contract of employment involved an option.

Among other things was this vital provision: "$3062.50 to be paid on acceptance of option and this option will expire on or before 6 P. M." A telegram was sent, on the day of expiration, at 4.44 P. M. accepting the offer.

At about 8 P. M. the same day, a telegram was sent in reply declining to accept the offer, on the ground that the money was not paid. No money was paid or offered until the next day.

Held:

(1) That time is the essence of an option.

(2) That an offer to pay money by telegram is neither payment nor tender.

(3) That acceptance and payment were to concur on or before the designated hour, to meet the terms of the contract.

(4) That payment, having been neither made nor tendered on or before 6 P. M., the option expired at that hour.

This is an action of assumpsit to recover seven hundred dollars as commission for procuring a sale of ice for the defendant. Plea, the general issue. Verdict for plaintiff for full amount claimed. Defendant filed a general motion for a new trial. Motion sustained. New trial granted.

Case stated in the opinion.

Harvey D. Eaton, for plaintiff.

F. W. Clair, for defendant.

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

SPEAR, J. This is an action of assumpsit in which the plaintiff seeks to recover the sum of seven hundred dollars, as commission for

procuring a sale of ice for the defendant. There is no question that the defendant agreed to pay the plaintiff twenty cents a ton for selling the ice. The contract by which the plaintiff was authorized to sell the ice was in writing as follows: "To whom it may concern. I, William Colby of Waterville, hereby agree to sell and convey all the ice in my ice houses now in Winslow, Me. estimated at 3500 tons for $3.50 per ton of two thousand pounds, f. o. b. Winslow, Maine.

Payments to be made as follows: $3062.50 to be paid on acceptance of this option and to apply to the last quarter of the above amount of ice. Other payments to be made when bill of laden is received.

This option will expire at 6 P. M. March 27, 1919. All ice must be taken before Sept. 1, 1919. If this option is accepted, the final details can be arranged when purchased." The instrument was signed and sealed. The plaintiff procured the Schipper Bros. Coal Mfg. Co. as prospective purchaser and optionee.

The evidence shows that on March 27, 1919, at 4. 44 P. M. the optionee sent the following telegram: "W. E. Colby, Waterville, Maine. We accept option on 3500 tons ice at $3.50 on board cars at Winslow, Maine. Mr. Glazier leaving tonight to arrange details with you." This telegram was communicated to the defendant's wife, and by her repeated to him between six and a quarter past six o'clock.

In the evening about eight o'clock the defendant sent the following telegram in reply: "Schipper Bros. Coal Mfg. Co. Boston, Mass. Don't send man. Offer in option not complied with because of non-payment of sum named therein. W. E. Colby."

The next day the defendant disposed of the ice, by sale or option, to the optionee at $3.75 per ton, an advance of twenty-five cents. For the purposes of this decision it is immaterial whether the defendant sold, or gave an option on, the ice.

The basis of the plaintiff's claim as he says is this: "I claim that I produced a customer to buy the ice."

We are of the opinion that this contention cannot prevail.

The plaintiff was not working under a general authority to furnish a customer who stood ready to buy and to comply with the broker's contract of employment, but under a specific contract, legally defined as an option. An option "is simply a contract by which the owner of property agrees with another person that he shall have the right

to buy his property at a fixed price at a given time." *Hanscom* v. *Blanchard*, 117 Maine, 501. A reference to the terms of this contract will show that the plaintiff was to do more than furnish a customer to buy the ice. His contract was an option, either to buy himself, or procure some other purchaser, in accordance with the terms of the option. His commission depended upon fulfilling the terms of the option, not merely in furnishing a party who was ready to buy, upon any other terms. A broker cannot claim his commission upon procuring a purchaser who makes an offer at variance with the contract of employment. This rule is stated in 4 R. C. L. 313, 52, and adopted in *Hanscom* v. *Blanchard*, supra, as follows: "If he accepts (the variance) he is legally obligated to compensate the broker for the services rendered; but if he refuses he incurs no liability whatever, for if he does not see fit to modify his original proposals, the broker can lay no claim to his commissions, until he produces a person who is ready, able and willing to accept the exact terms of his principal. This is true, no matter how small the variance may be between the contract, tendered by the broker and that authorized by his employer."

This rule applies as well to an option as to any other form of brokerage contract; with reference to the strict purpose of an option it is said, *Hanscom* v. *Blanchard*, supra, 4 R. L. C., 315, 53: "When a broker is engaged to negotiate a transfer or sale of certain real or personal property, the mere procurement of a prospective purchaser who enters into an option to buy the property in question, but never in fact does so is not sufficient to constitute a performance by the broker of his contract of employment and he is not entitled to his commissions, nor even to a percentage of the earnest money deposited by the defaulting optionee."

"It was the duty of the broker in the first instance to procure a purchaser who was ready and willing to meet the exact terms of the contract to make a sale. Even an offer of better terms will not suffice. But if the broker introduces parties with whom the seller makes a different contract, resulting in a sale, he is entitled to his commission." *Hanscom* v. *Blanchard*, supra.

The plaintiff claims under the latter principle, but the trouble is that the facts bring his case within the doctrine of the former. The plaintiff was acting under a specific contract by the terms of which he himself might exercise the option therein specified, or might procure

any other party to exercise it. But in either case the contract must be fulfilled by the optionee, whoever he might be. In this case the Coal Company undertook to exercise the option, but failed to meet the terms of the contract. "It is as much incumbent upon an optionee to comply with the terms of his option as upon a direct contractor to comply with the terms of his agreement." *Hanscom* v. *Blanchard*, supra.

And here it may be said that time and payment when prescribed as conditions of exercising it, are the very essence of an option. The property, whether real or personal, is held in abeyance in the hands of the optionee, during the life of the option. The owner is helpless to dispose of it, however advantageous the offer he may receive in the meantime. Accordingly, the moment the option expires, the owner's obligations are released and his rights instantly restored. For "an agreement in writing to give a person the option to purchase . . . . within a given time, at a named price is neither a sale nor an agreement to sell." *Hanscom* v. *Blanchard*, supra. It simply is a contract by which the owner says he will give another person the right to buy at a fixed price at a given time.

The present contract provided: "$3,062.50 to be paid on the acceptance of this option," and that "this option will expire at 6 P. M. March 27, 1919." This money was not paid nor tendered on or before 6 P. M. In regard to this fact there is no controversy. An offer by telegram to pay it was neither payment nor tender.

The terms of this option were explicit and definite. They could not be misread or misunderstood. The option was not only to be accepted by 6 P. M., but the money was "to be paid" by that time. Acceptance and payment were to concur, on or before the designated hour, to meet the terms of the contract. One was as essential as the other.

There is no evidence in the case that tends to show any waiver of the terms of the contract, but on the contrary the telegram sent to the Coal Company in the evening, after the expiration of the option, expressly negatives any waiver. Nor does the evidence disclose any transaction between the defendant and the plaintiff or the Coal Company that tended to establish any recognition of the contract, that could be construed into a revival or continuation of the prior negotiations.

The parties, accordingly must stand or fall upon the terms of the contract, and performance or non-performance thereof.

Whatever may have been the moral obligation of the defendant to recognize the services of the plaintiff which resulted in a sale of its ice, we are unable to find any legal obligation which enjoined him to pay a commission to the plaintiff.

Motion sustained.
New trial granted.

STATE OF MAINE *vs.* IGNAC BAKERWICZ.

Cumberland. Opinion March 30, 1920.

Unlawful possession of intoxicating liquor. Motion to direct a verdict for defendant. Refusal. Exceptions. Exceptions overruled.

This is a complaint against the defendant for the unlawful possession, on July 8, 1919, of intoxicating liquor, consisting of twelve quarts and one pint whiskey. During the course of the trial several exceptions were noted to the admission of testimony tending to show illegal possession of intoxicating liquor since four or five months before.

But these exceptions are not argued and we assume were abandoned upon the rules announced in the very recent decision of *State* v. *O. Toole*, 118 Maine, 314, 108 Atl., 99.

Several other exceptions were taken but not sufficiently amplified in the bill of exceptions to show whether the testimony admitted or excluded was prejudicial or otherwise. These exceptions are not argued.

The only exception argued is upon the refusal of the presiding Justice at the conclusion of the testimony to direct a verdict for the defendant.

A careful reading of the evidence discloses ample evidence for the verdict of conviction.

Indictment for the unlawful possession of intoxicating liquor. At the conclusion of the testimony, the presiding Justice, on motion, refused to direct a verdict for defendant, to which refusal exceptions were taken. Verdict of guilty. Exceptions overruled.

Case stated in opinion.

C. L. Beedy, County Attorney, and Clement F. Robinson, attorneys for State.

Henry C. Sullivan, for respondent.

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

SPEAR, J. This is a complaint against the defendant for the unlawful possession, on July 8, 1919, of intoxicating liquor, consisting of twelve quarts and one pint of whiskey. During the course of the trial several exceptions were noted to the admission of testimony, tending to show illegal possession of intoxicating liquor some four or five months before.

But these exceptions are not argued and we assume were abandoned upon the rules announced in the very recent decision of *State* v. *O. Toole*, 118 Maine, 314, 108 Atl., 99.

Several other exceptions were taken but not sufficiently amplified in the bill of exceptions to show whether the testimony admitted or excluded was prejudicial or otherwise. These exceptions are not argued.

The only exception argued is upon the refusal of the presiding Justice at the conclusion of the testimony to direct a verdict for the defendant.

A careful reading of the evidence discloses ample evidence for the verdict of conviction.

Exceptions overruled.

MARK BERMAN *vs.* E. P. LANGLEY.

Androscoggin. Opinion March 30, 1920.

Assumpsit upon a contract under seal. Guaranty. Structural defect. Option. Rescission. Differentiation of general clause of guaranty from a specific clause. Erroneous instruction.

This is an action of assumpsit to recover $800.00, the amount paid by the plaintiff to the defendant for an automobile purchased upon a contract under seal. The case comes upon motion and exceptions. A consideration of the exceptions will dispose of the case.

The contract contained two clauses of guaranty. The first, that the machine should "be delivered by said vendor or his agent to said purchaser in good order and condition." The second, "It is further understood and agreed between the parties that said vendor shall keep said car in repair for the term of one year from this date on account of any imperfections in the construction of said car at time of delivery to said purchaser or his agent."

The car was delivered under these provisions, used by the plaintiff and in the process of such use developed a structural defect which proved to be a flaw in the pump-shaft, inside the pump.

The exceptions turn upon the construction to be given to the second clause of the contract. Was it intended, in case of a structural defect, to give the buyer the option of seeking the repairs, or rescinding the trade?

Held:

1. That the one year clause for repair of "imperfection in construction" was intended to differentiate the general clause to deliver in "good order and condition" from the specific clause giving one year to repair structural defects.
2. That the contract contemplated a year in which structural defects might be repaired, if requested within the year.
3. That the second clause did not give the plaintiff an option for a year, in which he might request repairs or rescind.
4. That the instruction did not differentiate between the clause for delivery in "good order and condition" and the one year clause for repairs, and was erroneous on that account.

Assumpsit to recover eight hundred dollars, paid by plaintiff to defendant for an automobile purchased upon a contract under seal. Plea, the general issue, with a brief statement. Exceptions were

taken by defendant to certain instructions given to the jury by the presiding Justice. Verdict for plaintiff for nine hundred and twenty-eight dollars. Defendant filed a general motion for new trial. Exceptions sustained.

Case stated in opinion.

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

J. G. Chabot, for defendant.

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

SPEAR, J. This is an action of assumpsit to recover $800.00, the amount paid by the plaintiff to the defendant for an automobile purchased upon a contract under seal. The case comes up on motion and exceptions. A consideration of the exceptions will dispose of the case.

The contract contained two clauses of guaranty. The first: That the machine should "be delivered by said vendor or his agent to said purchaser in good order and condition." The second: "It is further understood and agreed between both parties that said vendor shall keep said car in repair for the term of one year from this date on account of any imperfections in the construction of said car at time of delivery to said purchaser or his agent."

The car was delivered under these provisions, used by the plaintiff and in the process of such use developed a structural defect which proved to be a flaw in the pump-shaft, inside the pump.

The exceptions turn upon the construction to be given to the second clause of the contract. Was it intended, in case of a structural defect, to give the buyer the option of seeking the repairs, or rescinding the trade? We do not think so. It is common experience that any machine, however well-made, may contain a structural defect, either in material or workmanship. It is perfectly obvious that a car with a defective pump-shaft due to a flaw in the shaft, or some other structural defect, could not be delivered "in good order and condition." It is equally obvious that the one year clause for the repair of "imperfections in the construction" of the car was intended to differentiate the general clause to deliver in good order and condition from the specific clause for the repair of hidden defects, whether of material or workmanship. The latter clause was intended to protect the seller from what could not, in the very nature of things, be more

obvious to him than to the buyer. Hence this clause should be construed with reference to the circumstances, and the object it was intended to accomplish. It should be held to reserve to the defendant a reasonable opportunity to enable him to comply with the terms of the contract by making good a structural defect which neither party could anticipate or detect except upon greater or less use, rather than to be interpreted as a breach of the contract at the option of the purchaser. The contract contemplates a year in which a structural defect may be repaired. It would seem incredible that either party contemplated that the purchaser might use a car 364 days and run it perhaps 10,000 miles, then rescind and turn the car back upon the seller, upon discovery at that time that, when the car was delivered, there was a structural imperfection. Concealment of such a defect might easily lead to fraud.

The phrase "between both parties" is significant. The only way in which "both parties" could act, would be for the buyer to give notice of the defects and the seller to repair. In other words, the defendant could not keep his part of the contract unless the plaintiff was required to give notice on his part, of the defects claimed. Moreover, the case shows that the plaintiff and defendant acted upon the interpretation herein contained, as the plaintiff gave notice and the defendant did the repairs. We are accordingly of the opinion that the second clause of the contract before us did not give the plaintiff an option to either give the defendant an opportunity to repair or repudiate his contract and rescind, but imposed upon both parties mutual duties as above expressed. It was a covenant of good faith, that both the seller and purchaser should do the fair thing, in case of an unforeseen contingency.

The flaw in the pump-shaft, therefore, came clearly within the meaning of the contract as "an imperfection in the construction of said car at the time of delivery."

This being so it was incumbent upon the plaintiff to notify the defendant that a fault had developed in the car, whereupon it was the duty of the defendant to investigate to discover the cause and properly repair, if within one year, and found to be a structural defect.

The undisputed testimony shows that a new pump-shaft was installed at the instance of the defendant and the only defect complained of was the flaw in the pump-shaft, as shown by the following quotation from the charge of the justice, namely: "He says, as I

understand, and if I am not right in stating his position counsel will please correct me, that the automobile when delivered was not in good order and condition, because it had a defective pump-shaft, and that was the condition at the time of delivery, and as I understand it, the plaintiff claims that is what is relied upon as being the failure in respect to contract on the part of the defendant."

Upon this state of facts the presiding Justice instructed the jury as follows, as shown by Exceptions 1 and 4. Exception 1, is to the instruction: "If the machine was not in good order and condition at the time it was delivered, then the plaintiff had a right when he discovered it to rescind."

This instruction does not differentiate between the delivery in "good order and condition" and the one year clause and was erroneous on that account.

Exception 4 is to the instruction: "Now did the defendant deliver the machine in good order and condition? If he did the plaintiff had no case. If it was not in good order and condition, by reason of the existence of a defective shaft, the plaintiff would have a right to rescind if he did it promptly when he became informed of the actual condition."

This instruction ignores and nullifies the second, or repair clause, of the contract. For the reasons already given this instruction would appear to be erroneous.

It may not be improper to add that while a consideration of the exceptions disposes of the case, it is nevertheless the opinion of the court that the motion should have been sustained.

Exceptions sustained.

ADA B. EVERETT *vs.* WILLAIM B. WHITNEY.

Somerset. Opinion March 30, 1920.

Real action. Relying on quitclaim deed. Disclaimer as to part. Lines on the face of the earth. Must make out a prima facie case.

This is a real action for the recovery of a certain lot of land, the alleged title to which was based upon a quitclaim deed. A disclaimer was filed up to a definite line, covering a part of the locus claimed in the writ. The plaintiff's deed did not define the east end of her lot either by metes or bounds, but described it as bounded "on the east and south by land of William Whitney." That is, the west boundary of Whitney's land, when located, would be the east boundary of the plaintiff's land, as described in her deed. The issue involved was not the capacity of the deed to convey, but the location of the Whitney line. The Whitney line was the only question in dispute. It was incumbent upon the plaintiff, in order to establish her line to prima facie prove where, upon the face of the earth, the Whitney line was located.

In attempting to prove this, the deed having been admitted, Mr. Everett, the husband and agent of the plaintiff who did all the investigating of the lines, was asked this question: Q. Did you in purchasing that lot, and taking that deed rely upon the line on the east as run by Judge Buswell marked by the—? The question was excluded. Upon the close of the plaintiff's evidence the presiding Justice ordered a non suit to which exception was also taken. But, assuming that the question excluded was admitted and answered in the affirmative, the case is then devoid of any adequate evidence to establish prima facie proof of the plaintiff's contention.

The non suit was properly ordered.

This is a real action for the recovery of a certain lot of land. Defendant filed a plea of general issue, and also a disclaimer as to a part of the land claimed in the writ. Exception was taken by plaintiff to the exclusion of certain testimony.

Upon the close of the plaintiff's evidence, on motion by defendant, the presiding Justice ordered a non suit, to which exception was also taken. Exceptions overruled.

Case stated in the opinion.

Walton & Walton, for plaintiff.

Fred F. Lawrence, for defendant.

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

SPEAR, J. This is a real action for the recovery of a certain lot of land, the alleged title to which was based upon a quitclaim deed. A disclaimer was filed up to a definite line, covering a part of the locus claimed in the writ. The plaintiff's deed did not define the east end of her lot either by metes or bounds, but described it as bounded "on the east and south by land of William Whitney." That is, the west boundary of Whitney's land, when located, would be the east boundary of the plaintiff's land, as described in her deed. The issue involved was not the capacity of the deed to convey, but the location of the Whitney line. The Whitney line was the only question in dispute. It was incumbent upon the plaintiff, in order to establish her line, to prima facie prove where, upon the face of the earth, the Whitney line was located.

In attempting to prove this, the deed having been admitted, Mr. Everett, the husband and agent of the plaintiff who did all the investigating of the lines, was asked this question: Q. Did you in purchasing that lot, and taking that deed rely upon the line on the east as run by Judge Buswell marked by the—? The question was excluded. Technically the exception is not entertainable, as it does not state what the answer might have been, and consequently does not show that the plaintiff was aggrieved by the ruling. Assuming, however, that the question was admissible, and would have been answered in the affirmative, even then we are of the opinion, upon an examination of all the evidence, that the admission of the question and answer, would not have changed the result in the least. The fact that the plaintiff might have relied upon that line has no force unless she could have furnished prima facie evidence that the Buswell line was the Whitney line.

It may be here noted that, while Judge Buswell and the other surveyors assumed that the Whitney farm was rectangular, there is no evidence whatever upon which to base the assumption.

We are unable to find any evidence in the case which rises to the plane of prima facie proof of where the Whitney line was, much less that it was where the plaintiff claims it to have been.

It appears that Judge Buswell run a line, purporting to be the defendant's west line, before the defendant took his deed. But the

deed was not offered in evidence, nor was there any evidence tending to show that the Buswell line was the boundary adopted in the deed. There is no evidence that the defendant ever recognized it as his west line, but on the contrary openly repudiated it as such. It may be conjectured that this was the line, but conjecture is not prima facie evidence. The case is also devoid of any evidence that the defendant ever informed the plaintiff or admitted that the Buswell stakes marked his boundary, but on the contrary at every interview with him, as well as in the presence of all the surveyors, specifically asserted that the stakes did not locate his line. The evidence also shows that the plaintiff was not in possession of the locus, but that the defendant was, and had occupied and used it.

They all agree upon the northeast monument, but the defendant persistently disputed the southeast boundary as claimed by the plaintiff, and asserted that it came too far up into his field.

The summary of the case is this: The plaintiff alleges title up to Whitney's land; not being in possession, she must rely upon the strength of her own title, not upon the weakness of Whitney's; the strength of her title, beyond the line of disclaimer, depends upon prima facie proof that the line she claims is Whitney's west line; prima facie proof must be established by evidence, either of deeds, admissions, possession, mutual agreement or alleged prescription; but no such evidence appears in the case. Every word of the testimony, so far as it tends to connect the defendant with any recognition of the claimed line, is res inter alios, and not binding upon him. Upon the close of the plaintiff's evidence the presiding Justice ordered a non suit to which exception was also taken. But, assuming that the question excluded was admitted and answered in the affirmative, the case is then devoid of any adequate evidence to establish prima facie proof of the plaintiff's contention.

The non suit was properly ordered.

Exceptions overruled.

JAMES DWIGHT TRACEY

vs.

STANDARD ACCIDENT INSURANCE COMPANY.

Penobscot. Opinion April 4, 1920.

Requirements as to written notice, and filing proof. Estoppel. Temporary diversion. Construction of phrase "entire loss of sight."

This is an action upon an insurance policy combining the phases, both of accident and health indemnity. On the accident side the plaintiff was classified as "select" and described his duties and occupation as "office manager, office duties only," in a business designated as "Lumber."

On the 30th or 31st day of August, 1917, the plaintiff, while riding a motorcycle ran through a swarm of flies or insects, one of which struck his right eye with such force as to give him immediate and continued annoyance and distress, but not sufficient at first to prevent him from the pursuit of his occupation as bookkeeper. It was not long, however, before it so impaired his capacity to work at his usual occupation, that he had to give it up, and pursue a business that did not tax his eye. The eye grew gradually worse until at last it became so blind that he could only distinguish light from darkness, without any ability whatever to distinguish one object from another. In other words the eye became what we call blind and had continued so to the time of the trial, without hope of improvement or recovery. Upon this state of facts the case resolves itself into the following propositions:

1. Was the injury to the eye accidental within the meaning of the policy?
2. Was notice of the accident invalid on account of delay?
3. Was it sufficient, if given in time?
4. Was the plaintiff engaged in an overhazardous employment?

Held:

(1) That the injury was clearly accidental.

(2) That the defendant is estopped to deny that the notice was not given in time.

(3) That the notice was sufficient in law.

(4) That the plaintiff at the time of his injury was not engaged in an overhazardous employment.

(5) That he did lose the entire sight of his eye, within the contemplation of the policy.

This is an action of assumpsit upon an insurance policy embracing both accident and health indemnity. Plea, the general issue with a brief statement. The case was tried to a jury. At the conclusion of the evidence, by agreement, it was withdrawn from the jury and submitted to the presiding Justice, with right of exception reserved to both parties. The court ruled against the contentions of the defendant and found for the plaintiff. Judgment for amount claimed. Defendant excepted. Exceptions overruled.

Case stated in the opinion.

P. L. Aiken, for plaintiff.

A. S. Littlefield, for defendant.

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

SPEAR, J. This is an action upon an insurance policy combining the phases, both of accident and health indemnity. On the accident side the plaintiff was classified as "select" and described in his duties and occupation as "office manager, office duties only," in a business designated as "Lumber."

On the 30th or 31st day of August, 1917, the plaintiff while riding a motorcycle ran through a swarm of flies or insects, one of which struck his right eye with such force as to give him immediate and continued annoyance and distress, but not sufficient at first to prevent him from the pursuit of his occupation as bookkeeper. It was not long, however, before it so impaired his capacity to work at his usual occupation, that he had to give it up, and pursue a business that did not tax his eye. The eye grew gradually worse until at last it became so blind that he could only distinguish light from darkness, without any ability whatever to distinguish one object from another. In other words the eye became what we call blind and had continued so to the time of the trial, without hope of improvement or recovery. Upon this state of facts the case resolves itself into the following propositions:

1. Was the injury to the eye accidental within the meaning of the policy?

2. Was the notice of the accident invalid on account of delay in giving it?

3. Was notice when given sufficient in substance and form, if given in time?

4. Was the plaintiff engaged in an overhazardous employment?

5. Did he lose the entire sight of his eye?

(1) It is hardly necessary to consume any time to establish the affirmative of the first proposition. That the injury was accidental is amply proven.

(2) The second proposition will be discussed upon the assumption that the notice when given, was regarded by the plaintiff and agent as valid and sufficient.

(3) The defendant contends, that the first notice being, in fact, erroneous, precludes the validity of the future notice by reason of delay.

In the present case the plaintiff within ten days informed Mr. Dyer, the agent of the company, of the accident with which he had met. On September 10th, not exceeding twelve days after the accident, he filled out and delivered to the agent a blank furnished by the company. This blank was the form to be filled out in case of sickness, instead of in case of accident. And the plaintiff so filled it out, stating in answer to the question, "What disease disables you?" "Inflamation of the right eye." This answer we conceive might follow from a condition of the eye produced by an accident as well as by disease. Hence no evidence is deducible from the answer, which convincingly shows that the plaintiff ought to have distinguished the sickness blank from the accident blank, especially as he had no previous knowledge of either form.

This being the case, we think the plaintiff may have been fully justified in using the wrong blank.—The uncontradicted evidence proves that the plaintiff, before he received the blank, and "within a day or two after the accident." had fully informed Mr. Dyer, the agent, what had happened; to put it in his own language: "I told him of my accident—told him what it was."

He then, as he testified, proceeded further, and gave the agent every detail of the accident and injury. Upon this full description the agent said: "That is all right; if you have a claim, bring it in. That is what we are here for."

"In the next three or four days we had gone over the thing several times." He says: "You better get your claim in on time." The plaintiff said "I will go right to your office and make it out now." In

regard to making out the notice the agent said: "Do as well as you can. We don't know the result. It is up to the company to come back and find out what was the matter." Thereupon, the agent, of his own volition, without any request from the plaintiff "reached in his drawer and gave me that blank." There was evidently no purpose or disposition on the part of the agent to mislead or defraud. He simply made a mistake but his mistake was the mistake of the company as will later appear.

Assuming still that both parties regarded the notice as proper in form the plaintiff, then had the same right to rely upon it as if it was proper in form, until the contrary appeared.

Matters stood in statu quo until the eighth of February following, when the plaintiff as he states it: "Made a formal report and the application on February 8th and explained fully the whole details to the company, and right away after that as I remember it, they sent me the blanks."

This communication called a report, is prefaced by the following statement: "You have already been advised that claim was to be made under policy A D C -R 2075, delay being due to the fact that the ultimate result of the accident was uncertain. The time has now come, when the condition seems reasonably definite and final." Then follows a detailed statement of the accident, the cause, the injury, the progress, impairment of the sight of the eye, the treatment and the final result.

This report, and, it may be here said, all other papers given to the agent, were at once forwarded by him to the company.

After making this report the plaintiff received blanks for proof of claim, as near as may be ascertained from the record, about March 6. About this time, probably upon receipt of the blanks, the plaintiff discovered "That the health blank was not what he wanted." We place no stress in the decision of this case upon the legal construction that the sending of the blank proofs was a waiver on the part of the defendant, of any question of liability.

On March 25th, the plaintiff sent to the agent a proof of claim or notice upon the accident blank furnished by the company.

From the rehearsal of the facts we are of the opinion that the voluntary production of the health blank on September 10th, by the agent, was the act of the company. The agent knew all the facts, in detail, of the injury, and, in law, is charged with knowledge that the blank

was the wrong one. The company is charged with the knowledge of of the agent. *Thorne* v. *Casualty Co.*, 106 Maine, 274, and cases there cited. The plaintiff had a right to rely on the agent to furnish him with the proper blank. R. S., Chap. 53, Sec. 119, applies.

As was said in *Leblanc* v. *Standard Insurance Co.*, 114 Maine, 6: "There is no limitation in the statute and we perceive none in the reason of the thing.

The statute recognizes what common experience teaches. Men commonly do all their insurance business with agents. They have no direct dealings with the companies. . . . . They go to agents when losses have occurred, and pursue the steps pointed out by them in proving the loss." This is precisely what the plaintiff did. He was led into error and consequent delay by the act of the agent, in furnishing the wrong blank.—The error, however, in filing the sickness blank may be regarded, not inappropriately, as a mutual mistake. The agent mistook the proper form of blank, else his act was a fraud. The plaintiff confided in the honor and knowledge of the agent, who knew all the facts, to furnish him the proper blank. Hence the plaintiff's mistake. But a mutual mistake always excuses. It therefore follows that the only effect of the first notice purporting to be a proof of disease instead of injury, although believed to be right, was to operate in causing a reasonable excuse for mutual delay upon the part of both the plaintiff and defendant.

It would be clearly wrong for the defendant to have the advantage of this delay to the detriment of the plaintiff, under the admitted facts of the case. The company knew that it was a case of accident, not of disease; of injury, not of sickness; that it required an accident, not a health form of notice; voluntarily furnished the form; intended the plaintiff to act upon it; received the notice; retained it; made no objection; requested no further information; had full opportunity to examine the form of blank before furnishing it; was in duty bound to see that it was correct, and not misleading; in fine, knew all the facts, regardless of any form of notice. Whatever the intention, in voluntarily passing out the wrong form, it lead the plaintiff to do to his injury what he would not have done but for the negligent act of the defendant by its agent. The plaintiff by this act was induced to do what defeated the entire indemnity of his policy, if the plaintiffs contention prevails, and inured in equal measure to the benefit of the company. We have already noted that the plaintiff was not at

fault; that he had a right to rely on the conduct of the agent. We are accordingly of the opinion that the doctrine of estoppel aptly applies. The very essence of estoppel is to prevent a party from taking advantage of misleading another party to his injury, when injury will result if estoppel is not declared. 10 R. C. L. Estoppel, Section 25. The law will not stand by in silence and see one party mislead another to his injury, whether by ignorance, negligence or design. 10 R. C. L. Estoppel, Section 24, upon this point says: "Yet ordinarily he will be estopped though he has acted or spoken in forgetfulness or ignorance of the facts, particularly when he had the means at hand of knowing all the facts, or when he was in such a position that he ought to have known them." This case therefore comes directly within the rule of negligence, that when one of two innocent parties must suffer, he whose negligence caused the injury must bear the burden. In 10 R. C. L. Estoppel, Section 23, this rule is thus stated: "This is an application of the general principle that when one of two innocent persons, that is, persons each guiltless of an intentional, moral wrong, must suffer a loss, it must be borne by that one who by his conduct has rendered the injury possible."

An erroneous notice, given upon an erroneous form, furnished by the error of the one producing it, and misleading the one required to give it, to the belief that it is correct, may be relied upon by such person as correct and fulfilling the office for which it was required to be given, until such error is detected.

We are therefore of the opinion that the defendant is estopped to deny that the paper, filed March 25 upon the proper form of blank, was seasonably filed, under the law and the facts as disclosed in this case.

3. Was the accident blank of March 25th, as finally filled out and executed, in accordance with the requirements of the policy and sufficient in law? As seen, the blank was furnished by the company, filled out by the plaintiff, delivered to the agent and sent to the company, which received it, according to the notation on the blank, March 29th. The plaintiff also sent affidavits of his employer, and the physicians who attended him, explaining, in every detail, the beginning, progress and result of his injuries.

The company did not return the paper purporting to be proof or notice of the accident and injuries, nor request any further information. It must be held, therefore to have waived all informalities and deficiencies.

We are of the opinion that the final proof or notice was sufficient.

4. Was the plaintiff at the time of the accident and injury engaged in an extra hazardous or forbidden employment?

There is no contention in the case that the plaintiff had changed his employment as a bookkeeper to the vocation of a motorcycle rider. He was using his motorcycle for exercise and pleasure. It is well settled that a temporary diversion from that stated, is not held to be an engagement in a more hazardous employment, unless plainly stated in the contract. This question is fully discussed in *Thorne* v. *Casualty Co.*, 106 Maine, 274.

Paragraph A. (1) of the policy before us is identical in meaning, and almost so in language, with Article 3, of the policy considered in the Thorne Case,—quoting *Eaton* v. *Insurance Co.*, 89 Maine, 570,—in which it is said: "This provision (3) relates to the occupation, employment or business—a vocation and not an avocation, occasional, exceptional and outside his regular vocation." The reasons for the rule are also discusesd in that opinion.

But it would seem unnecessary to revert to rules of interpretation to find that the plaintiff, in the case at bar, was exempt from the "more hazardous" clause, as the paragraph in which it is contained, expressly excepts him therefrom when engaged in the "Ordinary duties about his residence, or while engaged in recreation." But defendant urges, although it may be regarded as a temporary diversion, and not construed as overhazardous, under the doctrine of the Thorne case, that, nevertheless, riding a motorcycle, is specified, by reference, in the plaintiff's policy, as an occupation, though temporary, that changes the classification of his risk from "special" to "medium" and correspondingly, either reduces the amount recoverable in case of an accident, or requires a motorcycle permit at an increased annual premium. The langugage in the policy claimed to work this modification is a part of the last paragraph of the provision designated as A-(1) and reads as follows: "If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law."

To carry this clause into effect a red book is offered, the contents of

which, excerpts from pages 4, 41, 67, and 85, it is claimed are required by statute to be filed with the insurance commissioner, and thereby become official. The statute requirement is as follows: "No policy of insurance . . . . shall be issued or delivered . . . until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with the insurance commissioner."

From an inspection of the red book it will be observed that the parts offered to show a modification, contain matters of instruction to its agents, are not required to be filed with the insurance commissioner, and, to become effective should be put in force by riders, attached by the agents, at the time the policy is written. The book is denominated: "The Red Book and Agent's Rate Book (Third Edition) A Book of Ready Reference on all points connected in any way with the soliciting and sale of the personal accident and sickness Policies of the company. Compiled and published in the interest of its agents."

The caption of page 3, is: "General Instructions." Under this caption is found a paragraph on page 4, headed: "Prohibited Risks," which is the paragraph offered to show the modification claimed to be contained, by reference, in A-(1), and reads as follows: "Persons who are blind in both eyes, deaf, compelled to use a crutch or cane, insane, demented, feeble-minded, subject to fits; who have lost a foot or leg, who have suffered paralysis or are paralyzed, who are notoriously intemperate, reckless, disreputable, or without visible means of support, are not to be insured under any terms. Riders of motorcycles will not be insured unless in connection with the motorcycle permit described under heading "Riders."

Although the last sentence only refers to motorcycle riding we have quoted the whole paragraph to show how conclusively it appears to be nothing but an instruction to the agent, as it emphatically instructs him not to insure a blind man at all, nor a motorcycle rider, except upon a permit, as appears from page 41, which is offered by the defendant as the complement of page 4.

Upon page 41 of this red book is found this Caption: "Riders or Supplementary Agreements." Under this is a paragraph headed Motorcycle Permit. This paragraph is offered and relied upon to carry into effect, by reference, the paragraph on page 4. But instead of giving it effect it gives it an express negation. The paragraph on

page 41 explicitly instructs the agent not to issue a policy "unless this contingency (riding a motorcycle) be provided for by the attachment to the policy of one of the two following endorsements." As neither was attached they became nugatory as far as the present contract is concerned.

It further appears from this paragraph that it does not apply to the present case as only "where it is known (to the agent or company) that the insured uses a motorcycle that the company will not issue." In the present case this fact was not known as the plaintiff did not at the date of the policy use or own one of these machines. There is no requirement that the insured shall inform the company of taking up such use, for recreation or pleasure. Furthermore it should be observed that the only reference to a motorcycle in this contract, is an inhibition to use it in "a race or speed contest," plainly warranting the inference that the assured could use it in any other way. The rule of exclusio might well apply.

Nor does the record show that a word ever passed between the plaintiff and the agent concerning the use of a motorcycle, as prescribed in the red book, or any other way, whereby the plaintiff had any knowledge whatever of any objection to the use he was making of it when injured. The red book, pages 4 and 41, contains instructions only to the agent, and in no sense relates to or modifies the language of this or any other contract, unless attached as riders to the policy.

Pages 67 and 85 are but tables of rates and have no relation whatever to the modification of the plaintiff's contract.

But the red book was the only evidence offered in defense. We are therefore of the opinion that the plaintiff was not engaged in an over-hazardous occupation, nor violating any of the terms of this contract, while temporarily riding a motorcycle.

R. S., Chap. 53, Sec. 11, contains this Caption: "Standard Provisions for Accident and Health Insurance Policies." Section 12. "Conditions under which policy may be issued." Under this section five conditions are imposed, all enacted for the protection of the policy holder against deception, misunderstanding or fraud, of which the following is one: "No. (5). Unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply; provided however that any portion of such a policy which purports, by reason of the circumstances under which a loss is incurred to reduce any indemnity, promised therein, to an amount less than

that provided for the same loss, occurring under ordinary circumstances, shall be printed in bold faced type, and with greater prominence than any other portion of the text of the policy." The latter part of sub-division (5) relates specifically to an exception that has, for its purpose, a change that reduces the amount of the indemnity named in the policy and applies directly to the exception claimed in the case at bar.

In view of the object and purpose of this explicit statute, the legislature undoubtedly intended that any exception contained in the policy should be so conspicuously printed that it would attract the attention of the insured and so plainly expressed as to leave no doubt as to its meaning and application. In other words the exception should refer, in terms contained in the policy, to the subject matter to which the exception is intended to apply, so that the insured may at least, be put upon inquiry, as to what, under the exception, he is to do or not to do, in order to preserve the integrity of his indemnity, and prevent any diminution thereof, which is to him the chief object of his contract. We do not believe that a "red book" deposited in the archives of the insurance department, at the State House, requiring a pilgrimage to that shrine to find, and an examination of its contents to discover, if possible, the import of the exceptions, scattered upon pages 4, 41, 67 and 85, as the pages referred to in the offer of the red book as evidence, meets the requirement of the statute.

Regardless of any statute, it was held in *Miller* v. *Missouri State Life Insurance Co.*, 153 S. W., 1080 (Missouri Court of Appeals) as expressed in the syllabus: "To make the manual of an accident insurance company, defining the classification of risk etc., a part of the contract of insurance it should have been plainly referred to therein, and made a part thereof, or should have been actually written into the contract." We are accordingly of the opinion, that paragraph A. (1) of the policy fails to comply with the requirement of the statute, or the interpretation to be given by the common law, so far as it is invoked as an exception intended to affect a reduction of the plaintiff's indemnity, under the present state of facts.

5. Finally, did the plaintiff suffer the "entire loss of sight" of his eye? This depends upon the condition of his eye and the interpretation of the word "entire". Dr. Woods described the condition as follows: "Q. Will you tell the jury, in simple language, what condition you find his eye in now?

A. Mr. Tracey's vision is no better than it was when I saw him last February. He has no perception of color. He, by holding a bright red glass before his eye, or between his eye and a bright light, he couldn't tell—I had two, in fact three glasses, a yellow glass, a blue one and a red one; he couldn't tell the color of those glasses, whether it was red, blue or yellow. I carried my hand back and forth across his eye, with his left eye entirely covered from the light, and he couldn't see my hand go back and forth by the eye, in my office."

The meaning of the word "entire" should be determined in the light of the purpose and intent of the policy; why the plaintiff bought it; and with a construction most favorable to him. The intent and purpose of the policy as a business proposition was to indemnify the plaintiff for the complete loss of, or "entire" use of, his eye. The "loss of the entire sight" of an eye, and the loss of the entire use of an eye, by blindness, in practical effect, are precisely the same. Being a business contract, this policy should be construed, like any other contract, with reference to the object, purpose, conditions and circumstances.

The eye has earning capacity as well as the hand. To indemnify the complete loss of the sight of the eye as an earning factor was undoubtedly one of the controlling reasons for taking the policy.

We feel that it would be unfair to the company as well as the plaintiff, to impute to it the intention, by the artful employment of a word, to base its liability upon the frail and frivolous distinction between ocular ability to discriminate a flood of light from total darkness, and without the power to distinguish one object from another in the strongest light.

We have little doubt that the company used the strong word "entire" to protect itself against any possible fraud, regarding the degree of vision, that might be claimed to come within the terms of the policy, short of what might be declared a total loss of sight, based upon inability to see or distinguish one object from another. Accordingly the phrase "loss of entire sight," should be so construed as to give the plaintiff what he bought and paid for, and not to defeat the whole purpose and intent of the contract. It should be held to mean that the entire loss of the use of an eye from blindness is a loss of the entire sight of that eye. But if technicalities were to be invoked, then the meaning of the word "sight" becomes as important as the meaning of the word "entire." Sight is defined in Webster's Stand-

ard Dictionary: (1) The power of seeing; the faculty of vision or of perceiving objects. (2) Act of seeing; perception of objects by the instrumentality of the eyes; view. To see is defined: To perceive with the eye; to have knowledge of the existence and apparent qualities of by the organs of sight; to examine with the eyes; to behold; descry; view; observe; inspect. It is too plain for further discussion that the plaintiff had met with an entire loss of power to "see," to "behold," "descry," "view," "observe" or "inspect," as these terms are defined.

He had therefore met with a loss of entire sight, according to the etymology of the words "entire "and "sight", as employed in the policy.

This interpretation is supported by authority as well as reason.

International Travellers' Association v. *Rogers*, 163 S. W., 421, holds that "entire" does not mean total blindness, but is sufficient if the insured had practically lost the sight of the eye. *Murray* v. *Aetna Life Ins. Co.*, 243 Fed. Rep., 285 is precisely in point. "An accident policy providing for payment for the loss of the entire sight of an eye, if irrevocably lost, should be reasonably interpreted; and the sight of an eye will be deemed lost, where there is no ability to distinguish and recognize objects, though light from darkness can be distinguished," is the language of the rescript which accurately states the result of the opinion. It is further said in the opinion, "If this ability is so far destroyed that what remains will not to practical and useful extent confer any of this benefit, entire sight, within the construction of analogous terms in insurance law, is lost. So would it be in popular phrase or sense. The interpretation must be reasonable and relative not literal. The ability to perceive light and objects but no ability to distinguish and recognize objects, is not sight, but blindness."

We are of the opinion that the plaintiff lost the entire sight of his eye within a rational and practical interpretation of the language of the policy.

Exceptions overruled.

ROSE E. AMES WILSON, In Equity

vs.

CHARLES H. LITTLEFIELD, Executor.

Piscataquis. Opinion April 5, 1920.

Redemption of mortgage. Pro forma ruling. Burden of proof. Appeal from pro forma decree cannot be considered as report. In equity appellant must show decree to be clearly wrong.

This is a proceeding in equity under the provisions of R. S., Chap. 95, Sec. 15, demanding of the executor of a mortgage a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any, and offering to pay the sum found to be equitably due in full discharge of the mortgage. The case was heard before a single Justice, without a jury, and a finding and decree made and signed in which it was ordered, adjudged and decreed that the plaintiff should pay to the defendant a certain sum within a prescribed time. The defendant, claiming a larger sum to be due on the mortgage, seasonably filed notice of and perfected his appeal.

The Justice who heard the case declared his findings to be pro forma. The defendant claimed in argument that such finding entitled him to regard the case as before us upon report, and hence he was relieved of the burden of showing that the decision of the Justice was clearly wrong.

Held:

1. That under our statute, R. S., Chap. 82, Sec. 25, in order to report an equity case to the Law Court two elements must be present; first, one in which the presiding Justice is concerned, because it is conditional upon his opinion that a question of law is involved of sufficient importance or doubt to justify the report; second, one in which the parties are concerned, because they must agree to have the case reported. In the case at bar neither of these elements exists, and we cannot concede that the cause is before us as a report or in the nature of a report.
2. That the case is before us only upon appeal and we must be governed by the well established rule that in case of an appeal, in equity proceedings, the burden is upon the appellant. He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed.
3. After a careful examination of the record we are unable to say that the appellant has sustained that burden.

In equity. On appeal. Appeal dismissed with costs. Decree below affirmed.

Bill in equity under the provisions of R. S., Chap. 95, Sec. 15, to redeem a mortgage given by plaintiff to John E. Littlefield, defendant's testate. The principal contention at issue was as to whether a certain receipt for money alleged to have been paid by plaintiff to said John E. Littlfied, should be credited on the note. The cause was heard upon bill, answer and proof before a single Justice without a jury, who found, pro forma, that plaintiff should pay to the defendant one hundred twenty-nine dollars and eleven cents, within a prescribed time, from which ruling defendant appealed.

Case stated in the opinion.

Gillin & Gillin, for plaintiff.

Hudson & Hudson, for defendant.

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

PHILBROOK, J. This is a proceeding in equity under the provisions of R. S., Chap. 95, Sec. 15, demanding of the executor of a mortgagee a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any, and offering to pay the sum found to be equitably due in full discharge of the mortgage. The case was heard before a single Justice, without a jury, and a finding and decree made and signed in which it was ordered, adjudged and decreed that the plaintiff should pay to the defendant the sum of one hundred twenty-nine dollars and eleven cents within a prescribed time. The closing paragraph of the decree is: "A transcript of the testimony in the case is filed as part of this decree, and my findings are expressly declared to be pro forma." The defendant, claiming a larger sum to be due on the mortgage, seasonably filed notice of and perfected his appeal. In his brief, counsel for defendant says: "we wish, however, to call the attention of the court that the decision of the Justice was pro forma and not on the merits of the case. We, therefore, do not have the burden of showing that the decision of the Justice was clearly wrong, but claim that we are here as though the case had come up on report, in which event the burden would still be on the plaintiff to make out her case by a fair preponderance of the evidence."

The statutes of our State, in some measure, limit, extend, define and prescribe the procedure in equity cases so far as practice in our

court is concerned. As to report, R. S., Chap. 82, Sec. 25, provides that "Upon a hearing in any cause in equity, the justice hearing the same may report the cause to the next term of the law court, if he is of the opinion that any question of law is involved, of sufficient importance or doubt to justify the same, and the parties agree thereto." Thus it will be observed that in order to report an equity case to the Law Court two elements must be present; first, one in which the presiding Justice is concerned because it is conditional upon his opinion that a question of law is involved of sufficient importance or doubt to justify the report; second, one in which the parties are concerned because they must agree to have the case reported. In the case at bar neither one of these elements, according to the record, appears to exist, and we cannot concede that the cause is before us as a report or in the nature of a report.

On the other hand we are clearly presented with an appeal, under the provisions of the statute already referred to, and we must be governed by the well established rule that in case of an appeal, in equity proceedings, the burden is upon the appellant. He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed. *Young* v. *Witham*, 75 Maine, 536; *Carll* v. *Kerr*, 111 Maine 365; *Haggett* v. *Jones*, 111 Maine, 348; *Eastman* v. *Eastman*, 117 Maine, 276.

After a careful examination of the record we are unable to say that the appellant has sustained the burden of showing that the decree in this case is clearly wrong.

Appeal dismissed with costs.
Decree below affirmed.

STATE OF MAINE *vs.* GEORGE LOGAN and JOHN DAVIDSON.

Cumberland. Opinion April 9, 1920.

Larceny. Ownership. Evidence. Allegation sustained by proof. Ownership not properly laid in deceased, nor in the estate in absence of statute. R. S., Chap. 133, Sec. 12. Actual or constructive possession. Special property in goods.

If upon trial of an indictment for larceny, the ownership of the stolen property being laid in persons to the grand jurors unknown, the contention is made that the name of the owner was in fact known to the grand jury, the practice is to submit the question to the jury with appropriate instructions.

The fact, that the name of the person was in fact known, must appear from the evidence in the case. If there is no evidence to the contrary, the objection that the party was not unknown does not arise.

The question is not whether the grand jury acting with diligence might have ascertained the name of the owner, but whether the allegation that it is not known is sustained by the proof.

When property of a decedent's estate is the subject of larceny, the ownership cannot properly be laid in the deceased; and some authorities hold, in the absence of a statute, that it cannot properly be laid in the estate of the deceased. If an administrator is appointed after the theft and before indictment, the property may be laid in the administrator; under R. S., Chap. 133, Sec. 12, the property may be laid in the person having actual or constructive possession, or the general or special property in the goods.

In the instant case, assuming that the grand jury knew all the facts when finding the indictment, which were disclosed at the trial, it cannot be said that there was any evidence that the owner was not unknown to the grand jury. Therefore the question does not arise in the case.

On exceptions. Exceptions overruled. Judgment for the State.

An indictment for larceny of one automobile tire and two automobile tire tubes, "of the property of persons to your grand jury unknown," returned in Superior Court in Cumberland County, at September term, 1919. At the conclusion of the testimony, respondents filed a motion requesting the presiding Justice to direct a verdict of not guilty.

This motion was overruled and respondents excepted. Exceptions were also taken by respondents to the refusal of the presiding Justice to give three certain instructions to the jury, requested by respondents. The jury returned a verdict of guilty.

Case stated in the opinion.

Carroll L. Beedy, and Clement F. Robinson, for the State.

Harry C. Libby, for respondents.

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

MORRILL, J. The respondents stand convicted of the larceny of one automobile tire and two automobile tire tubes alleged in the indictment to be the property of persons to the grand jurors unknown.

The undisputed facts, as shown in the record, are that one Charles C. Deleware, Jr., was the owner of the automobile from which the tire and tubes were taken; that he was killed on Sunday, August 10, 1919, in an accident to said automobile on the highway between Portland and Windham; that after the accident the automobile remained at the side of the highway during the night of August 10th, and during the following day; that the articles in question were taken during Monday, August 11th. Administration on the estate of said Deleware was granted, and the administrator qualified September 19, 1919, after the finding of the indictment and before the trial in the Superior Court.

At the conclusion of the evidence respondents' counsel filed a written motion that the jury be instructed to return a verdict of not guilty; this motion was denied, and respondents have exceptions. The case was then submitted to the jury with instructions, to which no exceptions were taken. At the conclusion of the charge respondents requested the following instructions:

"1. The allegation in this indictment that the property alleged to have been stolen was the property of persons unknown is an affirmative allegation to be proven beyond a reasonable doubt by the State.

2. If you find from the evidence that there is a reasonable doubt in your minds whether or not the owner of this property was known at the time alleged by the State, then your verdict must be for the respondents.

3. It is not necessary that the respondents prove to you that the owner of this property was known at the time alleged by the state but only that they make it doubtful in your minds.

These requested instructions were refused and respondents have exceptions; the evidence is made a part of the bill of exceptions.

The exceptions must be overruled. It is a familiar principle that in indictments for larceny the ownership of the stolen article must be stated, and must be proved as laid; it is equally familiar that ignorance by the grand jury of the name of the person having either general ownership of the stolen property or special interest therein, does not shelter the criminal, and the ownership may be laid in persons to the grand jurors unknown. But if it appears from the evidence in the case that the name of the owner was in fact known to the grand jury, the respondent should be discharged, subject to be tried on a new indictment adapted to the facts of the case. The question is not whether the grand jury acting with diligence might have ascertained the name of the owner. "The fact that the grand jury might with reasonable diligence have ascertained the name may be evidence that they knew the name; but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation. After the evidence has been introduced, the question is not whether the name might have been known, but whether the allegation that it was not known is sustained by proof; it is a question, upon all the evidence, of accord or variance between the allegation and the proof, not of diligence or carelessness in making the allegation;" *Com.* v. *Sherman*, 13 Allen, 248; and this is said to be the law in England notwithstanding statements in the books, originating in reports of certain cases at nisi prius, that, if a name alleged to be unknown might with reasonable diligence have been ascertained, the defendant is entitled to an acquittal. *Com.* v. *Sherman*, supra.

When the contention is made that the name of the owner was in fact known to the grand jury, the practice is to submit the question to the jury with appropriate instructions. *Com.* v. *Hill*, 11 Cush., 137, 139; *Com.* v. *Hendrie*, 2 Gray, 503; *Com.* v. *Stoddard*, 9 Allen, 280, 282; *Com.* v. *Thornton*, 14 Gray, 42. "But the fact, that the name of the person was in fact known, must appear from the evidence in the case. It is immaterial whether it so appears from the evidence offered by the government, or that offered by the defendant. But there being no evidence to the contrary, the objection that the party was not unknown does not arise." *Com.* v. *Thornton*, supra.

When property of a decedent's estate is the subject of larceny, the ownership cannot properly be laid in the deceased; *U. S.* v.. *Mason*, 2 Cranch C. C., 410, 26 Fed. Cas. No. 15738; and it has been held that in the absence of a statute, the ownership cannot properly be laid in the estate of the deceased. *People* v. *Hall*, 19 Cal., 425; *State* v. *Cutlip*, (West Va.), 88 S. E., 829, L. R. A., 1916 E. 783 and note; *State* v. *Woodley*, 25 Ga., 235. The later cases to the contrary from California, *People* v. *Smith*, 112 Cal., 333, *People* v. *Prather*, 120 Cal., 660, seem to be based upon a statute of that State; so, also, with *State* v. *Sherman*, 71 Ark., 349, 74 S. W., 293. *Com.* v. *Kelly*, 184 Mass., 320, is cited by respondent's counsel as authority for the proposition that the ownership should be laid in the estate of the deceased; but the charge in that case appears to have been embezzlement of a sum of money from an estate of which the respondent was administrator, and the indictment was drawn in accordance with a statutory provision.

In England when a person dies intestate and the goods of the deceased are stolen before administration granted, it is said that the property must be laid in the ordinary—Roscoe's Crim. Ev. Sharswood's Ed., 638, * 639. If an administrator is appointed after the theft and before indictment, the property may be laid in the administrator. Per Shaw, C. J., *Wonson* v. *Sayward*, 13 Pick., 403. And the property may be laid in the person having actual or constructive possession, or the general or special property in the goods. R. S., Chap. 133, Sec. 12. *Com.* v. *McGorty*, 114 Mass., 299, decided under a similar statute.

In the instant case the only testimony as to the ownership of the car was given by Maurice Deleware, who testified that he was in the car at the time of the accident; that his brother was killed in the accident; that an administrator was appointed the day before the trial; that the deceased brother, Charles C. Deleware, Jr., owned the car; and that no other person owned any interest in it. There is no evidence that anybody had actual or constructive possession of the car at the time of the theft; it was lying at the roadside, where it was left at the time of the accident. No person had exercised any control over it; on the evening of the accident a deputy sheriff had taken the cushions and other movable articles to his house for safe keeping. Assuming that the grand jury knew all the facts when finding the indictment, which were disclosed at the trial, it cannot be said that

there was any evidence that the owner was not unknown to the grand jury. Therefore the question does not arise in the case. *Com.* v. *Thornton*, supra.

Exceptions overruled.
Judgment for the State.

THERESA CLARK et als., Appellants

from Decree of JUDGE OF PROBATE.

Hancock. Opinion April 20, 1920.

Rights of Judges of Probate Court to draw legal documents. R. S., Chap. 67, Sec. 20. Statute strictly construed. Common law rule. Prohibition applies to such documents only as the Judge of Probate Court is by law required to pass upon.

At common law a will was not invalidated because drawn by Judge of Probate in the county where the testator was then residing.

Sec. 20, Chap. 67, R. S., should be construed strictly. It is therefore held to apply only to such papers and documents as by their nature or because they are connected with the administration of an estate already pending, are required, in the ordinary course, to be passed upon by a Judge of Probate. It is not such papers as he may be, but such papers as he *is* by law required to pass upon.

A Judge of Probate is not required by law to pass upon all documents drafted as wills, only such as are presented to him for probate of testators who die resident in his county.

To hold that the statute prohibits Judges of Probate from drafting all papers falling within any of the classes of papers or documents that may in the course of the administration of estates come before him, would prohibit him from drafting any promissory notes. We think such was not the intent of the legislature.

On exceptions by appellants. Exceptions overruled. An appeal from a decree of the Judge of Probate Court for Hancock County allowing the will of Mary E. Jordan.

The appellants requested the presiding Justice to rule as a matter of law, that the will should not be allowed for the reason that it was

drafted by B. E. Clark, who, at the time was the Judge of Probate Court for Hancock County. The presiding Justice refused to so rule and appellants took exceptions.

Case stated in the opinion.

D. E. Hurley, for appellants.

George E. Googins, for defendants.

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

HANSON, PHILBROOK, JJ., concuring in result.

WILSON, J. The Judge of Probate for the County of Hancock in June, 1918, drafted the will of Mary E. Jordan, who died in June, 1919, a resident of that county. In due course the will was presented for probate in the Probate Court for the County of Hancock.

The Judge of Probate apparently deeming it inappropriate that he should pass upon its execution and the testamentary capacity of the testatrix requested the Judge of Probate for Washington County to sit in his stead at the hearing upon the petition for the probate of the will.

Objection was duly made to the probate of the will on the ground that under Sec. 20, Chap. 67, R. S., a Judge of Probate was prohibited from drafting a will, and it was, therefore, invalid. The will was allowed and an appeal taken to the Supreme Court of Probate. The appellants requested a ruling by the Supreme Court of Probate that the will should not be allowed for the same reason. The ruling was refused, and the decree of the Probate Court was affirmed. The case is now before this court on exceptions to that ruling.

Prior to the enactment of Chap. 312, Laws of 1915, now Sec. 20, Chap. 67, R. S., a will was not invalidated even though it was drawn and witnessed by the Judge of Probate in the county in which the testator resided and died. *Patten* v. *Tallman*, 27 Maine, 17. Also see *McLean, et al.* v. *Barnard*, 1 Root (Conn.), 462; *Ford's Case*, 2 Root, 232. Does Sec. 20, Chap. 67, R. S., prohibit a Judge of Probate from drafting a will?

The prohibition contained in the act and section above referred to reads: "Nor shall any Judge of Probate draft or aid in drafting any document or paper which he is by law required to pass upon." Is a will a document or paper within the intendment of the prohibition?

The statute being in derogation of the common law must be construed strictly. A Judge of Probate may in connection with the administration of an estate be required to pass upon the validity of a promissory note, but we could not regard it as a reasonable construction of the statute to hold that the legislature intended to prohibit Judges of Probate, most of whom are in the active practice of the law, from drafting promissory notes.

A document drafted as a last will and testament may never become such. The testator may destroy it. If a Judge of Probate should assist in drafting it, he might never be required to pass upon it. The testator may outlive his term of office or might die resident of another county.

The issue appears to be: Did the legislature intend under this act to place in the prohibited class all papers and documents that might in some event come before a Judge of Probate to be passed upon, or only such as by reason of their nature, as petitions initiating proceedings in a Probate Court, or by reason of their being a part of the administration of an estate already pending, as petitions for the sale of land, bonds and accounts, would in the ordinary cause be passed upon by the Judge of that court?

We think the stricter construction must prevail; and until the legislature shall make it clear that a Judge of Probate shall not act as scrivener in drafting a will, it must be left to his own good sense of propriety as to whether he shall act in that capacity.

Entry will be:

Exceptions overruled.

INHABITANTS OF THE TOWN OF ANDOVER *vs.* ETHEL M. MCALLISTER.

Oxford. Opinion April 20, 1920.

Replevin. Bailment. Innocent purchasers. Estoppel. Record. Constructive notice. Rule as to chattels attached to the realty.

Where a sum of money was raised by public subscription for the purchase of a bell and tolling-fork, and the bell was given to the town with the understanding it was to be hung in a church to be rung for church purposes and on public occasions, but was to be controlled by the voters of the town; and afterwards the church property was sold, the purchaser having no knowledge of the claim of the town to the bell.

Held:

(1) That either the relation of bailer and bailee existed in case the bell was delivered to the church and erected in the church edifice by the church itself; or if installed by the town it was done by license from the church, either express or implied, in which case the law governing the rights of innocent purchasers of real estate in fixtures will control.

(2) Where a bailor by his voluntary act confers on his bailee an apparent right of property other than would ordinarily follow from possession and permit him to retain and use it under conditions that would naturally mislead an innocent purchaser without notice of the title, he is estopped from setting up his title as bailor against such innocent purchaser.

(3) A record that is not required by law to be made is not constructive notice of what it contains.

(4) The rule in this state relating to buildings erected on another's land never having been extended by this court to other fixtures, and having been abolished by the legislature, the court now adopts as to other chattels the rule generally followed in other jurisdictions; that chattels attached to the realty in such manner as to indicate they are fixtures will pass by deed or mortgage of the real estate to an innocent purchaser or mortgagee, notwithstanding an agreement between the owner of the chattel and the owner of the realty, that they shall not become a part of the real estate.

Reported on agreed statement of facts. This is an action of replevin to recover a bell with tongue and tolling-fork. Plea, the general issue with brief statement alleging title in said bell, tongue, and tolling-fork, to be in defendant.

Judgment for defendant. Chattels to be returned to defendant, and damages, if any, to be assessed by the court below.

Case stated in the opinion.

Ralph T. Parker, and Aretas E. Stearns, for plaintiff.

Matthew McCarthy, for defendant.

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

WILSON, J. An action of replevin to recover a church bell, tongue and tolling-fork. It is before this court on an agreed statement of facts. In 1870, the trustees of the Methodist Episcopal Church in the town of Andover purchased a lot of land and erected thereon a church for the use of the Methodist Episcopal Society of that town. While the church was in process of construction a fund was raised by the pastor of the church, by public subscription, and a bell with tolling-fork was purchased, with the understanding that it was to be hung in the belfry of the church, to be used for public as well as church purposes. With this in view, it was presented to the town upon the conditions, according to the agreed statement, that it should be rung on all public occasions, should never be removed from the town, should be controlled by the voters of the town, and should remain in the church building so long as the Methodist Society held together.

In 1917, the Society having ceased to hold any meetings, the church property was sold to the defendant, who took possession of the bell and refused to deliver it up on demand of the town some six months after the sale. It is admitted, however, that at the time of the sale, neither the municipal officers, nor the trustees of the church, nor the defendant had any actual knowledge of the conditions under which the bell was placed in the church.

In several important particulars the agreed statement is lacking in complete information. It does not appear from the record or by express stipulation that the gift was accepted by the town, although the conditions of the gift were spread upon the town records; neither does it appear, except perhaps by inference, who installed the bell in the church edifice, whether the town or the church.

We conclude, however, that it is the understanding of the parties that the bell became the property of the town at the time of purchase,

upon the above conditions, which is, of course, predicated upon an acceptance by the town. Argument of counsel clearly indicates that such is their understanding of the stipulations contained in the agreed statement.

The bell must either have been delivered to the church by the town, and put in place by the church itself, or the town must have installed it in the church under license, express or implied, from the church. It is inconceivable that it could have been done without the knowledge and consent of the church officials. In the first instance, which is the more probable from the facts set forth in the agreed statement, the relation of bailor and bailee would be created; while in the latter instance the rights of the parties may have to be determined under the law relating to chattels attached to the realty of another under a license or agreement, but with the intent that they shall remain personal property. In either event we think the title of the defendant should prevail.

While the general rule in case of unauthorized sales of a thing bailed by the bailee, the purchaser acquires no better title against the bailer than the bailee had, 3 R. C. L., 142; *Emerson* v. *Fisk*, 6 Maine, 200; the bailor may be estopped from setting up his title against a *bona fide* purchaser from his bailee, if, by his voluntary act, he has conferred upon his bailee an apparent right of property other than would ordinarily follow from mere possession. *Morsch* v. *Lessig*, 45 Colo., 168; *Midland Co.* v. *Hitchcock*, 37 N. J. E., 549; *Smith* v. *Clews*, 105 N. Y., 283; 6 Cyc., 1148. In *Fryatt* v. *The Sullivan Co.*, 5 Hill, (N. Y.), 116 (App. 7 Hill, 529), it was held that even where the bailee tortiously annexed the chattel bailed to the realty, an innocent purchaser of the real estate would hold against the bailor.

In the instant case, the town, after having accepted the gift, having voluntarily delivered the bell or consented to its delivery, to the church knowing that it was to be placed in the church belfry, and except for the conditions upon which it was given and installed in the church, that it would become a part of the realty, *Cong. Society of Dubuque* v. *Fleming*, 11 Ia., 533, and would pass by a deed of the church property, *Davis* v. *Buffum*, 51 Maine, 160, permitted it to remain there under conditions that would naturally mislead a purchaser without notice as to the title; we think it is now estopped from setting up its title against such innocent purchaser. 3 R. C. L., 143; 6 Corp. Juris, 1148.

It is not a question of estoppel of the town by its failure to act at the time of the sale, but by its original voluntary act in consenting to the affixing of its chattel to the realty of the church thereby enabling the church, though not with any wrongful intent, to mislead an innocent purchaser. The record of the conditions of the gift of the bell not being one required by law cannot be held to be constructive notice to purchaser of the church property of any claim by the town to the bell.

The plaintiff contends the question should be determined by the law relating to fixtures which have been attached to the realty with the understanding that they shall remain personalty and shall not become a part of the real estate; and that the rule laid down in *Russell* v. *Richards*, 10 Maine, 429, and followed in *Hilborne* v. *Brown*, 12 Maine, 162; *Tapley* v. *Smith*, 18 Maine, 12; and *Peaks* v. *Hutchinson*, 96 Maine, 530 in relation to buildings erected by consent or license on the land of another, but with the understanding that they should remain the property of the one constructing them, should determine this case. The rule laid down in those cases, being that such buildings do not pass by deed of the land even to an innocent purchaser.

This rule is contrary to the weight of authority in this country and has been frequently criticised by this court, and was finally upon suggestion of the court in the case of *Peaks* v. *Hutchinson*, supra, abolished by the legislature, Chap. 150, Public Laws, 1903, so that it no longer obtains in this State. But the plaintiff contends it was only abolished as to buildings erected on the land of another and still remains in full effect as to all other chattels, and cites the case of *Young* v. *Chandler*, 102 Maine, 251, 255. We do not find, however, that this court has ever applied this doctrine to any other class of property than buildings and the court remarked in *Dustin* v. *Crosby*, 75 Maine, 75, that the doctrine should not be extended owing to the criticism it has incurred. The case of *Young* v. *Chandler* involved, so far as the application of this rule is concerned, only the title to a building, and was decided on another ground. The seeming general application of the rule is, therefore, purely dicta, and is not to the extent contended by the plaintiff, supported by the authorities cited. On the other hand, in *Hawkins* v. *Hersey*, 86 Maine, 394, 397, though dicta also, the court laid down the law, as applied to such chattels as machinery, in accordance with that generally followed in other juris-

dictions, viz: That chattels attached to realty, though between the owner and the owner of the realty they may by agreement remain personalty, pass by deed or mortgage of the realty to a mortgagee or purchaser without notice.

Since the rule in relation to buildings erected on land of another under consent or license has been already abolished by the legislature, Sec. 39, Chap. 78, R. S., 1916, and was peculiar to this and, perhaps, two other states, Alabama and New York; and this court has not had occasion to determine the rule applicable to other chattels, but has on several occasions criticised the rule in relation to buildings as laid down in *Russell* v. *Richards*, supra, and has refused to extend it further in relation to that class of property than its original application made necessary; we feel at liberty now to adopt the rule as to other chattels that seems to us more consonant with reason and accords with the great weight of authority elsewhere, and hold: That chattels attached to the realty in such a manner as to indicate they are fixtures will pass by deed or mortgage of the real estate to a purchaser or mortgagee without notice, notwithstanding an agreement, either express or implied, between the owner of the chattel and owner of the realty that they are to remain personalty and shall not become a part of the real estate. *Bank* v. *Exeter Works*, 127 Mass., 542; *Thompson* v. *Vinton*, 121 Mass., 139; *Tibbetts* v. *Horne*, 65 N. H., 242; *Powers* v. *Dennison*, 30 Vt., 752; *Prince* v. *Case*, 10 Conn., 375; *Stillman* v. *Flenniken*, 58 Ia., 450; *Fifield* v. *Farmers' Nat. Bank*, 148 Ill., 163; *Rowand* v. *Anderson, et al.*, 33 Kan., 264; *Knowlton* v. *Johnson*, 37 Mich., 47; *Case Mfg. Co.* v. *Garven*, 45 Ohio St., 289; 11 R. C. L., 1064-5.

Entry will be:

Judgment for defendant.
Chattels to be returned to defendant, and damages, if any, to be assessed by the court below.

C. V. RICHARDS *vs.* AMERICAN REALTY COMPANY.

AMERICAN REALTY COMPANY *vs.* C. V. RICHARDS.

Oxford. Opinion April 24, 1920.

"Cutting and yarding" defined. "Sluiced" wood. Abandonment.

The decision of these cases involves the settlement of the accounts of certain logging operations undertaken by Mr. Richards for American Realty Company, under two contracts, one dated May 21, 1913, referred to as the cutting and yarding contract, the other dated September 5, 1913, referred to as the hauling contract.

First Case. The plaintiff began work under these contracts in the season of 1913-14; he worked under the first contract for five successive seasons; and under the second contract for four successive seasons; the hauling was taken over by the Realty Company in January, 1918.

Separating the items in the account annexed to the plaintiff's writ, and arranging them under the contracts to which they apply, we find that all work done under the hauling contract has been paid for in full; the transactions under that contract need, therefore, receive no further attention.

We find, also, that for work during the four seasons 1913-17 under the cutting and yarding contract, Mr. Richards was overpaid $821.66; all question, therefore, as to Mr. Richard's right to receive yearly the contract reserve accruing during those years is eliminated.

As to the cutting and yarding during the last season, 1917-18, we sustain plaintiff's contention that he should be credited with 2758.45 cords cut and yarded; we state the account thus:

2758.45 cords, cut and yarded @ $5		$13,792.25
Deduct advances agreed upon		6,294.91
		$7,497.34
Deduct 50 cents per cord retained as per contracts of May 21, '13 and April 10, 1917	$1,379.22	
Overpayment	821.66	
		2,200.88
Due Richards at close of season of 1917-18		$5,296.46

Other items are undisputed:		
For use of equipment and camps	$300.00	
15 tons of hay at $20	300.00	
70 cords of boom logs @ $2.50	175.00	
Relocation of camps	292.50	
For fixing road and building bridge	300.00	
As to the item for 276 boom logs, we find that the charge should be:		
26 logs at $1.50	$ 39.00	
250 logs at $1.25	312.50	
	351.50	
		$1,719.00
		$7,015.46

The charge for use of camps and equipment after May 1, 1918 cannot be sustained; if defendant did not return the camps and equipment seasonably under the contract shown, or did not return them in condition called for by the contract, the plaintiff has an appropriate remedy.

Second Case. We state the account thus:

Loan made April 10, 1917		$4,069.85
Credit from sale of horses	$1,106.70	
Credit of 25 cents per cord under contract of April 10, 1917	689.61	
Credit of 25 cents per cord under contract of May 21, 1913	689.61	
		2,485.92
		$1,583.93

The plaintiff's claim to retain the item of 25 cents per cord, the contract reserve, under the contract of May 21, 1913,—$689.61—is not sustained. We are satisfied that at some date after the close of the season of 1916-17 the American Realty Company decided to abandon operations on the lands of Barnjum Sandy River Company.

The defendant's contention that this action cannot be maintained to recover the loan of $4069.85 is not sustained; the loan, an advancement in fact, was payable on demand, and the defendant agreed, by way of further security, to apply 25 cents per cord towards payment.

On report. Two actions of assumpsit, wherein C. V. Richards is plaintiff in the first case and American Realty Company is defendant, and American Realty Company is plaintiff in the second case and C. V. Richards is defendant, involving the settlement of the accounts of

certain logging operations undertaken by the said C. V. Richards for the said American Realty Company. In the first case, after the evidence had been completed, by agreement of parties, the cause was reported to the Law Court upon so much of the evidence as was admissible, the Law Court to render such final judgment therein as the legal rights of the parties require. At a subsequent term of court by agreement of parties in the second case, all the testimony and evidence in the first case which had been printed, so far as the same was pertinent and admissible, was considered as offered and admitted in the second case, and the case was reported to the Law Court, and argued together with the first case. The general issue with a brief statement was filed in each case. Judgment for the plaintiff in the first case for $7015.46, with interest on $5296.46 from June 1, 1918, and on $1719.00 from the date of the writ. Judgment for the plaintiff in the second case for $1583.93 with interest from date of the writ.

Case stated in the opinion.

Pulsifer & Ludden, and Matthew McCarthy, for plaintiff in first case.

Weeks & Weeks, and White, Carter & Skelton, for defendant in first case.

Weeks & Weeks, and White, Carter & Skelton, for plaintiff in second case.

Pulsifer & Ludden, and Matthew McCarthy, for defendant in second case.

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

MORRILL, J. The decision of these cases involves the settlement of the accounts of certain logging operations undertaken by Mr. Richards for American Realty Company.

In March, 1913, American Realty Company acquired the right to log upon certain lots in Sandy River Plantation in this State, owned by Barnjum Sandy River Company, undertaking to cut from 15,000 to 30,000 cords annually; on May 21, 1913, C. V. Richards, the plaintiff in the first action, contracted with American Realty Company to cut and yard, from a part of the territory held by the latter company under its permit from Barnjum Sandy River Company, "3000 cords or more of timber, spruce and fir, per year until the valley is cleared;" the contract price was five dollars per cord, settle-

ments to be made monthly; twenty-five cents per cord, called by counsel the contract reserve, was to be retained by American Realty Company and paid to Mr. Richards, when the contract should be wholly performed and the valley cleared.

On the fifth day of September, 1913, Mr. Richards made a second contract with American Realty Company to haul and land at Rangeley Lake or in Saddleback Brook the wood which he was to cut under his contract of May 21, 1913 for $2.50 per cord.

The transactions of the parties under these contracts are the subject matter of these actions. The claims upon which the second suit is based, might with advantage have been filed in set-off in the first suit; the defendant in that suit did not see fit to do so, and we therefore consider the cases as presented.

First Case. The plaintiff began work under the contracts referred to in the season of 1913-14; he worked under the contract of May 21, 1913, called by the parties the cutting and yarding contract, for five successive seasons; and under the contract of September 5, 1913, for four successive seasons; the hauling was taken over by the Realty Company in January, 1918.

Separating the items in the account annexed to the plaintiff's writ, and arranging them under the contracts to which they apply, we find that during the four seasons, 1913-17, Mr. Richards hauled under the contract of September 5, 1913, 21,618.07 cords for which he was entitled to receive, at $2.50 per cord, $54,045.18; and that he did receive under that contract, $54,045.18; the transactions under the hauling contract need, therefore, receive no further attention.

We also find that during the four seasons, 1913-17, Mr. Richards cut and yarded under the contract of May 21, 1913, 21,627.08 cords for which he was entitled to receive at five dollars per cord ($4.75, payable on the 20th of each month, and 25 cents to be reserved), $108,135.39, and that he did receive during those seasons, under that contract $108,957.05; these figures are not disputed, and it therefore appears that at the close of the season of 1916-17, Mr. Richards had been overpaid $821.66. All question, therefore, as to Mr. Richards' right to receive yearly the contract reserve accruing during those years is eliminated; the Realty Company had withheld the 25 cents per cord during the first two seasons, but during the two following seasons had not withheld the contract reserve and had advanced to Mr. Richards all that had been withheld during the first two seasons

and $821.66 in addition thereto. Mr. Richards' counsel contends that credit for about 1500 cords cut in 1916-17 was wrongfully withheld; but this wood was not yarded that season, but was carried over and included in the minimum cut of 1917-18, as accepted January 21, 1918.

The first substantial difference between the parties relates to cutting and yarding during the season of 1917-18. The plaintiff claims that he should be credited with 2758.45 cords cut and yarded; the defendant claims that only 2257.73 cords were cut and yarded, and 500.72 cords were cut and left at the stump for which it gives credit at $2.50 per cord. We think that the plaintiff has sustained his contention. He says that this 500.72 cords was not wood at the stump, i. e. cut and piled at the stump; but was "sluiced" wood, i. e. wood thrown down, slid down, or carried down from the more inaccessible places, and piled where it could be hauled with two sleds. That his version is probably correct is shown by the fact that this 500.72 cords was scaled and included in the amount accepted as the minimum cut for that season; and Mr. Crowell, the defendant's superintendent, says that the wood cut and yarded was scaled at the yard. If it was piled where it was reasonably accessible to be hauled with two sleds, the contract was met. For the season of 1917-18 we have, therefore,

2758.45 cords, cut and yarded @ $5		$13,792.25
Deduct advances agreed upon		6,294.91
		$7,497.34
Deduct 50 cents per cord retained as per contracts of May 21-13 and April 10, 1917	$1,379.22	
Over payment	821.66	
		2,200.88
Due Richards at close of season of 1917-18		$5,296.46

Other items are undisputed:

For use of equipment and camps	$300.00
15 tons of hay @ $20	300.00
70 cords of boom logs @ $2.50	175.00
Relocation of camps	292.50
For fixing road and building bridge	300.00

As to the item for 276 boom logs we think that defendant's position is sound and that the charge should be:			
26 logs at $1.50	$ 39.00		
250 logs at $1.25	312.50		
		351.50	
			1,719.00
			$7,015.46

The item of $47 for hiring men is not supported by the evidence; the last item for use of camps and equipment after May 1, 1918, cannot be sustained; if defendant did not return the camps and equipment seasonably under the contract shown by the letter of January 21, 1918, or did not return them in condition called for by the contract, the plaintiff has an appropriate remedy.

As to interest: The plaintiff claims interest upon the amount due under the contract, $5296.46, from June 1, 1918. By the contract payments were to be made monthly; that method seems not to have been adhered to, and evidence is not presented from which the monthly instalments can be determined. The season for cutting and yarding had closed, and the amount of the cut had been accepted January 21, 1918; any payment due for cutting and yarding during the season of 1917-18 had been long overdue on June 1, 1918.

The entry in the first case will be,

Judgment for the plaintiff for $7015.46 with interest on $5296.46 from June 1, 1918, and on $1719.00 from the date of the writ.

Second Case. On April 10, 1917, Mr. Richards borrowed of American Realty Company $4069.85, and as security transferred to the company four certain Holmes notes; he also made an agreement of that date, that 25 cents per cord should be deducted and retained under his contract of May 21, 1913; "said 25 cents per cord above stated to be in excess of the 25 cents per cord which is already held back according to the terms of the original contract, making the total amount to be held back 50 cents per cord, until said $4069.85 is wholly paid"

It is agreed that $1106.70 is a correct credit, realized from the sale of certain horses pledged for payment of the collateral.

Mr. Richards testifies that this loan was without interest; and plaintiff's counsel frankly admits that the charges of interest in the writ "are improper charges" on the part of his client.

The account then stands:

Loan	$4,069.85	
Credit from sale of horses	1,106.70	
Credit of 25 cents per cord under contract of April 10, 1917	689.61	
Credit of 25 cents per cord under contract of May 21, 1913	689.61	
		2,485.92
		$1,583.93

The plaintiff claims to retain the item of 25 cents per cord, the "contract reserve" under the contract of May 21, 1913,—$689.61—, upon the ground that defendant abandoned his contract; this contention is based largely upon Mr. Richards' letter of January 11, 1918; but the reference in that letter to the contract of May 21, 1913, is explained by Mr. Richards as a mistake; that the intended reference was to the hauling contract of September 5, 1913. We think the context of the letter, considered in the light of the action of the parties taken ten days later, as shown by the letter of January 21, 1918, sustains the explanation. The alleged obligation of the Realty Company "to fix the road seasonably" is found in the hauling contract.

We are satisfied that at some date after the close of the season of 1916-17 the American Realty Company decided to abandon operations on the lands of Barnjum Sandy River Company; it cut no timber on those lands the following season except about 1200 cords cut by Mr. Richards under his contract; the required yearly cut under that contract was only one-fifth of the minimum yearly cut under the larger permit. Mr. Richards was justified, from his knowledge of the situation, in understanding that the Barnjum Sandy River Company's permit was abandoned. The attitude of the officers of American Realty Company, at the meeting of December 13, 1918, lacked that business-like frankness, which was to be expected

of them in dealing with one of their contractors; they gave Mr. Richards no intimation as to their plans for future operations on those lands. We think that they should apply the "contract reserve" on the cutting and yarding of 1917-18, towards payment of the loan, as we have done.

The defendant contends that this action cannot be maintained to recover the loan of $4069.85; that plaintiff had agreed to accept payment at 25 cents per cord on wood cut and yarded. We do not so construe the agreement of April 10, 1917; the loan, and advancement in fact, was payable on demand, and the defendant agreed, by way of further security, to apply 25 cents per cord towards payment.

In the second case the entry will be,

Judgment for the plaintiff for $1583.93 with interest from date of the writ.

NICHOLAS KARAHLEOS *vs.* H. A. DILLINGHAM, et al.

Androscoggin. Opinion April 29, 1920.

Certificate of partnership, and certificate of withdrawal, under Secs. 11, 15, Chap. 39, R. S. The doctrine of respondeat superior requires the indispensible element, among others, of the relation of master and servant.

In this action of tort, brought to recover damages for personal injuries resultant from collision between a pedestrian and an automobile, the case was submitted to the trial judge for decision upon an agreed statement of facts showing only, in fair summary, that, at the time of the accident, the automobile was driven by a woman employee of a partnership then doing business in succession to, and under the same firm name as, a partnership which, as between these defendants, had previously existed; but notice of the dissolution of which, by retirement of one of the partners, had not been attested to the city clerk's office. As a matter of form, it was ruled, that the member who, as between the partners themselves, had retired from the partnership, was properly named as defendant.

On exceptions, *held:* Whether the agreed statement be or not entitled to the force of recital that defendants, at the beginning of a mercantile partnership, filed requisite statutory certificate which, as to other persons, still conclusively presumes them partners, yet plaintiff's case falls short of judicable rank.

Besides partnership, or estoppel to deny partnership, there are other indispensible elements. Under the doctrine of *respondeat superior*, in order to hold one person responsible in damages for the negligence of another, it must be shown, among other things, that at the time and in respect to the very occurrence out of which the injury arose, the relation of master and servant existed between the defendant and the wrong-doer. There is nothing of the sort here. Even were the driver of the automobile at the time of the accident acting in the course of her employers' business, they would not be liable if she would not be liable were the action against her, and she had acted for herself instead of for them. For all that appears, the accident complained of may have been inevitable, or, if negligence were the proximate of efficient cause, such negligence may have been on the part of plaintiff himself.

On exceptions. An action of tort, brought to recover damages for personal injuries, sustained by being hit by an automobile, operated by an alleged employee of defendants, alleged to be partners doing business under the firm name of Saxon Motor Company. On the 10th day of February, 1916, defendants filed in the office of the city clerk of Lewiston, a certificate of partnership, under Sec. 11, Chap. 39, R. S. Subsequently, and prior to the date of the alleged injuries, Walter A. Luce, one of the defendants, withdrew from the partnership, but did not file in the office of the clerk of Lewiston, the withdrawal certificate provided under the above statute. The remaining partner, Harry A. Dillingham, one of the defendants, immediately formed a partnership with one Burkett, and the new partnership thus formed carried on an automobile business in Lewiston under the former firm name of Saxon Motor Company, in whose employ, the woman who was operating the automobile at the time of the injury, was engaged. The presiding Justice ruled pro forma that Mr. Luce was properly named as a defendant. To this ruling defendant Luce took exceptions.

Exceptions sustained. Action dismissed in accordance with stipulation in agreed statement.

Case stated in the opinion.

Frank T. Powers, for plaintiff.

Harry Manser, for defendants.

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

DUNN, J. Range of this action is delimited by an agreed statement of facts.

A statute imposes that persons associating themselves as partners in any mercantile enterprise shall deposit, in the office of the clerk of the city or town in which business is to be carried on, a certificate signed and sworn to by them, setting forth their names and places of residence, the nature of the business in which they intend to engage, and giving the name under which they are to transact business. Each constituent "shall conclusively be presumed to be a member of the firm" to the time of his filing, in said clerk's office, certificate of withdrawal from such relationship. R. S., Chap. 39, Secs. 11, 15.

On February 10th, 1916, Harry A. Dillingham and Walter E. Luce, both of Lewiston, filed notice in the office of the clerk of that city that partnership existed between them by the style of Saxon Motor Company. After doing business, this partnership was dissolved by the retirement of Mr. Luce, who failed to attest that fact to the clerk for record. The remaining member, Mr. Dillingham, and one Burkett, promptly entered into co-partnership, adopting for descriptive appellation the old-time firm name. While Dillingham and Burkett were thus carrying on business, an automobile belonging to them, and driven at the time by their employee, collided with plaintiff who, as a pedestrian, was crossing a public street. To recover damages for resulting personal injuries sustained by him, he brought this suit against the members of the original partnership. As a matter of form, it was ruled by the presiding Justice, that in view of recorded partnership certificate, and in consequence of delinquency in not filing withdrawal certificate, Mr. Luce was properly named as a defendant. To this ruling the defendant Luce has exceptions.

It is unnecessary to consider whether the agreed statement is entitled to the force of recital that defendants, at the beginning of a mercantile partnership filed requisite certificate agreeably to statutory command, for, be that as it may, plaintiff's case yet falls short of judicable rank. Besides partnership, or estoppel to deny partnership, other indispensable elements must be proved. A master is liable to third persons for all damages consequent from the negligence of his servants, where, if there were neglectful act or omission on the part of the servant, it was while he was acting under the orders of the master, or in the course of the master's business. *Maddox* v. *Brown*, 71 Maine, 432. Under the doctrine of *respondeat superior*, in order to hold one person responsible in damages for the negligence of another,

it must be shown, among other things, that at the time, and in respect to the very occurrence out of which the injury arose, the relation of master and servant existed between the defendant and the wrong-doer. *Higgins* v. *Western Union Tel. Co.*, 156 N. Y., 75. There is nothing of the sort here. Even were the driver of the automobile, at the time of the accident, acting in the course of her employers' business, they would not be liable if she would not be liable, were the action against her, and she had acted for herself instead of for them. *New Orleans Railroad Co.* v. *Jopes*, 142 U. S. 18, 35 Law Ed., 919. For all that appears, the accident complained of may have been inevitable, or, if negligence were the proximate or efficient cause, such negligence may have been on the part of plaintiff himself. *Kennard* v. *Burton*, 25 Maine, 39.

Exceptions sustained. Action dismissed in accordance with stipulation in agreed statement.

THE REAL ESTATE TITLE INSURANCE and TRUST COMPANY of Philadelphia et al., In Equity

vs.

CALVIN W. DEARBORN, et als.

Kennebec. Opinion May 1, 1920.

Construction of a will. The words "give," "devise" and "bequeath" not essential to the validity of a testamentary provision. Vested remainder. Assignment of a remainder estate.

Bill in equity brought for construction of a will. By her will Harriet Stanley left her property in trust for the benefit of her son Benjamin during his life. The will further provides that "After the decease of my son Benjamin or at my decease should I survive him all of my said property shall go to Annie Stanley widow of my son David A. Stanley to be hers absolutely and freed from all trusts."

Annie Stanley became by marriage Annie Stanley Ostrom. She survived the testatrix, but died before the decease of Benjamin. During her life she assigned to the plaintiffs all her interest under the will.

The usual formal words "give, devise" &c. were omitted from the will. The intent and purpose of the testator were however plain. The intent when apparent governs. No rule of law or policy makes any special form of words essential to the validity of a testamentary disposition of property. The estate devised to Annie Stanley was a vested remainder.

The possession and enjoyment of it were postponed until after the termination of Benjamin's life interest. But the estate became vested immediately upon the death of Harriet.

A vested estate in remainder is alienable by deed to the same extent as are vested estates in possession. Annie Stanley Ostrom's estate was a vested remainder. It was subject to alienation at will. It follows that her assignments, the forms not being questioned, were effectual to transfer to the plaintiff all her interest derived under the will.

On report. Bill in equity seeking the construction of the will of Harriet D. Stanley. Defendants filed an answer, admitting all the allegations in the bill, and by agreement of parties, the case was reported to the Law Court, no testimony having been introduced by either of the parties. Bill sustained. Decree in accordance with opinion.

Case stated in the opinion.

Walter M. Sanborn, and Pattangall & Locke, for plaintiffs.

White, Carter & Skelton, and McGillicuddy & Morey, for defendants.

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

DEASY, J. Bill in equity praying for a judicial construction of the will of Harriet Stanley admitted to probate in Kennebec County on June 28, 1894. The will, omitting parts here immaterial reads as follows:—

"Know all men by these presents that I Harriet Stanley of Winthrop in the County of Kennebec and State of Maine do make this my last Will and Testament, being in sound mind:

1st. All of my property, Real & Personal, and however acquired which I shall have at my decease or to which I may be entitled to possession, to Elliott Wood of Winthrop but to be held by him in trust as follows, after he has given bond for the fulfillment of said

trust to the satisfaction of the Judge of the Probate Court having jurisdiction of this will. Said property to be well and carefully invested and the income used for the care, support and comfort of my son Benjamin during his life in a manner befitting needful care and attention; said Trustee to file yearly an account in the Probate Court of his Trusteeship during that period. . . . .

After the decease of my son Benjamin or at my decease should I survive him all of my said property shall go to Annie Stanley, widow of my said son David A. Stanley, to be hers absolutely and freed from all trust."

Annie Stanley, who became by marriage Annie Stanley Ostrom, made two assignments of her estate in remainder under the will to wit: In 1910 to The Real Estate Title Insurance and Trust Company of Philadelphia as security for certain bonds and in 1914 an absolute assignment of her remaining interest to Charles H. Walker who re-assigned to Margaret E. Walker. The plaintiffs claim under these assignments. The defendants are the heirs of Harriet Stanley, and the present trustee under her will. Said Annie Stanley Ostrom died in 1916. Benj. D. Stanley beneficiary under the will died in 1919.

In the construction of the will the parties are at issue in respect to three points:

The defendants contend (1) that the devise in trust to Elliott Wood is invalid, (2) that the estate devised to Annie Stanley was a contingent and not a vested remainder and (3) that therefore nothing passed to the plaintiffs by her assignments.

VALIDITY OF DEVISE IN TRUST.

The defendants contend that because of the omission of the words "give devise", &c. the estate did not pass to Elliott Wood in trust. The cardinal rule in the construction of wills is to determine if possible from the instrument itself and the circumstances surrounding its making, the real intention of the testator or testatrix and having found such intention, to give effect to it, unless some positive rule of law or public policy forbids. *Barry* v. *Austin*, 118 Maine, 51. 40 Cyc. 1386 and cases cited.

There is no room for doubt as to the actual intention of the testatrix to leave the property to Elliott Wood in trust and no rule of law or public policy makes the words give, devise or bequeath essential to

the validity of a testamentary provision. See note in 41 L. R. A. N. S. pages 44-47 in which numerous cases are assembled wherein instruments much more informal than that under consideration have been given effect as wills.

ESTATE A VESTED REMAINDER.

The estate devised to Annie Stanley by the will under consideration was a vested remainder.

The possession and enjoyment of the estate were postponed until after the termination of Benjamin's life interest. But the estate became vested immediately upon the death of Harriet. It is unnecessary to repeat the clear definition of vested and contingent remainders, adopted and recently stated by this court, to demonstrate that the estate of Annie Stanley was vested and not contingent. *Woodman* v. *Woodman*, 89 Maine, 131. *Bryant* v. *Plummer*, 111 Maine, 516.

VALIDITY OF ASSIGNMENT.

For obvious reasons no estate in remainder could be aliened by common law livery of seizin. To transfer land by that primitive and now obsolete method possession was indispensable, so that the seller could make "livery" i. e. delivery of a turf or twig to the buyer.

With this exception vested estates in remainder are and always have been alienable (also inheritable and devisable) to the same extent as vested estates in possession.

"Vested remainders are actual estates and may be conveyed by any of the conveyances operating by force of the statute of uses." 4 Kent Comm. (13th Ed.), 229.

"A vested remainder is a present interest in the property which the remainder man may convey by deed." 16 Cyc. 652.

"Such remainder (vested) may be devised, assigned or limited over and made subject to contingencies and trusts at the will of him in whom it is vested." Washburn on Real Property (5th Ed.), 2-600. See *Pearce* v. *Savage*, 45 Maine, 90; *Watson* v. *Cressey*, 79 Maine, 382; *Woodman* v. *Woodman*, 89 Maine, 128; *O'Donnell* v. *Smith*, 142 Mass., 505; *Loring* v. *Carnes*, 148 Mass., 223; *Swett* v. *Thompson*, 149 Mass., 302.

The defendants argue and cite authorities to show that except where otherwise provided by statute, a devise or legacy lapses if the benefici-

ary die before the decedent. This argument is not in point inasmuch as Annie Stanley Ostrom the legatee did not die before Harriet Stanley the decedent.

They also urge that if a devise or legacy is limited to take effect upon the happening of some future event and the beneficiary dies before the event, a lapse occurs. In support of this proposition, *Snow* v. *Snow*, 49 Maine, 159 is cited.

But this principle does not apply to vested remainders. A vested remainder does not and cannot take effect in the future. Its enjoyment is postponed but not the property right.

Annie Stanley Ostrom's interest having been a vested remainder which could be aliened at will it follows that her assignments, the forms of which are not questioned, were effectual to transfer all of her estate to the plaintiffs.

Bill sustained.
Decree in accordance with opinion.

JAMES E. PHILOON, Trustee *vs.* FREEMAN A. BABBITT.

Androscoggin. Opinion April 29, 1920.

Bulk Sales Law. R. S., Chap. 114, Sec. 6. Trustee in bankruptcy bound by acts of the bankrupt in a limited sense only. In cases of fraud, unlawful preference, and transfers made void by state law, the trustee has rights and remedies which the bankrupt did not possess.

On Oct. 30, 1918, one Arthur W. Stetson, an insolvent debtor, sold and conveyed his entire stock of merchandise in bulk to the defendant without conforming to R. S., Chap. 114, Sec. 6 known as the Bulk Sales Law.

No evidence of intentional fraud appears, but the sale was by the explicit provisions of the statute made void as to Stetson's creditors.

The plaintiff as trustee in bankruptcy of Stetson having first made a written demand for the goods brought this action of trover against the defendant to recover their value. The defendant does not dispute that the transaction was void as to Stetson's creditors, but maintains that it was valid as to Stetson and therefore valid as to the plaintiff his trustee in bankruptcy. It is a sufficient answer to the plaintiffs contention to quote from the Federal Bankruptcy Law the last paragraph of sub-section e of Section 67 as follows:

"And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District, in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

While it is sometimes loosely said that the trustee steps into the shoes of the bankrupt and takes the property "in the same plight and condition that the bankrupt himself held it" this is true only with limitations. In case of fraud and unlawful preference the trustee in behalf of the creditors is given rights and remedies which the bankrupt did not possess. So too where the State law makes transfers void as to creditors.

On report. Trover to recover the value of a stock of goods bought by the defendant of the plaintiff's bankrupt in violation of Sec. 6, Chap. 114 of the Revised Statutes. Plea, the general issue. Judgment for plaintiff for $851.95 and interest from date of writ.

Case stated in the opinion.

George C. Wing, Jr., for plaintiff.

McGillicuddy & Morey, for defendant.

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

DEASY, J. On Oct. 30, 1918, one Arthur W. Stetson, an insolvent debtor, sold and conveyed his entire stock of merchandise in bulk to the defendant without conforming to R. S., Chap. 114, Sec. 6 known as the Bulk Sales Law.

No evidence of intentional fraud appears but the sale was by the explicit provisions of the statute made void as to Stetson's creditors.

The plaintiff as trustee in bankruptcy of Stetson having first made a written demand for the goods brought this action of trover against the defendant to recover their value. The defendant does not dispute that the transaction was void as to Stetson's creditors, but maintains that it was valid as to Stetson and therefore valid as to the plaintiff his trustee in bankruptcy. It is a sufficient answer to

the plaintiff's contention to quote from the Federal Bankruptcy Law the last paragraph of sub-section e of section 67 as follows:

"And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District, in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

While it is sometimes loosely said that the trustee steps into the shoes of the bankrupt and takes the property "in the same plight and condition that the bankrupt himself held it" this is true only with limitations. In case of fraud and unlawful preference the trustee in behalf of the creditors is given rights and remedies which the bankrupt did not possess. So too where the State law makes transfers void as to creditors.

"The general rule is that the trustee stands in the shoes of the bankrupt, but in all cases affected by the fraud of the bankrupt toward creditors, or where there has been some transfer or incumbrance of the property void as to creditors by State law, for want of record, or for failure to take possession, or otherwise, the trustee succeeds to the rights of any creditor who may be qualified under the state law to avoid the transfer." *Studebaker* v. *Carriage Co.*, (Mo.), 133 S. W., 414.

"Where there has been some transfer or incumbrance of the property void as to creditors by state law . . . . the trustee succeeds to the right of any creditor who may be qualified under the state law to avoid the transfers or incumbrances." *Mishawaka Co.* v. *Teasdale*, (Wis.), 129 N. W., 672. "Such rights as they (creditors) possessed . . . . he (the trustee) possesses and he can avoid any transfer or conveyance of the property which they could have avoided." *Benner* v. *Bank* (Wash.), 131 Pac., 1152.

"A transfer . . . . is not voidable under Sec. 67 e unless it was either made with the intent on his part to hinder delay or defraud

his creditors or some of them or is held void as against his creditors by the laws of the state." *Coder* v. *Arts*, 152 Fed., 949.

In the instant case the sale to the defendant was by the State law made null and void as to creditors. Bankruptcy proceedings were begun within four months. The evidence shows that Stetson was insolvent at the time of the sale. The stock therefore "passed to the assignee" (trustee) under Section 67 e "to be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

We do not lose sight of the fact that in opinions by courts of the highest authority there are general statements that seem to be in conflict with our conclusion. We refer especially to *Coder* v. *Arts*, U. S. S. C., 53 L. Ed., 772, 782 wherein the court says: "To constitute a conveyance voidable under Section 67 e actual fraud must be shown." But in that case (and the same is true in other cases) the court is considering only that part of Section 67 e as is involved in the then pending controversy. Indeed in quoting Section 67 e "so far as it is necessary to consider it" the second paragraph relating to transfers void under State laws is entirely omitted. As Judge Newman remarks, In re Walden Bros. Clothing Co., 199 Fed. 318, referring to *Coder* v. *Arts*. "It leaves out of the question entirely consideration of the effect of a transfer void under the laws of the state."

It is not important that the stock was not in possession of the defendant at the time of demand, having been previously sold by him. As between the defendant and trustee the stock belonged to the latter and the sale of it by the defendant rendered him liable in trover without demand. Nor is it material that the stock was sold by the defendant before the appointment of the trustee. The trustee's title relates back to the beginning of bankruptcy proceedings. 3 R. C. L., page 231.

"A trustee in bankruptcy may sue in trover for a conversion of goods occurring either before or after bankruptcy." *Burns* v. *O'Gorman Co.*, 150 Fed., 226.

The evidence shows the value of stock not including fixtures to have been $851.95.

Judgment for plaintiff for $851.95 and interest from date of writ.

PETER NICHOLAS *vs.* JOHN J. FOLSOM.

Piscataquis. Opinion May 10, 1920.

Action at common law. Negligence. Admissions. Proximate cause.

This is an action at common law to recover damages for injuries sustained by the plaintiff while in the employ of defendant; the declaration contains the usual averment of due care on part of plaintiff at the time of the injury.

In *Nadeau* v. *Caribou Water, Light & Power Co.*, 118 Maine, 325, announced since the trial of this case at nisi prius, it was held that in an action of this kind, it was incumbent upon the plaintiff to prove, as he had alleged, that he was in the exercise of due care at the time of the injury.

The admission during the trial of the present case, that the defendant was at the time of the injury operating more than five workmen, and that he was not an assenting employer, did not relieve the plaintiff from the necessity of proving his own due care; the admission as to the number of workmen was immaterial, there being no allegation as to that fact; and, in the absence of an appropriate allegation by way of brief statement, it is assumed that the defendant is a non-assenting employer.

The presiding Justice, upon this admission, ruled that the negligence of the servant is not a defense; exceptions were not taken to this ruling; counsel for defendant disclaimed negligence as a defense; the issue of plaintiff's contributory negligence was not, therefore, raised at the trial.

The case was submitted to the jury upon the issues of defendant's negligence, and whether that negligence, if shown, was the proximate cause of the injury. Upon a careful consideration of the evidence the court cannot say that the jury were manifestly wrong in their conclusion.

The issue of proximate cause is one of fact, not of law, and was submitted to the jury, we must assume, under proper instructions. The jury found that the broken condition of the saw was the proximate cause of plaintiff's injury; it cannot be said that the finding is so manifestly wrong as to warrant the court in disturbing it.

On motion. This is an action at common law to recover damages for personal injuries sustained by plaintiff while in the employ of defendant in his saw mill operating a saw known as a bolter. Plea, the general issue. It was admitted that the defendant at the time of the injury was not an assenting employer within the purview of chapter 50, of the Revised Statutes, known as the Workman's Compensation Act, and that at the time of the injury he was employing

more than five workmen or operatives regularly. Verdict for plaintiff for $250.00. Defendant filed a general motion for a new trial. Motion overruled.

Case stated in the opinion.

Robert E. Hall, and Percy L. Aiken, for plaintiff.

C. W. & H. M. Hayes, for defendant.

SITTING: SPEAR, HANSON, MORRILL, WILSON, DEASY, JJ.

MORRILL, J. This is an action to recover damages for personal injuries received by plaintiff while in the employ of defendant, and is presented upon a motion by defendant for a new trial, in the usual form. The declaration, in a single count, states a cause of action at common law, and contains all allegations necessary to sustain such action, including an averment of due care on the part of the plaintiff; the defendant pleaded the general issue without a brief statement.

In *Nadeau* v. *Caribou Water, Light & Power Co.,* 118 Maine, 325, announced since this case was tried at nisi prius, it was held, page 331, (a) that 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 part; he need not allege the employer to be non-assenting; an assenting employer who desires to avail himself of his exemption from liability at common law must plead and prove that he is entitled to such exemption; or (b) in cases where the suit is against a large employer, the injured employee may omit the allegation of due care on his part, but in such case 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; (c) that the plaintiff must 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, i. e. regular employers of more than five workmen or operatives; that it is not inconsistent to join both allegations in separate counts in one declaration.

Upon the authority of this recent case, it was incumbent upon the plaintiff to prove, as he had alleged, that he was in the exercise of due care at the time of the injury. In the course of the trial it was admitted that the defendant was at the time of the injury "operating

more than five workmen, and that he was not an assenting employer." Obviously this admission did not relieve the plaintiff from the necessity of proving his own due care; the admission as to the number of workmen was immaterial, there being no allegation as to that fact; and, in the absence of an appropriate allegation by way of brief statement, it is assumed that the defendant is a non-assenting employer.

But when the above admission was made, the presiding Justice remarked: "I shall instruct the jury that in such an action as this, and under the admission made just now, the negligence of the servant is not a defense." No exception was taken to this ruling, the counsel for defendant remarking, "We are not undertaking to claim and we are not arguing negligence as a defense." The issue of plaintiff's contributory negligence was not, therefore, raised at the trial.

The issues submitted to the jury were the alleged negligence of defendant and whether that negligence, if shown, was the proximate cause of plaintiff's injury. We must assume that adequate and correct instructions were given to the jury; that the law of causal connection was fully explained to them; and we must consider the evidence entirely apart from any question of plaintiff's negligence. Upon a careful consideration of the evidence we cannot say that the jury were manifestly wrong in their conclusion. Whether the machine on which the plaintiff worked was inadequate, whether the saw in use was or was not reasonably suitable for use, whether the teeth were broken, were questions sharply controverted before the jury. They were questions peculiarly for the jury; witnesses for both sides testified positively; and there being evidence, which, if believed, would sustain the plaintiff's contention of defendant's negligence, we ought not to interpose our own judgment. The issue of proximate cause is also one of fact, not of law, and it is to be submitted to the jury under proper instructions, unless the court can say with judicial certainty that the injury is or is not the natural and probable consequence of the act of which complaint is made. *Bowden* v. *Derby*, 99 Maine, 208, 213; *Lake* v. *Milliken*, 62 Maine, 240; *Lane* v. *Atlantic Works*, 107 Mass., 104. Note to *Gilson* v. *Delaware etc. Canal Co.*, 65 Vt., 213, in 36 Am. St. Rep. 807, 851; 1 Sedgwick on Dam. 6 Ed., Secs. 55, 56. The jury has found that the broken condition of the saw was the proximate cause of plaintiff's injury; it cannot be said that the finding is so manifestly wrong as to warrant us in disturbing it.

Motion overruled.

In Re Knox County Electric Company.

Knox. Opinion May 10, 1920.

Powers of Public Utilities Commission. R. S., Chap. 56, Sec. 77. Constitutional right of the legislature to confer authority on the Commission. Public officers. Governmental powers. Distinction in municipal officers, as public officers, and as agents or servants of their respective towns.

Pursuant to the provisions of the private and special laws of 1889, chapter 409, the municipal officers of Rockport fixed and determined the route and location of the railroad of Camden and Rockport Street Railroad Company over the streets and ways in the town of Rockport, and determined the distance of the tracks from the sidewalks; the municipal officers granted said location with the following provision: "The condition on which said location is granted is, first, the iron bridge shall be put in repair, strengthened and kept in repair (the foot walks and abutments excepted) so long as said track crosses said bridge, at the expense of said street railroad company." The railroad company duly assented to the said location, constructed its railroad thereon, and has since made such repairs as have been made on the bridge, except as to foot walks and abutments.

On August 15, 1919, the Public Utilities Commission acting under the provisions of R. S., Chap. 56, Sec. 77, enacted in 1895, after due notice and hearing, determined "that said bridge is not safe for the uses to which it is being put, and that such bridge is not susceptible of any repairs, renewals or strengthening which will make it safe for such uses, and that the same may be rebuilt," and did therefore order that said bridge be rebuilt by Knox County Electric Company, and apportioned the expense of such rebuilding equally between the Knox County Electric Company and the town of Rockport.

Held:

That the proceedings of the municipal officers in fixing and determining the route and location of the railroad, and the acceptance by the company of the location so fixed and determined, did not constitute a contract for which the town may successfully claim immunity from legislative interference under the contract clause of the Constitution of the United States.

In proceeding under the Act of 1889 the municipal officers were acting as public officers exercising a governmental function, for the safety of the public.

The legislature has power to confer upon the Public Utilities Commission authority to provide for rebuilding the bridge upon terms other than those imposed by the municipal officers, and thus to change the terms upon which the location was granted, to the loss of the municipality.

On exceptions. The Public Utilities Commission, acting under the provisions of R. S., Chap. 56, Sec. 77, after a hearing in the matter of the safety of a highway bridge over Goose River, so-called, and known as "the iron bridge in Rockport," determined "that said bridge is not safe for the uses to which it is being put, and that such bridge is not susceptible of any repairs, renewals or strengthening which will make it safe for such uses, and that the same may be rebuilt," and ordered that said bridge be rebuilt; that the Knox County Electric Company rebuild said bridge, furnishing material and labor, and that the expense of such rebuilding be apportioned equally between the Knox County Electric Company and the town of Rockport. From such findings and determination the town of Rockport took exceptions. Exceptions overruled. Result to be certified by the clerk of this court to the clerk of the Commission.

Case stated in the opinion.

H. L. Withee, for town of Rockport.

A. S. Littlefield, for Knox County Electric Company.

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

MORRILL, J. This case is presented upon exceptions by the Inhabitants of the town of Rockport to certain rulings of the Public Utilities Commission upon matters of law.

By chapter 409 of the private and special laws of 1889, certain residents of Camden were constituted a corporation by the name of Camden and Rockport Street Railroad Company, and were authorized to construct, maintain and use a street railroad in that part of Camden which is now within the limits of the town of Rockport, upon and over such streets and ways therein as should from time to time be fixed and determined by the municipal officers of said town of Camden and assented to in writing by said corporation; section 1 of the act further provided that all tracks of said railroad should be laid at such distances from the sidewalks of said town, as the municipal officers thereof should in their order fixing the routes of said railroad, determine to be for public safety and convenience; and that the written assent of said corporation to any vote of the municipal officers of said town, prescribing from time to time the routes of said railroad, should be filed with the clerk of said town, and should be taken and deemed to be the location thereof.

Section 3 of the act provides: "Said corporation shall keep and maintain in repair such portions of the streets and ways as shall be occupied by the tracks of its railroad, and shall make all other repairs of said streets, roads and ways ,which in the opinion of the municipal officers of said town may be rendered necessary by the occupation of the same by said Railroad, and if not repaired upon reasonable notice, such repairs may be made by said town at the expense of said corporation."

Certain other sections of the act empower the municipal officers to make regulations as to rate of speed, removal of snow and ice, and mode of use of tracks, and relate to changes of grade of streets; but the foregoing abstracts from sections one and three define the extent of the authority of the town or the municipal officers over the railroad company, and the extent of the duty of the railroad company, as to repair and maintenance of streets and ways. Such authority and duty were imposed solely by the charter; the general street railroad law of the State was enacted in 1893, and the portion of Sec. 7 of Chap. 58, R. S., relating to the crossing of bridges over tide-waters, was enacted in 1901.

Upon petition for the location of said railroad, the municipal officers of Rockport, on February 11, 1892, fixed and determined the route and location over the streets and ways in the town of Rockport and determined the distance of the tracks from the sidewalks; the municipal officers granted said location with the following provision: "The condition on which said location is granted is, first, the iron bridge shall be put in repair, strengthened and kept in repair (the foot walks and abutments excepted) so long as said track crosses said bridge, at the expense of said street railroad company, and the Berlin Iron Bridge Co. is to be employed to strengthen said bridge."

Upon the same day the railroad company filed its written assent as follows: "The Camden & Rockport Street Railroad Company assents to the foregoing location. Rockport, February 11, 1892. H. L. Shepherd, Pres." In the same year the railroad was constructed across the bridge in question, the bridge having been strengthened by the company, and the railroad company has since made such repairs as have been made on the bridge, except as to foot walk and abutments. So far as the case shows no other action has been taken by the inhabitants of the town of Rockport, or the municipal officers of that town in relation to the location over, or use

of the bridge by the railroad company. Knox County Electric Company has succeeded to the rights and liabilities of Camden & Rockport Street Railroad Company.

On August 15, 1919, the Public Utilities Commission, acting under the provisions of R. S., Chap. 56, Sec. 77, and having given notice as required by that section, instituted a public inquiry as to the safety of the bridge in question, and after hearing determined "that said bridge is not safe for the uses to which it is being put, and that such bridge is not susceptible of any repairs, renewals or strengthening which will make it safe for such uses, and that the same may be rebuilt," and did therefore order that said bridge be rebuilt; that the rebuilding of said bridge, including the furnishing of material and labor, be done by said Knox County Electric Company; and apportioned the expense of such rebuilding equally between the Knox County Electric Company and the Town of Rockport, "the latter being authorized to receive such assistance as is provided by law."

The inhabitants of the town of Rockport contended and now contend:

"1. That the grant of location by the town, with the conditions attached, assented to by the railway and acted upon by it for the succeeding twenty-seven years, constituted a valid, continuing contract between the parties, placing upon the railway the burden of repairs and strengthening of the bridge, and that this contract was not affected or modified by subsequent legislation.

2. That the Public Utilities Commission has no authority to modify, by order or decree, the contract between the town and the railway, nor to order any part of the expense of repairing, strengthening or rebuilding the bridge to be borne by the town."

Sec. 77 of Chap. 56 of the Revised Statutes was enacted in 1895, being Sec. 3 of Chap. 72, of the Public Laws of that year; the duties then imposed upon the Board of Railroad Commissioners now devolve upon the Public Utilities Commission.

That the legislature had the constitutional right to confer upon the Commission authority to issue orders and decrees of the tenor issued in these proceedings is not open to question, and that the legislature did by the section in question confer such authority was settled in *Bangor Ry. & El. Co.* v. *Orono*, 109 Maine, 292, 296.

The contract relied upon by the inhabitants of the town of Rockport is based upon the charter of the Camden & Rockport Street

Railroad Company. Assuming as claimed in behalf of the town that the proceedings of the municipal officers in fixing and determining the route and location of the railroad in the streets, and the acceptance by the company of the location so fixed and determined, were binding upon the railroad company, and its successors in title, and constituted a legal obligation on the part of the railroad company to repair and keep in repair the bridge, the fundamental question still remains whether those proceedings constitute a contract for which the town may successfully claim immunity from legislative interference under the contract clause of the constitution of the United States.

The contention of the town of Rockport cannot be sustained. In proceeding under the Act of 1889 the municipal officers were acting as public officers exercising a governmental function, for the safety of the public.

It is settled law that the powers conferred and the duties imposed upon towns in the location, discontinuance, and building of ways and in the repair of highways and bridges are governmental in their nature, a part of the political government of the State; and that the town officials charged with the execution of those powers and the performance of those duties, are public officers, and not the servants or agents of their respective towns. *Small* v. *Danville*, 51 Maine, 359; *Goddard* v. *Harpswell*, 84 Maine, 499; *Woodcock* v. *Calais*, 66 Maine, 234.

An examination of the charter of Camden & Rockport Street Railroad Company discloses that the municipal officers were authorized (a) to fix the route of the railroad and to determine at what distance from the sidewalks the tracks should be laid, for public safety and convenience; (b) to make regulations as to the rate of speed, removal of snow and ice from the streets by the company, and the mode of use of the tracks, as public safety and convenience might require; (c) to require the railroad company to keep and maintain in repair the portions of the streets occupied by the tracks, and to make all other repairs to the streets, roads and ways which in their opinion may be rendered necessary by the occupation of the same by the railroad; and (d) to require the construction and maintenance by the railroad in such form and manner, and with such rails, and upon such grade as they shall direct.

Here are duties to be performed in the interest of public convenience and safety. These are all governmental powers, in respect to

which the town does not stand in any contract relation with the state. *New Orleans* v. *New Orleans Water Wks. Co.*, 142 U. S., 79, 91. Law. Ed. Bk. 35, Pages 943, 947. 15 Rose's Notes, 898. *Covington* v. *Kentucky*, 173 U. S., 231, 241. Law Ed. Bk. 43, Pages, 679, 683.

The Public Utilities Commission has determined that the bridge is not safe for the uses to which it is being put, that it is not susceptible of any repairs, renewals or strengthening which will make it safe for such uses; the situation discloses the supreme necessity for the exercise of the police power. Assuming that under the condition upon which the location was granted and accepted, the railroad company was obliged to replace the bridge, the question arises whether the legislature, in the exercise of its general legislative power, may not confer upon the Public Utilities Commission authority to provide for rebuilding the bridge upon terms other than those imposed by the municipal officers. We have no doubt that the legislature had that power. *Worcester* v. *Worcester Cons. Street Railroad Co.*, 196 U. S., 539. Law. Ed. Bk. 49, Page 591. "In granting locations for street railways, boards of selectmen and boards of aldermen are public officers and not agents of their respective towns and cities. The State exerts its sovereign power through them as its instruments. The legislature has the power, so far as concerns these public officers and the municipalities by whom they were elected, to change or abrogate the terms of such locations. Although phrased in the form of a contract and securing valuable financial obligations to the cities and towns, the power of the legislature to modify to their loss such locations has been settled after great consideration and vigorous protest from the interested municipalities." *Arlington Board of Survey* v. *Bay State Street Ry.*, 224 Mass., 463, 469. The principle seems to be no longer debatable. *Pawhuska* v. *Pawhuska Oil & Gas Co.*, U. S. Sup. Ct., June 9, 1919. 250 U. S., 394; Law. Ed. Bk. 63, Page 1054.

Exceptions overruled.
Result to be certified by the Clerk of this Court to the Clerk of the Commission.

LOTTA B. CARVER et als., In Equity *vs.* CHARLES H. WRIGHT et al.

Waldo. Opinion May 10, 1920.

Construction of a will. Life estate. Vested estate in remainder. A devise over in fee to a definite class of persons. Those who constitute the class at the death of testator take, in absence of a different intention.

A testator devised "unto my son, A., all my real estate and personal property (of whatever description and wherever found), during his natural life, and at his death said property to be equally divided between my children." Four children, including the life tenant, survived the testator; one daughter died before the decease of the testator, leaving three children.

It is held, that the four children living at the death of the testator took vested interests in his estate, subject to the life estate of the son.

There is no legal inconsistency in a life tenant holding a vested interest in a remainder to take effect at his death.

Nor does the fact that the life tenant will share in the remainder show that the testator intended that the remainder men should be ascertained at the termination of the life tenancy rather than at the death of the testator.

The ruling of the sitting Justice, as to the vesting of the estate in remainder, was correct; the decree below did not, however, follow the ruling but adjudged, that the life tenant took only an estate for life under the will, and that the remainder vested in the other children of the testator who were living at his decease.

The decree below must be modified accordingly.

On appeal. A bill in equity seeking the construction of the will of William C. Wright. The cause was heard upon bill and answer, the only testimony being the affidavit of Walter E. Crockett, which was offered by the defendant and admitted, all formalities being waived. The presiding Justice ordered, adjudged and decreed, that the bill be sustained and that the true construction of the will was, that Charles H. Wright took a life estate only, under said will, in the real estate described in the bill and that the title to said real estate, subject to the life estate of said Charles H. Wright, became vested in the other children of said William C. Wright who were living at the time of the decease of said William C. Wright.

From this decree the surviving defendant, Hannah Frances Crockett, took an appeal. Appeal sustained. Decree in accordance with the opinion.

Case stated in the opinion.

Dunton & Morse, for plaintiffs.

J. H. Montgomery, for defendants.

SITTING: SPEAR, HANSON, MORRILL, WILSON, DEASY, JJ.

MORRILL, J. William C. Wright, late of Northport, died on the twenty fourth day of March, 1893, leaving a will the material portion of which, for the purposes of this case, is as follows: "I give and bequeath unto my son, Charles H. Wright, all my real estate and personal property (of whatever description or wherever found), during his natural life, and at his death said property to be equally divided between my children."

There were born to the testator five children, namely, Charles H. Wright, Hannah F. Crockett, Niobe A. Orcutt, George W. Wright and Drusilla S. Wade.

Drusilla died before the decease of the testator, leaving three children who are plaintiffs in this bill, and who are by name as follows; William A. Wade, Bertha C. Hemlon and Helen J. Fisher.

Niobe died after the decease of the testator, leaving one child, Lotta B. Carver, who is also a plaintiff in this bill.

George died after the decease of the testator, leaving no child and as his only heirs at law and next of kin the aforesaid brother Charles, his sister Hannah, and the living children of Drusilla and the living child of Niobe.

The plaintiffs ask the court to determine (1) whether the children of Drusilla S. Wade take the share of the testator's estate which they would have taken, if no will had been made; and (2) to determine and decree that the title to said real estate, subject to the life estate of said Charles H. Wright, or such part thereof as is subject to his life estate, became vested in the children of said William C. Wright, who were living at the time of his decease, and that said children and their heirs may convey said real estate, subject to the life estate of said Charles H. Wright, before his decease.

The sitting Justice ruled (1) that the remainder over, subject to the life estate of Charles, was a bequest and devise to a class; that a

bequest or devise to the children of the testator means prima facie to those of that class in existence at the death of the testator, provided there be any at all to answer that description; (2) that a devise or bequest to children gives a vested interest, unless a contrary intent is shown by the will; (3) that the real property at the death of the testator became vested in those of his children, who were living at his decease, subject to the life estate of Charles; and (4) that the vested interest of the children of the testator who died subsequent to the death of the testator descends under the rule of R. S., Chap. 80, Sec. 1, Paragraph IV.

Charles H. Wright died unmarried, after the hearing; the sitting Justice entered a decree on the eighth day of October, 1919, as of the date of hearing August 23, 1919, "that the true construction of the will of William C. Wright is, that Charles H. Wright takes a life estate only, under said will, in the real estate described in said bill and that the title to said real estate, subject to the life estate of said Charles H. Wright, became vested in the *other* children of said William C. Wright who were living at the time of the decease of said William C. Wright, namely: Hannah F. Crockett, Niobe A. Orcutt and George W. Wright." From this decree, Hannah F. Crockett, the only child of the testator who survived the life tenant, appeals.

As to the first inquiry submitted, the burden to show that the omission of the children of Drusilla S. Wade was intentional, is upon those who oppose this claim. *Ramsdill* v. *Wentworth*, 106 Mass., 320. Upon this issue the defendant introduced the testimony of Walter E. Crockett, the Executor of the will, from which, as well as from the will itself, we are satisfied that such omission was intentional, and that the plaintiffs, William A. Wade, Bertha C. Hemlon and Helen J. Fisher, do not take the share of the testator's estate which they would have taken if no will had been made.

The principal contention of the plaintiffs involves the decision of the single question whether the children of the testator among whom his property is to be equally divided at the death of his son, Charles, are to be ascertained at the death of the testator or at the death of the life tenant. It is clear that if the estate in remainder vested at the death of the testator, the distribution only being postponed, that estate was held, subject to the life estate of Charles, in four shares, one for each of the then living children of the testator including the life tenant, Charles H. Wright; there are no words of exclusion

applicable to him; the estate is not to be divided among "my children" other than the said Charles. There is no legal inconsistency in the life tenant taking also a share in the remainder, if vested at the testator's death. *Cushman* v. *Arnold*, 185 Mass., 165. In this particular the decree does not follow the third ruling of the sitting Justice.

On the other hand, if the participants are to be determined at the death of the life tenant, the appellant is entitled to the whole estate.

The plaintiffs urge that the estate in remainder vested at the death of the testator; they rely upon well settled principles of law in the interpretation of wills; that no remainder will be held contingent, when it can be held vested consistent with the intention of the testator; *Woodman* v. *Woodman*, 89 Maine, 128; *Danforth* v. *Reed*, 109 Maine, 93; that so strong is the presumption that testators intend the vesting of estates that it is an elementary rule of construction that estates, legal or equitable, given by will, should always be regarded as vesting, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event, and so clear must be his expression, that in cases of doubt or ambiguity as to the time when it was intended the estate should vest, the remainder will be regarded as vested rather than contingent; *Blaine* v. *Dow*, 111 Maine, 480, 485; that a devise or bequest to children by name gives a vested interest unless a contrary intent is shown by the will; *Morse* v. *Ballou*, 109 Maine, 264; *Bryant* v. *Plummer*, 111 Maine, 511; and so where the children are not named; *Gibbens* v. *Gibbens*, 140 Mass., 102; that where the limitations are to the direct descendants of the testator, it is a circumstance which warrants the inference that vested, rather than contingent remainders were intended to be created. *Gray* v. *Whittemore*, 192 Mass., 367, 378.

Rules for the construction of wills are to be observed as aids in determining the intention of the testator; they are not aimed to defeat intention. It has frequently been said that the first great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided that it is consistent with the rules of law. "It is not that there are no longer any rules of construction to be observed; it is rather that these rules are to be followed so far as they aid in determining the meaning of the testator, but when that meaning is ascertained it is to be adopted." *Crapo* v. *Price*, 190 Mass., 317, 320.

The will in this case is brief; but we think it indicates quite clearly the testator's intention. First, there are absolutely no words of survivorship attached to the gift to the testator's children; "children then living," "or the survivors of them," or "children surviving him," and other similar phrases are wanting. Nor is any word of futurity annexed to the gift; it cannot be said that there are no words importing a gift other than a direction to divide at a future time, and that therefore the gift implied from the direction to divide speaks as of the time of the division, and not as of the day of the testator's death. The words of gift apply to the remainder as well as to the life estate. *Blaine* v. *Dow*, 111 Maine, 480, 484. The idea is more clearly expressed by repeating the words "I give" after the word "death":—"and at his death I give said property to be equally divided between my children." The ruling was correct; the children living at the death of the testator took vested interests in the estate, subject to the life estate of Charles. *Gibbens* v. *Gibbens*, 140 Mass., 102; *Dole* v. *Keyes*, 143 Mass., 237; *Dodd* v. *Winship*, 144 Mass., 464. It is the case of a gift of a life estate to a son of the testator, with a devise over in fee to a definite class of persons; those who constitute the class at the death of the testator take, unless the will shows a different intention. *Fairbanks' Appeal*, 104 Maine, 333; *Peck* v. *Carlton*, 154 Mass., 231, 233. Nor does the fact that, by this construction, the life tenant will share in the remainder indicate an intention that the remaindermen should be ascertained at the termination of the life tenancy rather than at the death of the testator. *Cushman* v. *Arnold*, supra; *Smith* v. *Smith*, 186 Mass., 138; *Gray* v. *Whittemore*, 192 Mass., 367, 381. So held in the case of a bequest or devise of a remainder, after a life estate, to the heirs at law of the testator. *Abbott* v. *Bradstreet*, 3 Allen, 587; *Minot* v. *Tappen*, 122 Mass., 535, 537; *Gardner* v. *Skinner*, 195 Mass., 164, 166.

It is therefore the opinion of the court that at the death of the testator his four children then living took vested remainders in his estate, and that the decree below must be modified accordingly.

Appeal sustained.
Decree in accordance with this opinion.

SUPHREM LABRECQUE *vs.* THE CATHOLIC ORDER OF FORESTERS.

Kennebec. Opinion June 2, 1920.

Benefit certificate. Non-payment of dues. Suspension. Reinstatement.

Action by widow and beneficiary of John Labrecque deceased, upon a benefit certificate issued by the defendant corporation. Verdict for the plaintiff. Case brought forward on motion and exceptions.

The defendant contends that Labrecque at the time of his death was not in good standing in the order, having been suspended, and that therefore the certificate was not in force.

The corporation's by-laws provided for suspension of members "upon conviction" (violation of by-laws) or ipso facto for non-payment of monthly dues.

No sufficient evidence appears of suspension upon conviction. All dues accruing prior to June, 1915 were paid. Whether dues for June were paid was an issue of fact in the case. This issue the jury found and were justified in finding in favor of the plaintiff.

The July dues were twice tendered and twice refused on the ground that Labrecque had been suspended for non-payment of June dues. From July to November Labrecque paid the defendant nothing and in November he died.

Held:

That the burden of proving suspension is upon the defendant. Held that the jury were justified in finding that notwithstanding his failure to make monthly payments from August to November Labrecque remained entitled to the rights of a member. Failure to make payments for four months following the corporation's wrongful repudiation of his membership resulted in his suspension only if he thus intended to acquiesce in the status of a suspended member, or by his conduct led the defendant to believe that he so acquisced.

Held also:

That the first requested instructions, having been comprehended in the charge, was properly refused. The court is not required to repeat instructions once clearly given.

That the second requested instruction was also properly refused. It in substance says that Labrecque lost his rights under his certificate through failure to apply for reinstatement. But reinstatement which is conditioned upon the passing of a medical examination and satisfying other conditions is an inappropriate and inadequate remedy for a member who without suspension is denied the status and privileges of a member.

Held:

That while an aggrieved member must first exhaust his remedies under the rules of his order before applying to the courts for relief, this applies only where under the rules of the order a reasonably adequate remedy is provided.

An action of assumpsit on an insurance policy or certificate, entered and tried in the Superior Court for the County of Kennebec, at the term thereof beginning on the second Tuesday of November, 1918.

A verdict for $1062 was returned for plaintiff. The case was taken to the Law Court on motion to set aside the verdict, and also on exceptions by defendant to refusal of the presiding Justice to give certain requested instructions. Motion overruled. Exceptions overruled.

Case stated in the opinion.

Fred W. Clair, for plaintiff.

Edward A. Lacroix, for defendant.

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

DEASY, J. The plaintiff is the widow of John Labrecque, deceased, and the beneficiary named in a benefit certificate dated June 26th, 1904 issued to him by the defendant corporation.

She has brought suit upon the certificate and obtained a verdict. The case comes to this court on the defendant's motion in the usual form and exceptions to rulings and refusals to rule of the presiding Justice.

MOTION.

By the certificate the defendant bound itself to pay to the beneficiary upon due proof of the death of the insured, the sum of one thousand dollars. But the certificate is made subject to the express condition that the insured at his death should be a member of the defendant order in good standing and should have "complied with all the laws, rules, regulations and provisions of the constitution and by-laws" of such order.

"The issuance of a certificate to a member is evidence of his good standing when it is issued, and such good standing will be presumed to continue unless there is proof that it no longer exists. In view of this presumption the burden of proving the loss of good standing rests

upon the Society." *High Court* v. *Zak*, (Ill.), 26 N. E., 593; Bacon on Benefit Societies Sec. 414. *Bange* v. *Supreme Council*, (Mo.), 161 S. W., 657.

The by-laws require payment of dues and assessments on the first day of each month. They further provide for suspension of members "upon conviction" or ipso facto for non-payment of dues or assessments.

It does not appear that Labrecque was ever formally suspended upon conviction. He was indeed informed by letter that he had been suspended, and one Créte, recording secretary deposes that he also was notified that Labrecque had been suspended.

But under the by-laws a formal suspension requires a conviction. A conviction pre-supposes a record. *High Court* v. *Zak*, (Ill.), 26 N. E., 594. No record is produced or proved, nor is its absence accounted for. The suspension referred to in the letter to Labrecque and in Créte's deposition may have been a suspension resulting ipso facto from alleged non-payment of dues. The evidence is equally consistent with either theory.

If formal action of the society were required to deprive the insured of his "good standing" we should say that such formal action had not been proved.

But according to the by-laws a suspension results ipso facto from non-payment of monthly dues, and the case shows that for four months prior to his death which occurred Nov. 29th, 1915 the insured had paid no dues. This default if no sufficient excuse is shown resulted in suspension. *Coombs* v. *Insurance Co.*, 65 Maine, 382; *Gifford* v. *The Me. Ben. Asso.*, 105 Maine, 17.

The plaintiff contends however that a sufficient excuse has been shown. She says that all dues up to and including June were paid; that the July dues were twice tendered and twice refused and that such refusal leading Labrecque to believe that further tenders would be likewise rejected, justified him in omitting to make payments after July.

The plaintiff's position is supported by reason and authority. If a member of a beneficiary society insured under a certificate like that in the pending case, and not shown to be suspended, tenders his monthly dues and the tender is refused on the ground of his alleged suspension, he does not necessarily forfeit his rights by omitting to pay further monthly dues. *Wagner* v. *Supreme Lodge*, 128 Mich., 660,

87 N. W., 905. *Supreme Lodge* v. *Davis,* 26 Colo., 252, 58 Pac., 595. *Sullivan* v. *Ind. Ben. Asso.,* 26 N. Y. S., 186. *Wuerfler* v. *Grand Grove,* (Wis.), 92 N. W., 433. *Ins. Co.* v. *Smith,* 44 Ohio St., 159, 5 N. E., 417.

Of course if he by ceasing to make payments intends to accept and acquiesce in the status of a suspended member or if his conduct is such as to lead the society or its officers to believe that he acquiesces in such status, his beneficiary cannot be heard to say that he remained a member in good standing until his death. *Bange* v. *Supreme Council,* (Mo.), 161 S. W., 652.

The jury were justified in finding and evidently did find as facts:—

That Labrecque had not been formally suspended "upon conviction" of failure to pay his June dues or of any other default;

That all dues were paid up to and including June 1915;

That the July dues were seasonably tendered and were refused, and that the insured in omitting payments between July and November did not actually acquiesce in, nor lead the society to believe that he acquiesced in the status of a suspended member.

The motion must be overruled.

EXCEPTIONS.

The first requested instruction that a suspended member "must exhaust all the remedies given him by the rules of the Society before appealing to courts of law for relief" was in different language comprehended in the charge. The court is not required to repeat instructions once clearly given. *Young* v. *Ins. Co.,* 80 Maine, 250.

The second requested instruction is "if the insured did not avail himself of every or any opportunity to become reinstated in the membership of the Society as provided by its rules, then he lost his rights under his policy."

The request was properly refused. Reinstatement was not the remedy that Labrecque asked and was not the remedy to which, if the plaintiff's testimony is to be relied upon, he was entitled. Reinstatement is the appropriate remedy for a member who has been suspended. But the plaintiff contends that her husband was not suspended. And it is true as she says that there is no competent evidence of suspension upon conviction and true that there is evidence tending to show that all dues were paid to and including June, so that he had not become ipso facto suspended.

Reinstatement which is conditioned upon proof of unimpaired health and other conditions is an inappropriate and inadequate remedy for a member who without suspension is denied the status and privileges of a member.

The third and last exception is to the instruction which in substance was that if the suspension were irregular it was void and "did not affect the rights of the plaintiff in this case."

The defendant relies upon several cases cited in its brief including *Jeane* v. *Grand Lodge,* 86 Maine, 434 wherein the court says: "If the courts of law should undertake to review the regularity of the proceedings in all sorts of secret or private societies or associations the burden would become onerous."

It is indeed an established principle that courts will not review the regularity of proceedings of societies in determining the standing of members unless the aggrieved member has first exhausted his remedy under the rules of the order,—but this necessarily applies only "when a member of such society has a remedy under the rules." *Jeane* v. *Grand Lodge,* 86 Maine, 436.

The same is either directly or inferentially held by many authorities including the following:

Karcher v. *Sup. Lodge,* 137 Mass., 368; *Chamberlain* v. *Lincoln,* 129 Mass., 70; *High Court* v. *Zak,* (Ill.), 26 N. E., 593.

In the pending case however, while the by-laws exhibited to this court make abundant provision for reinstating suspended members, no remedy appears for one who without suspension finds his membership repudiated and his privileges denied.

It is generally true that when the constitution or by-laws provide a remedy for a member's grievance, that remedy must be invoked and exhausted before resort is had to legal process, but when as in this case so far as appears, the society offers no appropriate remedy, the courts are open to the aggrieved member or his beneficiary.

Motion overruled.
Exceptions overruled.
Judgment on the verdict.

WILLIAM F. MASON *vs.* MAINE CENTRAL RAILROAD COMPANY.

Lincoln. Opinion June 3, 1920.

Common carrier may limit its responsibility. Reasonable and suitable restrictions. Knowledge and assent of consignor thereto necessary.

This is an action on the case to recover damages for failure to deliver certain Christmas trees in time for the plaintiff's Christmas business in the Boston market. The case comes before the court on report on an agreed statement of facts.

Held:

1. It is well settled that a common carrier may limit his responsibility for property entrusted to him by a notice containing reasonable and suitable restrictions if brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by him.
2. The defendant does not claim that the plaintiff knew the import of the memorandum and stamp referred to as an amendment to the bill of lading, or that his attention had been called to the meaning of the same, or the location and provisions of any document containing the tariff or classifications filed as alleged. The agreed statement is silent as to these matters, and being so we think the plaintiff is not legally chargeable with knowledge of the terms of such amendment, nor should it be held that he ought to have known, and that he is therefore precluded from recovering. The words "Section 3 is amended, as per classification governing" printed, apparently with a rubber stamp, upon a slip of adhesive paper affixed to the face of the bill of lading, cannot be held to charge the plaintiff with notice of a limitation of the time within which an action for the recovery of damages for the breach of the contract of carriage may be brought; especially since section three, as printed on the back of the bill of lading, does not mention any such limitation.
3. The agreed facts present a Federal question under the following clause and the amendment therein quoted, "that the official classification 43, effective Jany. 1, 1916, and supplement No. 8, to said official classification July 1, 1916, were in full force and effect and properly filed in accordance with the United States law and the rulings of the Interstate Commerce Commission." As to defendant's contention thereunder, we are of the opinion that the rights of the plaintiff are not cut off by the Interstate Commerce Act of 1887, and the Carmack amendment of the Hepburn Act of 1906.
4. Freight rates are controlled by the schedules and tariffs on file with and approved by the Commission, but provisions relating to the limitations of actions are controlled by special contracts made between the parties and subject to the approval of the Commission. The fact that the Commission has given the carrier the right to make a given contract does not authorize its enforcement unless and until the contract is in fact made.

No special contract was made here, and therefore the plaintiff is not bound by the so called amendment filed by the defendant with the Commission.

On report. An action on the case to recover damages for failure to deliver Christmas trees in time for plaintiff's Christmas business in Boston. Plea, general issue and brief statement. By agreement the damages were to be $300 if plaintiff's case was sustained. The case was reported to the Law Court on an agreed statement of facts. Judgment for the plaintiff for $300.

Case stated in the opinion.

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

HANSON, J. This is an action on the case to recover damages for failure to deliver certain Christmas trees in time for the plaintiff's Christmas business in the Boston market. The case comes before the court on report on an agreed statement of facts.

"It is admitted that all the facts and averments contained in the plaintiff's declaration are true. By agreement the damages are liquidated in the sum of three hundred dollars. The goods were shipped under a written contract of carriage known as a bill of lading, that the date of the writ is February 11, 1919; that the official classification No. 43, effective January 1, 1916, and supplement No. 8, to said official classification effective July 1, 1916, were in full force and effect and properly filed in accordance with the United States law and the rulings of the Interstate Commerce Commission, and also in accordance with the laws of the State of Maine and the rulings of the Maine Public Utilities Commission on the date of the shipment, and are the same as referred to on the face of the bill of lading, as shown by Plaintiff's Exhibit No. 1. That the amendment referred to of the bill of lading, Plaintiff's Exhibit No. 1, is as follows: Supplement No. 8, to Official Classification No. 43, page 9, Amendment to Section 3,—Section 3 entitled Bill of Lading Conditions: 'Except where the loss, damage, or injury complained of is due to the delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claim must be made in writing of the originating or delivering carrier within six months after delivery of the property (or, in case of export traffic,

within nine months after delivery at port of export), or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.' "

That the bill of lading—Plaintiff's Exhibit No. 1 contains on its face, just above line of destination and shipper's name, the following: "Received, subject to the classifications and tariffs in effect on the date of issue of this shipping order," that the same form of bill of lading was used by said defendant company in interstate and intrastate commerce shipments; that the suit was commenced after two years and one day after delivery of the property had been made.

The sole issue to be argued before the Law Court is—"Can the plaintiff maintain this action where the same was not brought within two years and one day from the date of delivery of the trees in Boston?"

The declaration is in the usual form and alleges carelessness and negligence on the part of the defendant company, and concludes as follows: "Whereby and by reason of all which carelessness, negligence and delay on the part of the defendant, its agents and servants as heretofore alleged, the plaintiff was put to great damage, etc."

The defendant contends that the action cannot be maintained, and counsel in their brief urge "that the law is well settled and clearly stated in this state, upholding such limited liability contracts," and cite *Young* v. *R. R. Co.*, 113 Maine at page 116, *Fisher* v. *R. R. Co.*, 99 Maine at page 341, *Little* v. *B. & M. R. R.*, 66 Maine, at page 240, and *Hix* v. *Steamship Company*, 107 Maine, 359, as sustaining their claim. If counsel had omitted the word "such," we could agree with the statement of the law without further comment. We are unable to adopt the defendant's application of the law as stated in its citations. In *Hix* v. *Steamship Company*, supra, upon which defendant places most reliance, the court say: "No principle of law is now more firmly established than that a common carrier in the absence of any statute to the contrary, may by special contract limit its liability, at least against all risks but its own negligence or misconduct." The case there under consideration, as well as all cases cited therein, had in view a bill of lading wherein was printed the terms of

the contract of affreightment, and in such a manner that there could be no escape for a plaintiff from the rule that the law presumes, in the absence of fraud or imposition, that the plaintiff did read the contract, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. But this case from the agreed facts does not fall within the cases there reviewed. The terms involved were not printed on the face or on the back of the bill of lading, but a notice by a stamp impression does appear on the face of the bill of lading that "section 3 is amended, as per classification governing." The section referred to is printed on the back of the bill of lading. In all other respects the document is the standard uniform bill of lading. In *Gerry* v. *Express Co.*, 100 Maine, 519, cited with approval in *Hix* v. *Steamship Company*, supra, the court say: "It is well settled that a common carrier may limit his responsibility for property entrusted to him by a notice containing reasonable and suitable restrictions if brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by him," and if it appears "that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered." *Fillebrown* v. *Grand Trunk Ry.*, 55 Maine, 468.

The defendant does not claim that the plaintiff knew the import of the memorandum and stamp referred to, or that his attention had been called to the meaning of the same, or the location and provisions of any document containing the tariff or classifications filed as alleged. The agreed statement is silent as to these matters, and being so we think the plaintiff is not legally chargeable with knowledge of the terms of such amendment, nor should it be held that he ought to have known, and that he is therefore precluded from recovering. The words "Section 3 is amended, as per classification governing" printed, apparently with a rubber stamp, upon a slip of adhesive paper affixed to the face of the bill of lading, cannot be held to charge the plaintiff with notice of a limitation of the time within which an action for the recovery of damages for the breach of the contract of carriage may be brought; especially since section 3, as printed on the back of the bill of lading, does not mention any such limitation.

The agreed facts present a Federal question under the following clause and the amendment therein quoted, "that the official classification 43, effective Jany. 1, 1916, and supplement No. 8, to said official

classification July 1, 1916, were in full force and effect and properly filed in accordance with the United States law and the rulings of the Interstate Commerce Commission." As to defendant's contention, thereunder, we are of the opinion that the rights of the plaintiff are not cut off by the Interstate Commerce Act of 1887, and the Carmack amendment of the Hepburn Act of 1906. The particular provision in that act as amended which applies to the limitation of actions is as follows:

"Provided further that it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years." U. S. Comp. St. 1916, Sec. 8604a.

1. It is of course now firmly established that by the Carmack amendment the subject matter of the liability of railroads under bills of lading issued for interstate freight is placed under Federal regulation so as to supersede the local law and policy of the several States, whether evidenced by judicial decision, by statute or by constitution. On this subject the Federal law is supreme. *Adams Express Co.* v. *Croninger*, 226 U. S., 491; *Boston & Maine R. R.* v. *Hooker*, 233 U. S., 97.

2. One of the chief features of the Carmack amendment was the requirement that the carrier must issue to the shipper a bill of lading, in form approved by the Interstate Commerce Commission. And this bill of lading constitutes the contract between the parties and regulates and defines their respective rights and liabilities.

3. The right of a carrier to reasonably limit, by express agreement with the shipper, its liability, so far merely as the time within which notice of loss should be given or suit brought, has always been recognized. *Express Co.* v. *Caldwell*, 21 Wall., 264.

4. This right of special agreement was neither created nor destroyed by the Carmack amendment, but was recognized as valid within certain specified limits, viz: Notice of claims not to be fixed by contract at less than ninety days, filing of claims to be fixed by contract at not less than four months, and institution of suits at not less than two years. But this limit must be by stipulation.

5. Acting within statutory authority the bill of lading in this case was prepared in standard form, and was approved by the Interstate Commerce Commission, by order of June 27, 1908. Section 3 of the

conditions printed on the back, provided among other things, as follows: "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery. Unless claims are so made the carrier shall not be liable."

Under the Federal statutes this condition was a reasonable one, and when assented to by the shipper it became a valid stipulation or contract between the parties, and the shipper was bound by it. As it was fully printed and clearly expressed on the back of the bill, and as the shipper signed and accepted the bill of lading with this printed condition upon it, his assent is presumed and the special contract was completed.

If the shipper in this case had not given notice or filed his claim within the time specified in his contract, he would undoubtedly be precluded from recovery.

6. But the defense offered here is that the action was not brought within two years from the date of the delivery of the trees to the consignee.

That is a good defense provided the parties have made a stipulation to that effect. *M. K. & T. Ry.* v. *Harriman*, 227 U. S., 657. But that stipulation has not been made. The only approach to it is a slip pasted on the face of the bill of lading, containing these words; "Section 3 is amended as per classification governing." It gives no hint as to what that amendment might be. Section 3 relates to various subjects; the first clause relates to the carrier's duty to forward by any particular train or route; the second, to the method of computing the value in case of loss; the third, to time of making and filing claims, which we have already considered; and the fourth, to the benefit of insurance on the property.

There is not one word pertaining to the time within which action may be brought, and the natural assumption in this State would therefore be six years. The reader of the pasted slip, which simply informs him that section 3 is amended as per classification governing, would have the right to assume that one of the four clauses above specified was amended. He might perhaps be put on his guard were that the case. Here, however, there was no amendment of any one of the clauses, but an entirely new subject introduced by way of addition. It was not germane as an amendment. It now proves to

be a new condition, specifying the time within which suit must be brought or otherwise the action would be barred, and there is not the slightest suggestion of such a limitation either on the bill of lading itself or on the slip. It served as a trap, and by simply signing the bill of lading with this slip on it we cannot hold that the shipper had assented to the unseen and unknown addition and had entered into a special contract with the carrier. That is, in our opinion, taking an unfair advantage of the shipper who presents his goods for transportation and receives this receipt therefor. He is presumed to be bound by the stipulations recited on it, which he is at liberty to read, but he should not be bound by an independent stipulation of which he has no knowledge.

True that new condition has been filed with the Interstate Commerce Commission and the State Public Utilities Commission, but that simply means that those two boards have approved of the form of the contract for limitation of time of bringing suit, but does not do away with the necessity of the special contract being in fact made by the shipper and the carrier. If it is made, it has their approval. But their advance approval does not obviate the necessity of making the contract itself. That must be done before the shipper is bound, and that was not done in this case.

In every case that has come to our attention where the court has held such a stipulation valid and binding, it has been printed in full on the bill of lading, thus:

The four months notice clause in *Stevens* v. *Railway Co.*, 178 S. W., 810; *Sims* v. *Mo. Pac. Ry. Co.*, 163 S. W., 275; *Albrecht* v. *Penn. Ry., N. J.*, law., 92 At., 381.

The five days notice in Uniform Live Stock Contract, *Ch. & O. Ry. Co.* v. *McLaughlin*, 242 U. S., 142; *Erie Ry.* v. *Stone*, 244 U. S., 332; *B. & O. R. R.* v. *Leach*, 249 U. S., 217.

The thirty-six hour notice in case of fruit, in *St. L. &c. R. R.* v. *Starbird*, 243 U. S., 592.

The ten days clause in case of live stock, *So. Pac.* v. *Stewart*, 248 U. S., 446.

Limitation of time in bringing suit in *M. K. & T. Ry.* v. *Harriman*, 227 U. S., 657; *St. L. & S. F. Ry.* v. *Pickens*, (Okla.), 151 Pac., 1055; *Texas & P. Ry.* v. *Langbehu*, 158 S. W., 244.

The provisions as to giving notice, filing claims and bringing suits are to be distinguished from those relating to rates dependent upon valuation, which are a part of the schedules of rates themselves, are published and posted in accordance with the rules and regulations, and which bind the shipper, although he may not read them. *B. & M. R. R.* v. *Hooker*, 233 U. S., supra. No special contract is needed for that. It is a part of the ordinary contract of carriage, and the shipper is bound thereby.

In short. Freight rates are controlled by the schedules and tariffs on file with and approved by the Commission, but provisions relating to the limitations of actions are controlled by special contracts made between the parties and subject to the approval of the Commission. The fact that the Commission has given the carrier the right to make a given contract does not authorize its enforcement unless and until the contract is in fact made.

No special contract was made here, and therefore the plaintiff is not bound by the so-called amendment filed by the defendant with the Commission.

In accordance with the stipulation the entry will be,

Judgment for the plaintiff for $300.

MORRILL, J., Concurs in result.

JOHN T. PRATT *vs.* GEORGE A. CLOUTIER.

Androscoggin. Opinion June 3, 1920.

Master and servant. Principal and agent. Parent not liable for tort of child unless the act complained of was authorized by the parent or was in the course of some authorized employment. Mere relation of parent and child not sufficient.

This was an action on the case brought to recover damages sustained by plaintiff as a result of certain injuries to his automobile alleged to have been caused by the negligence of the defendant. The writ was dated January 28, 1919, and was entered at the March term, 1919, of the Superior Court for the County of Androscoggin. The cause was heard before a jury at the May term, and a verdict returned in favor of the defendant. The plaintiff filed exceptions, on which the case is now before this court for its determination.

On November 16, 1918, the plaintiff, with three other persons of full age, and two children in his car, was driving in a northerly direction on the road from Greene to Leeds, in Androscoggin County. His car was a light Ford touring car.

The defendant's car, a high-power Paige touring car, going in the opposite direction at the time of the collision, was driven by his son, Davila Cloutier, accompanied by a young lady friend, only.

Held:

1. The charge of the presiding Justice placed the question squarely before the jury, whether the relation of master and servant existed between the defendant and his son, and was wholly in accord with the law as stated in *Farnham* v. *Clifford*, 118 Maine, 145, which is decisive of this case. And it may be said that the question was one for the jury exclusively. To hold otherwise, and announce a rule such as is contended for here, would be to transcend our authority, and a departure from established law.
2. A father who has provided an automobile for the pleasure of the family is not liable under the rule of master and servant, or principal and agent, for the negligent operation of the car by a member of the family competent to drive, who is permitted to take it for his exclusive pleasure or purpose.
3. The mere relation of parent and child imposes upon the parent no liability for the torts of the child committed without his knowledge or authority, although the parent when he authorizes his child to act as his agent or servant is liable for the torts committed in the course of such employment. Such liability does not grow out of the relation of parent and child, but out of the relation of master and servant or principal and agent, and must be based on rules of negligence.

4. We cannot adopt the rule for which the plaintiff contends. In such cases we feel bound to follow what we believe to be the sounder rule based upon the settled law of master and servant and principal and agent, a rule which has had universal acceptance, and the adherence of our court since its formation.

On exceptions. An action on the case to recover damages sustained by plaintiff resulting from a collision between his automobile and one operated by defendant's son in an alleged careless and negligent manner. Plea, the general issue. The cause was tried to a jury in the Superior Court for the County of Androscoggin at the May term, 1919, and a verdict was returned for defendant. The plaintiff took exceptions to the refusal of the presiding Justice to give certain requested instructions. Exceptions overruled.

Case stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Walter M. Sanborn, for defendant.

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

HANSON, J. This is an action on the case brought to recover damages sustained by plaintiff as a result of certain injuries to his automobile alleged to have been caused by the negligence of defendant. The writ was dated January 28, 1919, and was entered at the March term, 1919, of the Superior Court for the County of Androscoggin. The cause was heard before a jury at the May term, and a verdict returned in favor of the defendant. The plaintiff filed exceptions, on which the case is now before this court for its determination.

On November 16, 1918, the plaintiff, with three other persons of full age, and two children in his car, was driving in a northerly direction on the road from Greene to Leeds, in Androscoggin County. His car was a light Ford touring car.

The defendant's car, a high-power Paige touring car, going in the opposite direction at the time of the collision, was driven by his son, Davila Cloutier, accompanied by a young lady friend, only.

The plaintiff claimed that the defendant's automobile was driven at an excessive rate of speed, on the wrong side of the road, and carelessly and negligently ran into and upon the plaintiff's car, causing the damage sued for.

At the trial the following admission was made by the defendant's attorney, to wit:—

"It is admitted that the car colliding with the Pratt car belonged to or was owned by the defendant and was in the possession of Davila Cloutier and driven at that time by the permission of the defendant, and further that the young man, Davila Cloutier, is the son of the defendant and a member of his family and was authorized by the defendant to drive this car at any time for his personal or family pleasure, and at the time of the accident the car was being driven by Davila Cloutier for his personal pleasure."

The plaintiff requested the following instruction, which the presiding Justice declined to give:

"If the father, George A. Cloutier, bought the automobile for the general pleasure of his family and the individual members thereof and authorized his son, Davila Cloutier, to take the car and use it any time whenever he wanted to for such pleasure and the son was so using the car at the time of the collision, then the defendant is liable." The plaintiff excepted, and also took exception to the charge as a whole, and particularly to the failure of the presiding Justice to instruct the jury that if the father, George A. Cloutier, the defendant, bought the automobile in question for the pleasure and recreation of his family, of which his son, Davila Cloutier, was a member, and authorized and permitted the said Davila Cloutier to use said automobile for the general pleasure of the family and for his own individual pleasure, then the furnishing of said automobile under such conditions would be a part of the business of the father, George A. Cloutier, the defendant.

1. As to the first exception, it suffices to say that the instruction given in the charge of the Justice presiding instead of that requested was taken verbatim from the decision of this court in *Farnham* v. *Clifford*, 118 Maine, 145, which in no manner differs in principle from the case at bar, and to which we adhere. The plaintiff's requested instruction was properly refused, and he therefore takes nothing by this exception.

2. Exception No. 2 raises practically the same question that counsel raised in *Farnham* v. *Clifford*, supra, urging that the presiding Justice failed to give to the jury proper instruction as to the meaning of the word "business" as applied to this case. We quote in full that

part of the charge of the presiding Justice to which exceptions were taken, and express our entire concurrence in the law as stated therein. The presiding Justice instructed the jury as follows:—

"The plaintiff says that as a matter of law whatever negligence, if you find any, was committed in the conduct of the defendant's car was committed by the defendant, because whatever a person does by his servant he does by himself in the eye of the law.

"He says that in this case you must find the defendant guilty just the same as if he had been there driving that car because, as he asserts and claims, the young man who drove the car was, in the eyes of the law, the servant of the defendant. That is the law, if he was a servant of the defendant at that time, and if he was not the servant of the defendant, the defendant is not liable. I shall give you the law as it has very recently been stated in this court.

" 'Liability cannot be cast upon the defendant, (that is, George A. Cloutier 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 for his own purposes. 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.' "

"I do not know as I need to illustrate what would or would not be the business of the defendant. You can see that if you have a man in your employ and you send him out to do a job he is your servant in that respect. He is serving you, rendering you service, and if he does the job unsuccessfully you are responsible for it. If he does it well, you, perhaps, will get your pay for it.

"In his case, as to this point, the only question you have to consider is whether the young man when he was out with this car that evening was in any way upon the business of his father, or was he entirely and absolutely on his own business and on his own pleasure, using the father's car by the permission of his father and not in any way on business for the father. That is the only question as to this branch of the case."

The charge placed the question squarely before the jury, whether the relation of master and servant existed between the defendant and his son, and was wholly in accord with the law as stated in *Farnham* v. *Clifford*, supra, which is decisive of this case. And it may be said that the question was one for the jury exclusively. To hold other-

wise, and announce a rule such as is contended for here, would be to transcend our authority, and a departure from established law.

The plaintiff cites and relies upon *Marshall* v. *Taylor*, 168 Mo. App. page 240,—Southwestern Rep. 153, page 527,—

"Where an automobile was provided by a father for the use of members of his family, and an adult son was chauffeur for them, and was permitted to use the car for his own pleasure, the son was an agent of his father, though using the car for his own pleasure." *Stowe* v. *Morris*, 147 Ky., page 386, 144 S. W., 52,—

"Where the defendant bought an automobile for the comfort and pleasure of his family, his son being authorized to use it at any time for such purpose, the son, in taking it out for the pleasure of himself and sister, with whom were some friends, was a servant or agent of the defendant, not performing an independent service of his own, but the business of defendant, making defendant liable for his negligence in driving it." *Hays* v. *Hogan*, Mo. App., 1914, 165 S. W., 1125,—

"Where an adult son, living with his father as a member of the family, used the father's automobile, purchased for general family use, with the father's express or implied consent, on a trip purely for his own pleasure and in no way connected with any business of the father, the relation of master and servant existed, and the father was liable for the death of plaitiff's husband caused by the negligence of the son in so operating the car." Plaintiff cites also *Johnson* v. *Smith*, Minnesota Supreme Court, July 25, 1919. As to *Hays* v. *Hogan*, Supreme Court of Missouri, Dec. 22, 1917, 200 S. W., 286, supra, it will be found upon examination that the final decision of that case was against the plaintiff's position, although in the first instance holding as plaintiff contended. The opinion reported in 200 S. W. 286, holds "that a father is not liable for the torts of his minor or adult children simply because of the relationship,—" and "that a father is not liable for the negligence of a minor son in driving an automobile purchased for the use of the family, solely in furtherance of the child's own business or pleasure, and permission of the father is immaterial." It will be found, also, that the conclusion therein negatives the value of *Marshall* v. *Taylor* and *Stowe* v. *Morris*, supra, as authorities in the instant case. Reference is made to *Blair* v. *Broadwater*, infra, where, as in *Hays* v. *Hogan*, will be found an exhaustive review of the cases.

In *Johnson* v. *Smith,* supra, presented to us by agreement of counsel after this case was argued, and from which we quote at length because of its clear statement of position, the plaintiff's intestate died from an injury received when an automobile in which she was riding overturned through the alleged negligence of the driver thereof, the defendant Harold Smith, the minor son of the defendant Swan Smith. Father and son were sued. The father kept the automobile for business and pleasure. Harold, a minor, was usually the driver, and at the time of the accident was using the automobile with the implied consent at least of his father, in conveying plaintiff's intestate, a guest at the home of the defendants. The accident causing the death of plaintiff's intestate was due to the careless driving by Harold Smith. The separate motion of defendants for a new trial being denied, each took an appeal. The court say: "The main contention is that the court erred in refusing to submit the defendant Swan Smith's liability to the jury under appropriate instructions. The charge given was that if the negligence on the part of Harold proximately caused the death of plaintiff's intestate, plaintiff was entitled to a verdict against both defendants. Swan Smith testified that he bought and kept the car partly for business use and partly for pleasure of the members of the family, including Harold, and that Harold was privileged to take and use it whenever he desired. On this occasion Swan Smith was at home when plaintiff's intestate was entertained as a guest and apparently knew and acquiesced in her entertainment by Harold. There the court say: "This court stands committed to the rule that where the head of the family makes it his business to provide recreation and pleasure for the family and its several members, and to that end furnishes an automobile, he is responsible for its negligent use by any one of the family having his permission to drive it;" and the opinion cites *Ploets* v. *Holt,* 124 Minn., 169, 144 N. W. 745; *Kayser* v. *Van Nest,* 125 Minn. 277; *Jansen* v. *Fischer,* 134 Minn., 366; *Uphoff* v. *McCormick,* 139 Minn., 392; *Johnson* v. *Evans,* 170 N. W., 220; *Dennison* v. *McNorton,* 228 Fed., 401; *Crittenden* v. *Murphy,* 173 Pac., 595; *Hutchins* v. *Haffner,* 167 Pac. 966; *Lemke* v. *Ady,* 159 N. W., 1011; *Stowe* v. *Morris,* 147 Kentucky, 386; *Farnham* v. *Clifford,* 116 Maine 299; *Lewis* v. *Steele,* 52 Montana, 300; *Boes* v. *Howell,* 173 Pac. 966; *McNeal* v. *McKain,* 33 Okla., 449; *Davis* v. *Littlefield,* 97 S. C. 171; *King* v. *Smythe,* 140 Tenn., 217; *Birch* v. *Abercrombie,* 74 Wash., 496; *Hiroux* v, *Baum,* 137 Wis., 197.

The foregoing citations include the majority of the decisions favoring the plaintiff's view. Other cases may be found by reference to the interesting report of *Johnson* v. *Evans*, supra, in Law Notes, of January, 1920, and in Minnesota Law Review, January, 1920, pages 73 and 74.

The court cites the following cases supporting the defendant's contention that the father who has provided an automobile for the pleasure of the family is not liable under the rule of master and servant, or principal and agent, for the negligent operation of the car by a member of the family, competent to drive, who is permitted to take it for his exclusive pleasure or purpose, viz:—*Parker* v. *Wilson*, 179 Ala. 361; *Watkins* v. *Clark*, 103 Kansas, 629; *Wood* v. *Clements*, 113 Miss., 720; *Hays* v. *Hogan*, 273 Mo., 1; *Doran* v. *Thomsen*, 76 N. J. L., 754; 71 Atl., 296; 19 L. R. A., (N. S.), 335; *Van Blaircom* v. *Dodgson*, 220 N. Y., 111; *McFarlane* v. *Winters*, 47 Utah, 598; *Blair* v. *Broadwater*, 93 S. E., 632; *Winn* v. *Haliday*, 109 Miss., 691. . . . . The learned Justice in arriving at his conclusion, among other things says: "The reason for fixing responsibility under the master and servant or principal and agent rule seems clear enough when the family automobile is used for the pleasure or convenience of other members of the owner's family than the driver, but appears to the writer somewhat doubtful when the driver, it may be an adult son or daughter, uses the car for his or her own purpose exclusively." In *Legenbauer* v. *Exposita*, (N. Y., 1919), 176 N. Y. S., 42, where several girls asked a son for a pleasure ride in his father's automobile, and upon being referred to the father, asked him if his son could give them a 'joy ride,' received the father's consent. The plaintiff was injured through the son's negligent driving, and brought action against the father. Held, "that the defendant was not liable since he had no interest in the pleasure ride, the son under such circumstances not being the father's agent." The mere relation of parent and child imposes upon the parent no liability for the torts of the child committed without his knowledge or authority, and although the parent when he authorizes his child to act as his agent or servant is liable for the torts committed in the course of such employment. Such liability does not grow out of the relation of parent and child, but out of the relation of master and servant or principal and agent, and must be based on rules of negligence, 29 Cyc., 1665.

The instant case is not one where a minor son was driving a car for the pleasure of "himself, his sister, and a guest of the family" as in *McNeal* v. *McKain*, supra, or where a car bought both for business and pleasure was being driven by a minor son, in which were all the members of the family except the father and mother, as in *Denison* v. *McNorton*, supra, where, as in the former case, the father was held liable. The distinction between such cases and the instant case is found in the fact that in the former, other members of the family were in the car at the time of the accident, and the jury might well find that the driver in such circumstances was engaged in his father's business. Few, indeed, of the many cases cited will be found to go so far as to hold a father liable when a son, alone in the father's car, seeking only his own pleasure and entertainment, and while so engaged injures a third party. The reason for finding the father liable in the cases so holding is usually founded on the fact that one other member of the family, at least, accompanied the driver, thus raising the questions which in each case have gone to the jury, was the driver engaged in the business of the father or owner at the time of the injury complained of? Was he the servant or agent of his father at the time of the accident? Both questions must be tested by the rule that, "in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from service, and pursuing his own ends exclusively, there can be no question of the master's freedom from responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master." 1 Sherman and Redfield, Negligence, 5th Ed., 147. In *Doran* v. *Thomsen*, New Jersey Court of Errors and Appeals, 76 N. J. Law, 754, 71 Atl., 296, 19 L. R. A., (N. S.), 335, where a daughter nineteen years of age was running an automobile for her own pleasure in driving her personal friends negligently injured a person in the highway, the court charged the jury that:— "If she took that machine out at that time in pursuance of a general authority of her father to take it whenever she pleased for the pleasure of the family, and for her own pleasure, for the purpose for which the master bought it, for the purpose for which her father owned it, for the purpose for which he expected her to operate it, then she was the servant of the father. Under

those circumstances, that was the business for which the father bought the machine." The instruction was held to be error, because it based the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child, ignoring an essential element in the creation of that status as to third persons, that such use must be in furtherance of, and not apart from, the master's service and control.

The instruction sought in the instant case was substantially the same as given in *Doran* v. *Thomsen*, supra, and the opinion in that case is in accord with our own view as heretofore expressed. In *Blair* v. *Broadwater*, Virginia Supreme Court of Appeals, Sept. 20, 1917, 93 S. E., 632, the court cites *Doran* v. *Thomsen*, supra, with approval, as substantially the same in its facts, and identical in principle, and commends the rule stated in *Smith* v. *Jordan*, 211 Mass., 269, 97 N. E., 761, in relation to the responsibilities of a parent for the torts of his minor child, which in no particular differs when the torts of an adult child are involved, in this class of cases. The Massachusetts court say: "The principles of law which govern this case are plain. A father is not liable for the torts of his minor son, simply because of paternity. There must exist an authority from the father to the son to do the tortious act, or a subsequent ratification and adoption of it, before responsibility attaches to the parent. . . . . The wrongful act must be performed by the son in pursuance of the business, incident, or undertaking authorized by the father before the latter can be liable. . . . . If the act is not done by the son in furtherance of the father's business, but in performance of some independent design of his own, the father is not liable. The controlling rules of law are the same, whether the business in question concerns the operation of an automobile or any other matter." *Smith* v. *Jordan*, 211 Mass., 269. To the same effect is *Schroer* v. *Brooks*, Missouri Supreme Court, February 16, 1918, 200 S. W., 1068, in which is cited *Guthrie* v. *Holmes*, 198 S. W., 854, and *Hays* v. *Hogan*, supra.

In *Johnson* v. *Smith*, supra, the learned court cited *Farnham* v. *Clifford*, 116 Maine, 299, as supporting the rule to which the Minnesota court is committed, but it will be found upon examination that *Farnham* v. *Clifford*, supra, is clearly to be distinguished, in facts and in principle. In that case the defendant, after the accident and with full knowledge of the facts, admitted his liability, and at the trial did

not deny the admission. The opinion upon this point concludes: "The defendant having admitted his liability, and when a witness in his own behalf, not having explained or modified his admission, it is useless to discuss the rights of the parties upon the theory that facts existed which the defendant by his admission shows did not exist."

Examination of the cases discloses a divergence of opinion not soon to be reconciled, a difference of view arising from occurrences due to the advent of the automobile. The situation is new, but while the use of the automobile is general and steadily increasing, displacing locally nearly all other means of transportation, the change has been accomplished in such order that the public generally cannot be said to have suffered therefrom. In any event we cannot adopt the rule for which the plaintiff contends. In such cases we feel bound to follow what we believe to be the sounder rule based upon the settled law of master and servant and principal and agent, a rule which has had universal acceptance, and the adherence of our court since its formation.

Before motor cars as now known were invented, a case involving the same principle arose in this State. In *Maddox* v. *Brown*, 71 Maine, 432, where the defendant's son, a minor of the age of seventeen years, took his father's horse and carriage, which he had been allowed to use without restriction, and drove to a store for the purpose of depositing money, which as treasurer of a Sabbath school he had received the day before. Entering the store to make the deposit, he left his horse unfastened and unattended, and the horse so left started, and running away, the defendant's carriage collided with the plaintiff's team and occasioned an injury, to recover compensation for which the action was brought. The plaintiff claimed to recover, "not on the ground of parental and filial relation, but because the son in the management of the defendant's team was his servant, and engaged in his business, and that the defendant was liable for his negligence; and this court held that the father was not liable, "that the relation of master and servant must exist at the time of the injury," and "that it cannot be pretended, that under the circumstances stated, the boy was engaged in the business of his father or acting for him. The jury could not have drawn the inference that he was so engaged or was so acting. It would have been unauthorized from the evidence."

Such conclusion in the instant case would be equally unauthorized.

The entry will be,

Exceptions overruled.

ARIZONA COMMERCIAL MINING COMPANY, In Equity,

vs.

IRON CAP COPPER COMPANY,

(Two Cases)

Cumberland. Opinion June 7, 1920.

Jurisdiction of court in Maine. No suit can be maintained in one State to directly determine the title to real property in another State. No action of trespass or action for injury to real property in another State can be maintained in this State. Actions where the gravamen of the action is trespass quare clausum are also local. Actions of trover and actions for money had and received are transitory and judgment is conclusive as to amount of debt due from one Maine corporation to another. Disseizin. "Full faith and credit."

Penalty imposed by the law of a State will not be enforced in another. Statutory remedy will not be given extraterritorial effect unless act contemplates it.

Two cases between the same parties and having same title.

The plaintiff and defendant both Maine corporations operate mines on contiguous claims in Arizona.

Ore Case.

The plaintiff claims that the defendant has entered upon the vein or lode owned by the plaintiff and severed, taken and sold some two hundred and fifty thousand tons of ore. The only question now before this court is that of jurisdiction. The defendant by its demurrer and plea says that the cases are cognizable exclusively by the courts of Arizona, and that the courts of Maine have no jurisdiction.

In this case it is held that—no suit can be maintained in one State to directly determine the title to real property in another State. No action of trespass or other action for injury to real property in another State can be maintained here.

Actions are also local where the gravamen of the action is trespass quare clausum, notwithstanding that there may be also an allegation of conversion. But the pending suit does not directly involve title to real estate.

It disclaims damages for injury to land. Its gravamen is money had and received by the defendant for chattels converted and sold by it. This suit is brought on the equity side of the court under R. S., Chap. 82, Sec. 6, Paragraph XI. It is

however in effect an action for money had and received. So far as jurisdiction is concerned it presents the same problem that would be presented by an action of trover. Actions of trover (or actions legal or equitable to recover where converted chattels have been sold) are transitory, even when to prove title to converted chattels it is necessary incidentally to prove title to real estate in another jurisdiction.

Our judgment will be conclusive as to the existence and amount of a debt due from one Maine corporation to another. Any incidental finding as to title of real estate in Arizona is not such a judgment as under the constitution is entitled to "full faith and credit."

Held also:

In reference to another contention of the defendant that while the disseizin of the plaintiff would defeat the action, it does not appear that the plaintiff had been disseized at or before the alleged conversion.

Water Case.

This action is brought under the provisions of an Arizona statute to recover for expense incurred in draining the defendants mine, the drainage of which was in common with that of the plaintiff.

Held:

That while a penalty imposed by the law of a State will not be enforced in another, a statutory remedy is not necessarily confined in its operation to the courts of the State creating it.

But a remedy provided by statute will not be given extra territorial effect unless such effect is within the contemplation of the act.

The remedy given by the statute invoked in the pending case is obviously a remedy designed to be enforced by courts of competent jurisdiction with the State of Arizona.

On report. This case embraces two distinct equity proceedings wherein the Arizona Commercial Mining Company is complainant in each bill, and the Iron Cap Copper Company is respondent in each bill. Both plaintiff and defendant corporations were organized under the laws of Maine, and each conducts mining operations in the State of Arizona, and the business of each, aside from its actual mining operations, is carried on in the City of Boston, Massachusetts.

In one of the two bills, referred to as the "ore suit" the plaintiff seeks to recover for ores mined and extracted by the defendant from "veins, lodes or ledges" in the State of Arizona to which plaintiff claims title, and to enjoin the defendant from further extracting ores from said property. In the second bill, referred to as the "water

suit," the plaintiff seeks to charge the defendant with liability under a statute of the State of Arizona, for part of the expense incurred by the plaintiff in pumping and draining water which it claimed flowed into the plaintiff's mine from the mine of the defendant. To each bill defendant filed a plea in abatement, and a demurrer. A hearing was had upon the bill, plea in abatement, and demurrer, in each case at the same time, and, the Justice presiding being of the opinion that questions of law involved were of sufficient importance to justify the same, by agreement of the parties, the cause was reported to the Law Court with the following stipulation in each case:—If the demurrer is sustained, or if the plea is adjudged sufficient, the bill is to be dismissed; otherwise the respondent to have twenty days after rescript in which to answer over to the merits.

ORE CASE: Bill sustained. Demurrer and plea overruled. Defendant to have twenty days after rescript filed to answer.

WATER CASE:—Plea adjudged sufficient. Bill dismissed.

Cases stated in the opinion.

Cook, Hutchinson & Pierce, and Dunbar, Nutter & McClennen, for complainant.

Woodman & Whitehouse, and Tyler, Tucker, Eames & Wright, for respondent.

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

DEASY, J. To differentiate the above entitled suits, the parties being the same in each, we refer to the first as the "Ore Case" and the other as the "Water Case." The parties are Maine corporations operating mines on contiguous claims in Arizona.

Equity jurisdiction is invoked under R. S., Chap. 82, Sec. 6, Paragraph XI. Also section 8.

Substantially identical suits were first brought in Massachusetts, there reported to the full bench and after hearing ordered dismissed. *Arizona Mining Co.* v. *Iron Cap Copper Co.,* 233 Mass., 522; 124 N. E., 281.

It is contended by the defendant that the Massachusetts judgments are conclusive, and that the questions now presented to this court are res judicata. We are of opinion that this contention is not

sound. The Massachusetts court indeed discusses the "difficulties which can be avoided without apparent hardship to the plaintiff if it brings these suits in the courts of Arizona," but its reason for declining jurisdiction is thus stated: "The parties plaintiff and defendant are both non-residents. The courts of equity in this state are not open to them as matter of right but only as matter of comity." If the parties had been Massachusetts corporations the court of that Commonwealth might have looked further into the merits before refusing to take jurisdiction.

The cases are reported on bills, pleas and demurrers. No evidence is presented. In each case it is stipulated that if the demurrer is sustained, or the plea adjudged sufficient the bill is to be dismissed. Otherwise the time for filing answer is to be extended. For present purposes we must accept the allegations of the pleas as true and those of the bills as true except as contradicted by the pleas.

ORE CASE

The plaintiff alleges that the defendant has taken, converted and sold some 250,000 tons of its (the plaintiff's) ore and brings suit for the money had and received by the defendant for the same.

The bill in equity after specifying certain mining properties owned by the plaintiff and certain other and adjacent properties and workings in possession of the defendant, including the "Iron Cap" and "Williams" shafts, says:

"Continuously during the six years last past, the respondent has taken by way of said Iron Cap shaft and said Williams shaft and other nearby shafts on the property occupied by the respondent, and underground workings connected with each shaft, and converted to its own use certain ores and has sold and has had and received to the complainant's use money for all said ores, and all of which were at all times the property of the complainant and originally came from those portions of the veins, lodes and ledges aforesaid, which had their top or apex upon the mining claim aforesaid, owned by the complainant, and wholly within the complainant's surface lines aforesaid and not elsewhere, and said portions of said veins, lodes or ledges aforesaid from which such ores came were at the time in the actual possession of the complainant."

The defendant by its plea replies:

"That this defendant has not at any time during the period complained of in the plaintiff's bill taken or removed any ore as to which the plaintiff claims to have had title or ownership, except ores extracted from real estate wholly without this State, to wit, veins, lodes and ledges in the State of Arizona as to which the defendant in good faith has at all times openly and to the knowledge of the plaintiff claimed and now claims title and ownership under the laws applicable thereto . . . . and that the plaintiff has had no access to the workings to those portions of the veins, lodes and ledges underneath the surface of the defendant's lands and claims as aforesaid, from which the defendant has extracted, taken and removed ores, but said workings and all access and means of access thereto have been in fact in the exclusive occupation, possession and control of the defendant, and during all of the period complained of in the plaintiff's bill, and prior thereto, the defendant has openly and with the knowledge of the plaintiff continuously worked upon and extracted ores from such veins, lodes and ledges, under claim of title thereto made in good faith."

In Maine the proprietor of lands owns all of the soil, rock, ore and other natural products lying directly beneath the surface. His boundaries are planes produced by projecting his boundary lines vertically downward and upward. But a different rule prevails in the case of mining claims derived from the public domain. The boundaries of such claims are governed by the so-called "Apex Law," which gives to the locator:

"The exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes or ledges may so far depart from the perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." U. S. R. S., Sec. 2322, U. S. Compiled Statutes, Sec. 4618.

The defendant contends that for four reasons the bill should be dismissed—

(1) That mortgagee should have been made a party.

It is alleged in the bill that "the only property which the respondent has in the State of Arizona is covered by a mortgage" for its full value. One of the grounds of demurrer is the non-joinder of the mortgagee.

If it appeared that an existing mortgage covered the lode from which the ore in question was severed the point might be well taken. But the bill which discloses that the defendant's property is mortgaged also declares that the lode is not the property of the defendant.

The plea does not refer to the mortgage. As a whole the bill must be taken as true, not so its every individual allegation forcibly separated from the context.

It does not appear from the bill that the ore involved in this suit is subject to mortgage.

(2) That defendant had disseized the plaintiff.

The defendant contends that the plea is sufficient and that therefore according to the stipulation the bill must be dismissed because it appears that the defendant at the time it took the ore was a disseizor. Quoting from the defendant's brief, "Even the owner of land who has been disseized cannot maintain trespass . . . . nor assumpsit for money had and received."

Many authorities support the contention that this action would be defeated if it appeared that, at the time of the alleged conversion, the defendant had disseized the plaintiff. *Abbott* v. *Abbott*, 51 Maine, 575; *Mansur* v. *Blake*, 62 Maine, 38; *Allen* v. *Thayer*, 17 Mass., 302; *Bigelow* v. *Jones*, 10 Pick., 164; *Downs* v. *Finnegan*, 58 Minn., 112, 50 N. W., 981; *Parks* v. *Morris*, 63 W. Va., 51, 59 S. E., 753.

The plea in the instant case does not expressly or by implication allege the plaintiff's disseizin. The bill alleges actual possession and right of possession in the plaintiff. The plea carefully avoids contradicting the plaintiff's claim of possession. It indeed alleges exclusive possession of the workings and means of access to the vein, lode or ledge from which the ore was taken, and it alleges that the defendant extracted the ore openly with the plaintiff's knowledge and under a bona fide claim of title. But this falls short of claiming disseizin.

An indispensable feature of disseizin is ouster. Disseizin is accomplished by excluding, evicting, ousting the owner from possession. Disseizin is that kind of possession which, continued for twenty years, ripens into title. *Worcester* v. *Lord*, 56 Maine, 268; *Roberts* v. *Niles*, 95 Maine, 245; *Hume* v. *Packing Co.*, (Or.), 92 Pac., 1071; *Towle* v. *Ayer*, 8 N. H., 59; *Unger* v. *Mooney*, 63 Cal., 590; 3 Blackst. Com. 169; 14 Cyc., 519.

The defendant does not allege ouster. An allegation of exclusive possession might be equivalent to ouster, but there is no allegation of exclusive possession by the defendant of the vein, lode or ledge.

A man may have exclusive possession of the only road leading to an orchard, and may have taken apples openly and under a claim of title—but unless he ousts the owner from possession of the orchard, he is not a disseizor. If by reason of the plaintiff's disseizin the present action cannot be maintained here, neither trover nor trespass quare clausam can be maintained here or anywhere. If the defendant's contention prevails the only remedy of the plaintiff is an action of ejectment to recover possession of property of which, according to the pleadings, it now has possession.

(3) That title to Arizona real estate is involved.

(a) No suit can be maintained in one State to directly determine the title to real property in another State. Citation of authorities is unnecessary to support this elementary proposition.

(b) No action of trespass or other action for injury to real property in another State can be maintained here. In a few jurisdictions the contrary is held. *Little* v. *Railway Co.*, (Minn.), 33 L. R. A., 423. But the great weight of authority is to the effect that a suit to recover damages for injury to land is local. *Northern Co.* v. *Mich. Co.*, 15 How., 233; *Allin* v. *Lumber Co.*, 150 Mass., 560; *Niles* v. *Howe*, 57 Vt., 388; *A. T. Co.* v. *Middleton*, 80 N. Y., 410; *Dodge* v. *Colby*, (N. Y.), 15 N. E., 703; *Hill* v. *Nelson*, (N. J.), 57 At., 411; *M'Gonigle* v. *Atchinson*, (Kan.), 7 Pac., 552; *Peyton* v. *Desmond*, 129 Fed., 4.

(c) Actions are also local wherein the gravamen of the action is trespass quare clausam, notwithstanding there may be also an allegation of conversion. *A. T. Co.* v. *Middleton*, 80 N. Y., 408; *Ellenwood* v. *Marietta Chair Co.*, 158 U. S., 105; 39 L. Ed., 913; *Ophir Mining Co.* v. *Sup. Ct.*, 147 Cal., 467, 82 Pac., 70; *Lindsley* v. *Union Mining Co.*, 26 Wash., 301, 66 Pac., 382.

But the pending suit does not directly involve title to real estate. It disclaims damages for injury to land. Its gravamen is the recovery of money had and received by defendant for chattels converted and sold. So far as jurisdiction is concerned it presents the same problem that would be presented by an action of trover. It differs widely from the cases cited in paragraphs (b) and (c). Two especially of the cases above cited are, with confidence relied on by the defendant, but even those cases are only seemingly in point—*Ophir Mining Co.*

v. *Superior Court*, supra. This was a petition for a writ of prohibition to restrain the Superior Court from proceeding further in a suit alleged to involve title to a mining property in Nevada. In determining the action to be local and therefore wrongly brought in California, the court says:

"So long as the complaint contains allegations of threatened future injuries to the realty and prays an injunction against future trespasses, the case is on a par with those cases in which a part of the damages claimed was for injury to the freehold." (82 Pac., 74).

In the pending case there is no "threatened future injury to realty" and no "injunction against future trespasses" is prayed for.

Lindsley v. *Union Mining Co.*, supra. The syllabus is as follows: "The fact that the necessary parties are before a court of equity does not give it jurisdiction in proceedings to enjoin trespass and waste in a mine located in a foreign jurisdiction, where there is no further ground for equitable interference."

The court in declining to take jurisdiction says: "The complaint involves in its essence the possession of the mining lode. The possession is in itself the foundation of the controversy." In the instant case the possession of a mining lode is by no means the foundation of the controversy.

The cases cited in brief and referred to above in this section of the opinion were held local, but for reasons which do not apply in the pending case.

The following authorities are more nearly applicable:

Stone v. *United States*, 167 U. S., 178, 42 L. Ed., 127.

In this case the United States brought its action against Stone in the District Court for the District of Washington to recover the value of timber cut by him in Idaho. The title to the timber was disputed and depended upon title to land in Idaho. "The defendant introduced evidence to show that certain individuals had acquired the lands under the laws of the United States and were in the exercise of their rights when cutting timber from them." (page 132). The action was held transitory. "The gravamen of the action," says the court, "was the conversion of the timber . . . . and a judgment was asked not for the trespass, but for the value of the personal property so converted by the defendant." This case is almost precisely parallel with the case at bar.

In deciding the Stone case the Federal Supreme Court cites *Schulenberg* v. *Harriman*, 21 Wall., 44, wherein the court says (page 64):

"Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property."

Ophir Mining Co. v. *Superior Court*, 82 Pac., 70.

This action was held local and improperly brought in California. A writ of prohibition was issued by the Supreme Court of California staying further proceedings by the Superior Court in a suit involving a Nevada mine. But the relief asked for in the suit thus stayed was an injunction against future trespasses upon the realty. It was this ground upon which the court based its decision. The decision is therefore not in point, but in its opinion the court says:

"As land can be injured only where it is situated, damages for such injuries can only be recovered where it is situated; but since timber or ores, when severed from the land by the act of a trespasser, remain the personal property of the owner, and are capable of being converted by any person anywhere, an action to recover only the value of the ore or timber after severance is transitory, and may be maintained wherever the trespasser can be served with summons."

The following authorities also lend support to the contention that the pending action is transitory. These are not precisely in point because it does not appear that in them the question of title was distinctly raised: *Whidden* v. *Seelye*, 40 Maine, 247; *Hodges* v. *Hunter*, (Fla.) 54 So., 811; *M'Gonigle* v. *Atchinson*, (Kan.), 7 Pac., 550; *Peyton* v. *Desmond*, 129 Fed., 1; *Greeley* v. *Stilson*, 27 Mich., 154; *West* v. *McClure*, (Miss.), 37 So., 752.

A review of the above authorities leads to the conclusion that actions of trover (or for money had and received where converted chattels have been sold) are transitory even when to prove title to converted chattels it is necessary incidentally to prove title to real estate in another jurisdiction.

This court perceives no reason why it should not follow what seems to be the trend of the only authorities that have passed on the question that we are considering.

It may involve a finding, not indeed as to who owns a mining lode in Arizona, but as to who did own such lode when ore, the proceeds of which are subject to our jurisdiction, was severed from it. Our judgment will be conclusive as to the existence and amount of a debt alleged to be due from one Maine corporation to another. Any incidental finding as to title of real estate in Arizona is not of course such a judgment as under the constitution is entitled to full faith and credit.

It is true, as pointed out by the Massachusetts court, that great difficulties must be encountered in litigation so far from the base of supplies of evidence and experience. *Arizona Mining Co.* v. *Iron Cap Copper Co.*, 233 Mass., 522.

We are of opinion, however, that great difficulties will not justify this court in declining to take jurisdiction of a controversy between Maine citizens or corporations involving only the disputed ownership of personal property.

(4) That the plaintiff's remedy is barred by laches.

We do not find that the defense of laches set up by the defendant is well founded.

Water Case

This action is brought under an Arizona statute. The plaintiff alleges that it has for six years drained the defendant's mine and that under the statute the defendant is indebted to it for such service in the sum of one hundred and fifty thousand dollars.

The Arizona statute provides in substance that where adjacent mines have a common ingress of water or a common drainage it shall be the duty of the occupants of said mines to provide for their proportionate share of such drainage; and that in case of failure or neglect by either so that the occupants of the adjacent mine are compelled to pay more then their share of the cost of drainage, "the occupants of the mine so in default shall pay respectively to those performing the work of drainage their proportion of the actual and necessary cost and expense of pumping, draining or otherwise providing for said water, and if they fail or refuse to make such payment the same may be recovered by an action in any court of competent jurisdiction."

Another section provides that upon application of the plaintiff the court shall grant an order for the underground inspection and examination of the mine designating the number of persons who may examine and inspect such mine. The statute further says that "the Court shall have power to cause the removal of any rock, debris or any other obstacle in any lode or vein where such removal is shown to be necessary to a just determination of the question involved."

While a penalty imposed by the law of a State will not be enforced in another, a statutory remedy is not necessarily confined in its application to the courts of the state creating it. But a remedy provided by statute will not be given extra territorial effect unless such effect is within the contemplation of the act.

"It is familiar law that statutes do not extend ex proprio vigore beyond the boundaries of the State in which they are enacted. If they are merely penal, they cannot be enforced in another State. If the right by the terms of the statute creating it is to be enforced by prescribed proceedings within the State, the right is limited by the statute, and can only be enforced in accordance with the statute. If it is of such a kind that, with a due regard for the interests of the parties, a proper remedy can be given only in the jurisdiction where it is created, it will not be enforced elsewhere." *Howarth* v. *Lombard*, 175 Mass., 572.

Referring to a Colorado statute this court has said, "It simply establishes a purely local method of procedure and practise. It does not purport to have and obviously was not designed to have any force beyond the jurisdiction of the State in which it was created." *Miller* v. *Spaulding*, 107 Maine, 271.

The remedy given by the statute invoked in the pending case is obviously a remedy designed to be enforced by courts of competent jurisdiction within the State of Arizona.

The intent that the act shall have no extraterritorial effect is made manifest by the grant of powers deemed necessary for its adequate enforcement, and which can be exercised only by the courts of Arizona.

ORE CASE: *Bill sustained.*
Demurrer and plea overruled.
Defendant to have 20 days after rescript filed to answer.

WATER CASE: *Plea adjudged sufficient.*
Bill dismissed.

ERNEST H. DYER

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

Cumberland. Opinion June 5, 1920.

Directed verdict for defendant. Negligence of defendant. Contributary negligence of plaintiff. Subsequent negligence of defendant. Doctrine of the last clear chance.

This case comes up on exceptions to the order of a verdict by the presiding Justice after the evidence was all presented and involves a mixed question of law and fact. The question now before the court is: If the case had been submitted to the jury upon the evidence, under proper instructions, would a verdict for the plaintiff be permitted to stand? As the case is now presented, two important issues arise upon the plaintiff's theory of the accident—

1. The contributory negligence of the plaintiff, assuming the negligence of the defendant.
2. The subsequent negligence of the defendant, assuming the negligence of the plaintiff in the first instance.

Upon the first issue the evidence proves the plaintiff guilty of contributory negligence upon his own testimony. The second question raises the doctrine of the last clear chance. Upon this question a majority of the court are of the opinion that the case should be submitted to the jury.

On exceptions. An action on the case for personal injuries sustained by the plaintiff as a result of a collision between an automobile truck owned and operated by the plaintiff, with an electric car of defendant. Plea, the general issue. At the conclusion of the evidence, on motion by defendant, the presiding Justice directed a verdict for defendant, to which ruling plaintiff excepted, defendant having waived strict compliance with R. S., Chap. 82, Sec. 55, in respect to the time of filing written exceptions. Exceptions sustained.

Case stated in the opinion.

Hinckley & Hinckley, for plaintiff.

Bradley & Linnell, and William Lyons, for defendant.

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

SPEAR, J. This case comes up on exceptions to the order of a verdict for defendant by the presiding Justice. It presents a mixed question of law and fact. It appears that the case had been previously tried with a verdict for the plaintiff, which was set aside upon motion, as against the evidence. The report of the evidence in the previous trial was not introduced in the present trial, but the presiding Justice in giving his reasons for ordering the verdict for the defendant commented upon the evidence of the former trial. But an examination of the whole case shows that the comments and reasons given by the presiding Justice for ordering the verdict became entirely immaterial in considering the exceptions.

A motion by the defendant for the order of a verdict, after the evidence is all in, is equivalent to a demurrer to the evidence, on the ground that the evidence is not sufficient, in law, to sustain a verdict for the plaintiff. Exceptions to such an order have the effect of bringing up all the evidence and raising the question of law, whether upon that evidence the case should have been submitted to the jury. It is accordingly evident that the comments or reasons of the presiding Justice for ordering the verdict became wholly immaterial. They present nothing whatever for the Law Court to consider. The comments of the presiding Justice do not bring the former case before us, nor do we have any recourse to it, except so far as the law and facts appear in the per curiam decision of that case.

Therefore the question now before the court is: If the case had been submitted to the jury, upon the evidence, under proper instructions, would a verdict for the plaintiff be permitted to stand.

It is conceded that the plaintiff's auto truck and the defendant car were proceeding in the same direction. Otherwise than this, there is a complete conflict of theory and fact, as to how the accident occurred. The plaintiff claims that he overtook and passed the car, and while proceeding a short distance ahead was obliged to stop his truck to avoid possible contact with some small boys who were conveying something across the street in front of him; that while thus stopped the electric car, without signal or warning, collided with the truck, tipped it partially over, and inflicted the injuries of which he complains.

The defendant claims that the plaintiff came up behind the car, on the car tracks, and that, in heading his truck to the left to go around the end of the car, his truck skidded on the tracks, whereby

he lost momentary control of it, in which the truck darted diagonally to the left, as it was pointed across the street triking the curb and then, as suddenly shot diagonally back across the street, into the left forward end of the car. As the distance between the electric car and the curbing was but 13 feet, the diagonal motion of the truck in going to the curb and back would be the act of but a second.

If the case rested solely upon the right of the jury, upon the testimony, to find whether the electric car overtook and collided with the truck, as the plaintiff claims, or that the truck overtook and ran into the car as the defendant claims, we think the finding of the jury upon that issue whether for the plaintiff or defendant would be permitted to stand. The case upon that issue is so close that a verdict either way would not be so manifestly unfounded as to require the intervention of the court.

But we do not think the case can be decided upon that issue alone. Two other important issues arise, upon the plaintiff's theory of the accident. 1. The contributory negligence of the plaintiff assuming the negligence of the defendant. 2. The subsequent negligence of the defendant, assuming the negligence of the plaintiff in the first instance. Upon the first issue we think the evidence proves the plaintiff guilty of contributory negligence upon his own testimony. He was perfectly familiar with the locality; the location and direction of the car tracks; the width of the street, between the car and the curb; and every other detail involved in the operation of autos and cars at that particular locality. If he drove past the car, as he says he did, he knew that the car was coming right along behind him on its own track, to which it was confined. He knew that the street where he says he stopped was wide enough, between the car track and the curb, for two autos to pass by the exercise of care. He had an unobstructed space of 13 feet between the curb and the track in which to stop his truck. There was nothing whatever in the way to prevent him from making a free and even deliberate choice as to where he would stop. The boys, if any, were ahead of him. He deliberately, if his theory is true, stopped so near the railroad track that the car collided with his right forward wheel. Under the admitted facts and circumstances in this case such conduct cannot receive the sanction of meeting the measure of due care. We think his act in stopping so near the car track, under all the circumstances of this particular case, with a car right upon him was clearly a negligent act.

Therefore, assuming that a verdict might stand upon the issue of which vehicle was ahead, yet upon such finding, the plaintiff upon his own evidence was guilty of contributory negligence.

This brings us to the second question, the doctrine of the last clear chance. The elements of this rule have been so often and so clearly stated that repetition is unnecessary. Upon the plaintiff's testimony that he had passed the car and stopped, so near the track that a collision upon the approach of the car was inevitable. The motorman says he did not see the truck until it was right upon the front end of the car. We think this phase of the case comes within the doctrine of *Fickett* v. *Lewiston, Augusta and Waterville Ry.*, 110 Maine, 267. The rule in that case is thus expressed: "If the motorman did see or could have seen that the wheels were so dangerously near the track and run into the wagon then the company would be liable."

At the former trial the question of subsequent negligence was not raised. The case was decided upon the evidence as it then stood, upon the ground that the truck came upon the car and collided with it.

But under the present testimony the last chance doctrine is raised, and we think it should be submitted to the jury.

Exceptions sustained.

CORNISH, C. J., DUNN and MORRILL, JJ., do not concur.

LUCIUS R. WILLIAMS *vs.* FREDERICK A. SWEET.

York. Opinion June 5, 1920.

Contract. Breach of contract justified. House flies carriers of death-dealing disease germs. An implied promise that a dining service at a hotel should be reasonably free from insanitary conditions. Verdict manifestly wrong.

This case comes up on exceptions and motion, but the exceptions are waived. The case involves a contract whereby the defendant agreed to take and pay for certain rooms in the plaintiff's hotel for two weeks from the second day of August, 1918, but left on the fifth day.

This action is upon the contract to recover the full contract price for two weeks. The crux of the case is found in answer to the inquiry. Was the defendant justified in leaving the hotel on account of the fault of the plaintiff in allowing flies to collect at the defendant's table in such numbers as to become unsanitary and repulsive? We think he was. The house fly is now attracting the serious attention of sanitary and health departments all over the country; in fact, all over the world. The danger with which his presence is fraught is also a matter of common knowledge and hence of judicial notice. L. O. Howard, M. D., Ph. D., LL. D., in the third edition of his treatise on The House Fly, Disease Carrier, says that within the last twelve years the dangerous character of the common house fly has been known and that within the last two years articles relative to the so-called house fly in connection with its disease carrying possibilities have been published literally by the thousands, and this interest perhaps having its origin in the United States has spread to nearly all parts of the civilized world, and yet in no one of these published articles is the whole story told.

We find also that the bibliographical list upon this subject in the last twelve years embraces 136 publications in books and bulletins issued in many countries and printed in different languages. We might indefinitely cite publications from Italy, France, Germany, and probably every State in the Union, and it is safe to say from nearly every medical society in this country and from the great hospitals, each approaching the subject from a somewhat different angle but all concurring in the final opinion that the common house fly is one of the most, if not the most dangerous and insidious agencies in the communication of many of the most dreaded and most fatal diseases.

We have not, yet, however referred to the literature and attitude of our own State toward this disreputable intruder. Our publications are in the form of official bulletins issued by the State Board of Health of Maine. While this subject was discussed in a meeting of the State Department of Health on the 27th of April

last, and while the State publications thereon are numerous, we deem it necessary to insert one document, which, in clear, unvarnished language summarizes the offensive and dangerous characteristics and habits of the house fly. This document is official and with caption in full reads as follows:

"Health of Home and School Leaflet No. 38

Issued by the State Board of Health of Maine

Flies are the most dangerous insects known to men.

Flies are the filthiest of all vermin. They are born in filth, live on filth, and carry filth around with them. They are maggots before they are flies.

Flies are known to be carriers of death-dealing disease germs.

They leave some of these germs wherever they alight.

Flies may infect the food you eat. They come to your kitchen or to your dining table, fresh from the privy vault, from the garbage box, from the manure pile, from the cuspidor, from decaying animal or vegetable matter, or from the contagious sick room with this sort of filth on their feet and in their bodies, and they deposit it on your food, and *you do* swallow filth from privy vaults, etc. etc., if you eat food that has come in contact with flies.

Flies may infect you with tuberculosis, typhoid fever, scarlet fever, diphtheria, and other infectious diseases. They have the habit of feasting on tuberculous sputum and other discharges of those sick with these diseases, and then go direct to your food, to your drink, to the lips of your sleeping child, or perhaps to a small open wound on your hands or face. When germs are deposited in milk they multiply very fast, therefore milk should never be exposed to flies."

We offer no apology for inserting the expressive language above used. We have inserted the document unexpurgated because it speaks a bald truth of which the community should be fully informed.

Our conclusion is that under the evidence, the defendant was fully justified in leaving this hotel in view of the implied duty on the part of the plaintiff to provide the defendant and his party, as his guests, a dining service that was reasonably free from unsanitary conditions having in mind at all times upon the question of reasonableness, the particular dangers that are now well known to be effective in causing such conditions, and the verdict of the jury to the contrary was manifestly wrong. Reasonable care is always measured by the imminence of the danger to be avoided. Reasonable conditions of sanitation are likewise always to be measured by the fatality of the diseases liable to be communicated as the result of the lack of such conditions. It might be improvident to expose one to the germs of measles, but it would be a base and degenerate act to knowingly tolerate conditions that would tend to the communication of a fatal disease.

On motion and exceptions. Assumpsit to recover on a contract made by defendant with plaintiff under the terms of which defendant agreed to take and pay for certain rooms in the plaintiff's hotel for two weeks from the second day of August, 1918, but left on the fifth day.

The action was brought in the municipal court of the city of Biddeford. Defendant filed a plea of the general issue, and also a brief statement, alleging that plaintiff waived the original contract and substituted another contract in lieu thereof. The court found for the plaintiff and defendant appealed to the Supreme Judicial Court, where the case was tried to a jury and a verdict of $128.78 was returned.

At the close of the evidence defendant requested the presiding Justice to direct a verdict for the defendant, which was refused, and defendant took exceptions. The case was taken to the Law Court on a motion to set aside the verdict, and on the exceptions, but the exceptions were waived. Motion sustained. New trial granted.

Case stated in the opinion.

Ray P. Hanscom, for plaintiff.

E. P. Spinney, for defendant.

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

SPEAR, J. 1. The exceptions were waived. 2. There is no doubt about the terms and completion of the alleged original contract. The correspondence confirms it. The defendant carried it into execution by the occupancy of the rooms reserved. Nor is there any question that the defendant infringed the terms of the contract. But infringement of a contract may or may not be a violation of the obligation imposed by it. The defendant agreed to take and pay for the rooms in question for two weeks from the second day of August in 1918, but left them on the fifth day.

This action is upon the contract to recover the contract price for two weeks. The defendant tendered the regular transient rates for the time he and his party were at the hotel. The crux of the case is found in answer to the inquiry: Was the defendant justified in leaving?

It will be conceded that a hotel, when it holds itself out to the public as a place of resort for rooms and board, carries with such offer an implication that it will furnish its patrons with accommodations that are compatible with the standing of the hostelry, the prices paid and the class of people invited to become its guests. These accommodations include apartments, table, dining service and especially such

sanitary conditions as are calculated to render the surroundings inviting and wholesome rather than repulsive and deleterious to health.

The complaint in this case is not as to accommodations, the quality or quantity of food or the merits of the table, the theory upon which the case was at least partially tried, thereby diverting the minds of the jury from the real issue, but that at the table at which the defendant and his party were accustomed to sit the flies were so numerous and became so obnoxious, that their presence created an intolerable condition in violation of the obligation of the landlord to furnish suitable and sanitary dining facilities as implied in his contract.

The real issue involves a single question of fact: Was the defendant justified in leaving the hotel on account of the fault of the plaintiff, in allowing flies to collect at the defendant's table in such numbers as to become unsanitary and repulsive? We think he was. It is a matter of common knowledge that the common house fly has come to be regarded by the enlightened understanding not only as one of the most annoying and repulsive of insects, but one of the most dangerous in his capacity to gather, carry and disseminate the germs of disease. He is the meanest of all scavengers. He delights in reveling in all kinds of filth, the greater the putrescence the more to his taste. Of every vermin, he above all others is least able to prove an alibi when charged with having been in touch with every kind of corruption, and with having become contaminated with the germs thereof. After free indulgence in the cesspools of disease and filth he then possesses the further obnoxious attribute of being most agile and persistent in ability to distribute the germs of almost every deadly form of contagion.

It is a matter of common knowledge that yellow fever was formerly the scourge of certain localities in our own and other countries. For years no one mistrusted or was able to detect the cause. But one day it was announced that a certain kind of mosquito, by his sting, communicated the germs of this dread disease. The knowing introduction of one of these mosquitos now would constitute a criminal offense. While the house fly has not yet been regarded as fatal as a mosquito, he, nevertheless, is now attracting the serious attention of sanitary and health departments all over the country; in fact all over the world. The dangers with which his presence is fraught is also a matter of common knowledge and hence of judicial notice.

L. O. Howard, M. D., Ph. D. LL. D., in the third edition of his treatise on The House Fly, Disease Carrier, says "that within the last twelve years the dangerous character of the common house fly has been known. And that within the last two years articles relative to the so-called house fly in connection with its disease carrying possibilities have been published literally by the thousands and this interest perhaps having its origin in the United States, has spread to nearly all parts of the civilized world and yet in no one of these published articles is the whole story told." (The last two years referred to were from 1909 to 1911).

We find also that the bibliographical list upon this subject in the last twelve years embraces 136 publications in books and bulletins issued in many countries and printed in different languages. We mention a few authors and their subjects to show that there is no dissenting opinion as to the germ spreading powers of this loathesome insect. Ainsworth, R. B. (1909) The House Fly as a disease carrier. Journal Royal Medical Corps. Cobb, J. O. (1905). Is the Common House Fly a Factor in the Spread of Tuberculosis? American Medicine IX. Dutton, W. F. (1909) Insect Carriers of Typhoid Fever. American Med. Assoc. LIII. Felt, E. P. (1910) The Typhoid House Fly and Disease. 24th Rept. State Entomologist of N. Y. Fraggatt (1910) The House Fly and the Disease it Spreads. Agric. Gazette, New South Wales. Ficker M. (1903) Typheus Fliegen. Arch. f. Hyg., XLVI. The Fly as a carrier of Tuberculosis, Haywood E. H. (1904) N. Y. Medical Journal LXX. Jackson D. D. (1907) Report to Committee on Pollution.

Thus we might go on almost indefinitely citing publications from Italy, France, Germany and probably every State in the Union, and it is safe to say from nearly every medical society in this country and from the great hospitals each approaching the subject from a somewhat different angle but all concurring in the final opinion that the common house fly is one of the most, if not the most, dangerous and insidious agencies in the communication of many of the most dreaded and most fatal diseases.

So dangerous has the house fly become as the communicant of typhoid that L. O. Howard to whom we have referred who was an officer in the Division of Entomology U. S. Agric. Dept. proposed, at a meeting of the committee of 100 on the public health, that "the name typhoid fly be substituted for the name house fly now in general

use." He further says: "As a matter of fact this name has been adopted only generally. The newspapers took it up with avidity." It seems that Dr. Styles of U. S. Public Health and Marine Hospital Service at the same meeting suggested the name "filth fly." We have cited these publications, many of them of an official character and all of them of a public nature, to prove beyond question that the common house fly, his nature and character are matters of common knowledge.

We have not yet, however, referred to the literature and attitude of our own State toward this disreputable intruder. Our publications are in the form of official bulletins issued by the State Board of Health of Maine. While this subject was discussed in a meeting of the State Department of Health on the 27th of April last and while the State publications thereon are numerous we deem it necessary to insert one document, which, in clear unvarnished language summarizes the offensive and dangerous characteristics and habits of the house fly. This document is official and with caption in full reads as follows:

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Flies are known to be carriers of death-dealing disease germs.

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Flies may infect the food you eat. They come to your kitchen or to your dining table, fresh from the privy vault, from the garbage box, from the manure pile, from the cuspidor, from decaying animal or vegetable matter, or from the contagious sick room with this sort of filth on their feet and in their bodies, and they deposit it on your food, and *you do* swallow filth from privy vaults, etc. etc., if you eat food that has come in contact with flies.

Flies may infect you with tuberculosis, typhoid fever, scarlet fever, diphtheria, and other infectious diseases. They have the habit of feasting on tuberculous sputum and other discharges of those sick

with these diseases, and then go direct to your food, to your drink, to the lips of your sleeping child, or perhaps to a small open wound on your hands or face. When germs are deposited in milk they multiply very fast, therefore milk should never be exposed to flies."

We offer no apology for inserting the expressive language above used. We have inserted the document unexpurgated because it speaks a bald truth of which the community should be fully informed.

We now come to the question of whether defendant was justified in leaving the hotel on account of the presence of flies at his table. The case starts out with the admitted fact that the defendant had spent the previous season at the plaintiff's hotel and found it entirely satisfactory as shown by the undisputed testimony. He wished also to spend the season in question there and made a contract and procured his rooms for that specific purpose. In pursuance of his contract and his purpose, he and his family came and entered upon the prospective enjoyment of their two weeks vacation as they had done the year before. No complaint was made about the character of the rooms, the quality of the food or the efficiency of the service, yet the defendant and his family, after they had become settled for their vacation, put themselves to the inconvenience and trouble of repacking their baggage, leaving the hotel and procuring accommodations elsewhere. It is a general rule that men act from motive. It may be regarded as an axiom that they act from selfish motives, when given a perfectly free choice as to what they will do. We may therefore assume that the defendant in the case at bar did not leave the plaintiff's hotel in violation of his own interests for the mere caprice of moving. What then was the cause of the defendant's departure? By the affirmative, undisputed testimony, the only cause apparent is the one which the defendant assigns, the obnoxious presence of flies. That the defendant left on this account there can be no doubt. We think he was justified in so doing. The plaintiff's depositions together with his own testimony, support the defendant's contention to such an extent as to justify his complaint. Every deponent but one whose depositions were read admitted the presence of some flies in the dining room. But the significant testimony comes from Mildred Bent, the waitress who served the defendant and his guests.

"Q. Did you hear Mr. Sweet say anything about flies in the dining room?

A. Yes. He was always saying that there were so many flies that he could not eat. I heard him say that he could not eat where there were so many flies around him."

Is it then conceivable that this defendant was complaining of flies being so numerous that he could not eat when only two or three of them were in the dining room, especially when he was located there and was in all other respects satisfied? But the further testimony of this witness practically admits that the defendant's cause of grievance as shown in the following question and answer:

"Q. How did these flies get in?

A. Just the same of any flies. After a rainy day or on a rainy day, they are bound to get in and it is impossible to keep flies out, especially in a hotel where there are so many people going in and out of the doors all of the time."

We now quote from the testimony of the plaintiff himself:

"Q. Upon the fourth day of August did you have any talk with Mr. Sweet in the green room of your hotel?

A. Sunday?

Q. Yes, August fourth. Friday was the second, that would be Sunday.

A. Sunday; yes, I did.

Q. Will you tell us what that conversation was?

A. Mr. Sweet sent a bell boy out after me, told me he wanted to see me. I went in and Mr. Sweet was in the green room we call it, and was rather disturbed, and said the flies were so thick in the dining room they couldn't eat their dinner, and that his wife's mother was in such condition, and his wife's sister, that they were nauseated or something like that and it was simply unendurable, that they couldn't eat with the flies around the table. That is substantially the words that he used."

In the light of the circumstances that Mr. Sweet had every incentive to remain at the hotel, that he should interview the proprietor is also almost inconceivable if there was no ground for complaint. But what the plaintiff did and found according to his own admission furnishes a foundation for the compaint. The plaintiff says that on the day of complaint about 20 minutes of six that night, he went into the dining room with a folded newspaper and killed all the flies he could see in there.

"Q. How many did you find in the dining room if you can tell us?

A. I don't know exactly. You said twenty, but I don't think I killed twenty flies. Perhaps 15 or 18."

This testimony of the plaintiff himself proves two things; 1. that the defendant was so annoyed by flies that he felt compelled to send for and complain to the proprietor. 2. that many flies were actually in the dining room.

We may now turn to the testimony of the defendant. The defendant was 41 years old and a teacher in the Worcester High School, a position requiring a man of responsibility and character. His testimony in regard to the presence of flies is as follows:

"Q. When you got there will you tell the jury what conditions you found in regard to the dining room?

A. When we arrived Friday evening we went in to supper and found that flies were quite numerous, and we remarked the fact, one to the other—

THE COURT: State the conditions as you found them.

A. That is the gist of the entire thing. We went in there to supper and I noticed a great number of flies around the dining room, our dining table, on our table. These flies were very annoying; both mentally and physically. They were buzzing around the foods and the reaction caused by their presence was something that wasn't at all agreeable to think about, and I was disgusted by their presence.

Q. When the waiter came in with the food what would you notice in connection with the food? I am now referring to the flies.

A. I noticed the flies were buzzing around the food and alighting upon the food, and on one occasion particularly I noticed several of the guests were busy brushing them away, and I used my left hand one day to guard the food while I manipulated the eating utensils with my right hand."

Mrs. Sweet, after stating that the conditions in 1917 were satisfactory, testified in regard to the flies as follows:

"Q. What were the conditions?

A. Well, there were flies everywhere on the walls. We were in the corner, and naturally the flies were not in the center of the floor where the waitresses were hurrying back and forth. We were over at one corner; they were all over the walls, ceiling and on our table; my

sister sat at one end of the table where the waitress put the trays on those little racks, and she did that (illustrating) with the napkin to keep the flies off till we got the food."

Mrs. Sweet also says that the dishes were polluted and especially the drinking glasses, as the following question and answer shows:

"Q. What was there on that glass?

A. It was all covered with fly specks.

Q. How did this affect you?

A. Well, it affected me of course. I thought, well, it was not like this last year and probably it will be better. I hoped it would be better because I was so disappointed."

Further along she was asked this question:

"Q. Were the accommodations at the hotel satisfactory to you?

A. Everything but the flies."

At this point, it is proper to call attention to one significant fact which is almost controlling with reference to the true interpretation of the evidence in this case, and that is that this hotel was entirely satisfactory to both the defendant and his wife except for the presence of flies at the dining table and that this obnoxious feature was a great disappointment to them. The defendant's evidence when considered in connection with the plaintiff's and with the circumstances is so overwhelming in favor of the defendant's contentions, that but one reasonable conclusion can be drawn, and that is that the flies around the defendant's table were so numerous as to become not only obnoxious and disgusting but a positive menance to health. The defendant's table was in a corner of the room where the flies would more naturally congregate upon the walls than around the tables in the center of the room.

But the defendant and his wife say they had no complaint except the flies. They talked the situation over, and thought the condition but temporary, and concluded not to say anything about it at first. Their testimony which is in perfect harmony with their purpose in coming to the hotel, and of remaining there shows that they had every motive for remaining and it was only when conditions became intolerable on account of flies alone without any prospect of improvement that they felt compelled to break up their plans and move to another place. Again we repeat that we find no motive whatever inducing the defendant to leave this hotel except the one which his testimony discloses. This fact alone adds forcibly to the value of his testimony

and is equally derogatory to that of the plaintiff. Accordingly, the circumstances surrounding this case are entitled to very great weight in seeking to ascertain the truth of the situation, as it existed at this hotel during the four days that the defendant and his party were its guests.

And, the admitted circumstances, considered in connection with all the plaintiff's evidence, excluding the defendant's testimony as to the presence of flies, is sufficient in our opinion to warrant the defendant in taking the action he did in leaving the hotel. The plaintiff and all his witnesses but one admit the presence of more or less flies. Accidentally flies may invade any dining room, public or private, but the presence of flies in a dining room regularly in numbers however small are a menace not to be encouraged or tolerated. As before seen, a single fly may so contaminate food, milk or a dish as to communicate a dangerous or even deadly disease like tuberculosis. To the person therefore, who knows its dangers, flies about the food in numbers however small, are at once repulsive, nauseating and dreaded. A single fly may be reeking with filth and covered with a million noxious germs. The danger in the presence of a single fly may be estimated from the following quotation taken from page 84 of a treatise, under the title of Flies and Disease, published by the Cambridge University Press as one of the Cambridge Public Health Series, and edited by G. S. Graham-Smith lecturer in hygiene, Cambridge;

"Flies deposit vomit and faeces on almost every object on which they alight, whether food or not. In feeding, as has been shown already they frequently moisten soluble substances, and often attempt to dissolve insoluble materials with vomit and saliva, and even during feeding have been noticed to deposit faeces. Recently 1102 vomit marks, and 9 faecel deposits were counted on an area six inches square of a cupboard window.

One does not like to think that the fly now walking round the edge of the cream jug was a short time ago regaling its impartial palate on the choicest morsels in the dust-bin, ash-pit or garbage-can, or on more indescribable filth."

We supplement the above pertinent quotation from circular No. 122, "The Filthy Fly as a Disease Carrier," issued by the State Board of Health of Maine:

"Surfaces much exposed to flies become contaminated quickly. The fly specks, so much in evidence in such places are of two kinds, the darker specks consisting of matter which has passed through the fly, and the lighter ones which are the result of an untidy habit of the fly while temporarily resting after gorging himself. It has been observed that he has the trick of returning through his suction tube, drops of the fluid with which he has filled his crop. The drop at the end of his proboscis grows until sometimes it is nearly as large as his head. These drops may be left or they may be sucked up again. Both the light colored specks, the "vomit spots," and the darker ones contain bacteria sometimes in enormous numbers and they may be dangerously infectious if the fly has feasted on typhoid discharges or on tuberculous sputum or other infectious matter."

From the same circular under the caption "The Diseases the Fly May Spread," we find the following, among many others:

"The governmental commission which investigated the serious epidemics of typhoid fever which laid low many of our soldiers during and after the Spanish-American war, reported that the fly was the principal cause.

So far as tuberculosis is concerned, considerations of safety demand that the fly be barred absolutely from everything that is coughed up by the consumptive or discharged by any person who is known or suspected of having tuberculosis. The fly is particularly fond of tuberculosis sputum and after he eats it and excretes tubercle bacilli these germs, it is claimed, may retain their virulence in the fly specks at least fifteen days."

It would hardly seem necessary to proceed further with the quotations of the loathesome evidence necessary to the true exposition of the merits of this case. To those informed upon the subject, this case presents a matter of importance and serious consideration.

Our conclusion is that under the evidence, the defendant was fully justified in leaving this hotel in view of the implied duty on the part of the plaintiff to provide the defendant and his party, as his guests, a dining service that was reasonably free from unsanitary conditions having in mind at all times upon the question of reasonablness, the particular dangers that are now well known to be effective in causing such conditions, and the verdict of the jury to the contrary was manifestly wrong. Reasonable care is always measured by the

imminence of the danger to be avoided. Reasonable conditions of sanitation are likewise always to be measured by the fatality of the diseases liable to be communicated as the result of the lack of such conditions. It might be improvident to expose one to the germs of measles, but it would be a base and degenerate act to knowingly tolerate conditions that would tend to the communication of a fatal disease.

Motion sustained.
New trial granted.

GEORGE R. CAZALLIS, et ali., In Equity

vs.

FRANK H. INGRAHAM, Admr., et ali.

Knox. Opinion June 10, 1920.

The mere fact of the entry of a deposit of money in a bank, by one person in trust for another, would not effectuate an indisputable gift in the form of an irrevocable trust without limitation or condition, which the beneficiary might terminate at will, and which extrinsic evidence could not control. But such deposit would raise a presumption that an irrevocable trust was intended, and, if supported by evidence showing a continuing intent, or not refuted by the showing of a contrary intent, create a completed and irrevocable trust, unless the donor reserved the power of revocation.

On January 13th, 1880, one Celina Cazallis, whose domicile was in the State of Maine, deposited one hundred dollars from her personal funds in a Boston Savings Bank, in her own name as trustee for a sister of hers, and received a pass-book evidential the deposit. During the same year she increased the amount of the deposit by one hundred dollars more, and still later swelled it by seven hundred dollars. As interest accrued and remained available it was credited to the account. At odd times, beginning about ten years from the first deposit, and thence continuing for a period of twenty years, the depositor

made withdrawals to the number of thirty, but for what purpose does not expressly appear. Thirty-two years after the first deposit, a guardian was appointed for Miss Cazallis. He found the pass-book among her effects, retained it throughout his trust, and afterward delivered it to the domiciliary administrator of the intestate estate of the depositor, the account being outstanding and open. By agreement between the administrator and the parties in interest, the money was withdrawn from the bank, and remained in the administrator's custody, pending determination of ownership. No one, excepting the bank officials, the depositor herself, and, later, her guardian appears to have known of the depositor's dealings with the bank until after her death in 1916.

At a later date, in the year of 1880, Miss Cazallis likewise opened three accounts in another Boston bank. As the pass-books show, one was in her name with the addition of trustee for her niece, Eliza H. Robinson; the others, respectively, as trustee for two of her nephews. These accounts were increased by subsequent deposits and by interest accummulations. There were no withdrawals. The pass-books came to the administrator from the former guardian. All the donees survived the depositor, and are claimants of the funds. None had knowledge, while Miss Cazallis was alive, of a deposit purporting to have been made by her for his benefit.

It is contended by the defense that of the four transactions not one was effectual to make over the possession or control of the particular money.

Evidence to establish a trust must be explicit and convincing. The giving must be consummated. It must not remain unexecuted. It must rise above a promise wanting consideration and unredeemed. If the act be left executory or promissory, courts will not know it as a gift. A gift, inter vivos or equitable, is voluntarily bestowed without expectation of return or of recompense. An express trust rests upon a declaration. No especial phrase or formula is requisite to create a trust. It is enough to make one himself a trustee for the benefit of another if it be explicitly, unconditionally and fully stated or declared in writing or orally, if the property be personal, that it is held in trust for the person named. Acceptance by the donee, always essential to perfect a trust, may be after the donor's death, and is presumed in case of a beneficial trust.

The mere fact of the entry of a deposit of money in a bank, by one person in trust for another, would not effectuate an undisputable gift in the form of an irrevocable trust without limitation or condition, which the beneficiary might terminate at will and which extrinsic evidence could not control. But such deposit raises a presumption that an irrevocable trust was intended, and, when supported by evidence showing a continuing intent, or when not refuted by the showing of a contrary intent, creates a trust which is completed and irrevocable, unless the donor reserved the power of revocation. That Celina Cazallis was entitled to deposit her own moneys in trusts, and to constitute herself trustee thereof, is unquestionable. Explicitly and unreservedly, as the headings of the bank-books at first view indicate, Miss Cazallis intended all to know that the funds were deposited in her name as trustee for others. In doing this, unfettered and untrammelled English presumably was used for what is meant. No evidence

having been brought forward irreconcilable with such signified intention, it seems consonant with reason and rules of law to take for granted that the words expressed her deliberate intent as trustor, and that they should be given their full effect. It is unnecessary now to inquire whether the rights of Celina Cazallis as trustee, fell by succession upon her guardian. Upon the death of Miss Cazallis they devolved upon her administrator. The trusts did not survive her. Now that she is dead, the administrator of her estate, who has but naked legal title to the trust funds, should make payment to the beneficiaries to each his due proportion.

On report, on agreed statement. A bill in equity to determine to whom money deposited in four banks in Boston, Massachusetts, by Celina Cazallis, during her lifetime, in her name as trustee for four cestuis que trustent, one of whom was a sister, two of whom nephews, and one a niece, should be paid. The funds since the depositor's death, by agreement of the parties in interest, were paid over to the domiciliary administrator of the estate of the depositor, pending the termination of this suit. The case was reported to the Law Court upon the bill, answers, copies of bank deposits, and agreed statement of facts, for the determination of the legal rights of the parties and all questions of law arising therefrom; and to render final judgment in accordance therewith. Bill to be sustained by single Justice. Decree in accordance with the opinion.

Case stated in the opinion.

Frank B. Miller, and M. A. Johnson, for plaintiffs.

S. T. Kimball, Daniel V. McIssac, and Frank H. Ingraham, for defendants.

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

DUNN, J. From her earnings as saleswoman in a Boston store, Celina Cazallis, whose domicile was in the State of Maine, on January 13th, 1880, deposited one hundred dollars in the Suffolk Savings Bank of that city, in her own name as "Tr. for Nancy L. Robinson," Nancy being a sister of hers. A pass-book evidential the deposit was given the depositor by the bank. In December of the same year, Miss Cazallis increased the amount of the deposit by one hundred dollars more, and nearly five years later she swelled it by seven

hundred dollars. As interest accrued and remained available it was credited to the account. At odd times, beginning about ten years from the first deposit and thence continuing for a period of twenty years, the depositor made withdrawals to the number of thirty, but for what purpose does not expressly appear. Notwithstanding these withdrawals, the integrity of the original deposits never was impaired, and the credit balance of the account grew, by way of accumulations of interest, from $900.00 to $1,744.02. Thirty-two years after the first deposit, a guardian was appointed for Miss Cazallis. Finding the pass-book among her effects, the guardian retained it in his possession throughout his trust; afterward delivering it to the domiciliary administrator of the intestate estate of the depositor, the account being outstanding and open. By agreement between the administrator and the parties in interest, the money was withdrawn from the bank, and remains in his custody, pending determination of ownership in this bill to that end. No one, excepting the bank officials, Miss Cazallis herself, and, later, her guardian, appears to have known of the dealings with the bank, until after the depositor's death in 1916.

On October 13th, 1880, Miss Cazallis opened three accounts in the Provident Institution for Savings, another Boston bank. As the pass-books show, the accounts were in her name with the respective additions of "Trustee for Hiram Cazallis," "Trustee for George R. Cazallis," and "Trustee for Eliza H. Robinson," who now is Mrs. Bowen. Hiram and George Cazallis were nephews of Celina. Counsel have referred to Mrs. Bowen as Celina's niece. These accounts were opened with personal funds of the depositor. In every instance the initial deposit was $50.00. One day, ten years later, Miss Cazallis added fifty dollars to each. About three years afterward, she put eighty dollars in the Eliza H. Robinson account. From these accounts there was no withdrawal. When, to await the outcome of this suit, the moneys of the several accounts were received by the administrator, those in favor of Hiram and of George each amounted to $238.26; that of Eliza H. Robinson to $380.73. In relation, pass-books had issued to the depositor and were retained in possession, at first by her and more recently by her guardian, until the latter handed them over to the administrator, with the Nancy Robinson book. The donees all survived the depositor and are claimants of the funds. None had knowledge, while Miss Cazallis was alive, of a deposit purporting to have been made by her for his

benefit. It is contended by the defense that of the four transactions not one was effectual to make over the possession or control of the particular money.

Decisions of this court hold the equitable principle to be well established, that, excepting as to creditors of the donor whose rights could be affected by it, or bona fide purchasers from him for value, without notice, an executed voluntary gift of property in trust will be regarded as valid and enforceable. The gift is an equitable one as distinguished from a legal gift inter vivos. While differing from a legal gift, an equitable gift yet involves essentially similar acts for establishment. A gift inter vivos, to be effective, requires a delivery of the property itself, and must at once completely pass title so that over it the donor can have no further dominion. A gift in trust withholds the legal title from the donee. But the equitable title passes. The donor, whether he transfer the legal title to a third person, or retain it in himself, has parted irrevocably with the beneficial title (*Bath Savings Inst.* v. *Hathorn*, 88 Maine, 122; *Norway Savings Bank* v. *Merriam*, 88 Maine, 146), and, without the consent or the renunciation of the beneficiary, he is left incapable to extinguish the trust. *Savings Inst.* v. *Hathorn*, supra. Thereafter, on the part of the donor, neither a change of mind, commendable desire to benefit some other person, affection waned or waning, regret's sting nor sorrow's pang, the ills of life, the vicissitudes of fortune, inability to care for himself, nor any other reason so far as he alone is concerned, should be permitted to undo what was validly done. There may be reservations on his part, such as income (*Savings Inst.* v. *Titcomb*, 96 Maine, 62), or he may fix a time for the vesting of the legal title in the beneficiary (*Insurance Company* v. *Collamore*, 100 Maine, 578), but the gift of the equitable title is as perfect and irrevocable as is the gift of the thing itself in an executed gift inter vivos. *Savings Inst.* v. *Hathorn*, supra; *Savings Bank* v. *Merriam*, supra; *Insurance Company* v. *Collamore*, supra.

Evidence to establish a trust must be explicit and convincing. The giving must be consummated. It must not remain unexecuted. It must rise above a promise wanting consideration and unredeemed. If the act be left executory or promissory, courts will not know it as a gift. A gift, inter vivos or equitable, is voluntarily bestowed without expectation of return or of recompense.

An express trust rests upon a declaration. *Savings Inst.* v. *Hathorn,* supra. The declaration bears the same relationship to an equitable gift that delivery bears to a legal gift. No especial phrase or formula is requisite to create a trust. It is enough, as made known by the Massachusetts court, to make one himself a trustee for the benefit of another, if it be explicitly, unconditionally, and fully stated or declared in writing or orally, if the property be personal, that it is held in trust for the person named. *Gerrish* v. *Inst. for Savings,* 128 Mass., 159; *Insurance Company* v. *Collamore,* supra; *Savings Bank* v. *Merriam,* supra; *Savings Inst.* v. *Fogg,* 101 Maine, 188; *Gower* v. *Keene,* 113 Maine, 249. To perfect a trust it must be accepted. But the acceptance may be after the donor's death. *Woodbury et al.* v. *Bowman,* 14 Maine, 154, 161. Acceptance is presumed in case of a beneficial trust. *Libby* v. *Frost, et als.,* 98 Maine, 288. So this case starts readily along a right of way well defined by precedents.

Notice to the beneficiary of the establishment of a trust is unnecessary. *Savings Inst.* v. *Hathorn,* supra; *Savings Bank* v. *Albee,* 64 Vt., 571; *Smith* v. *Darby,* 39 Md., 278; *Merigan* v. *McGonigle,* 205 Pa. St., 321; *Martin* v. *Funk,* 75 N. Y., 134. A trust of this kind originates with the donor's act and accompanying appropriate declaration. *Milholland* v. *Whalen,* 89 Md., 212, 44 L. R. A., 205. The material inquiries are the intention which went with that act, and unequivocal avowal of holding the property in trust for another. *Bickford* v. *Mattocks,* 95 Maine, 547. If a trust be created, no later act of the donor, whether impulsed by good or by bad, can destroy it. By the intervention of a trustee, even a *donatio mortis causa* may be effected (*Borneman* v. *Sidlinger,* 15 Maine, 429; *Dole, Admr.* v. *Lincoln,* 31 Maine, 422; *Dresser* v. *Dresser,* 46 Maine, 48; *Clough* v. *Clough,* 117 Mass., 83; *Sheedy* v. *Roach,* 124 Mass., 472), although the gift does not come to the knowledge of the donee and is not accepted by him until after the death of the donor. *Pierce* v. *Bank,* 129 Mass., 425.

Savings Institution v. *Hathorn,* supra, concerned a savings bank trust. In that case, the method employed to create the trust was similar to that used here; the nature of the evidence proving the trust was different. Besides a pass-book of distinctive features characteristic of those here, there was clear and emphatic evidence that when the deposit was made and afterward, it was the orally expressed intention of the depositor that, at his death, the money should go to the beneficiary. On interpleader by the bank, to settle

title to the fund, the trust prevailed. It was held, that from the making of the deposit the donee was clothed with the beneficial title to the money, though the legal title did not vest in her until the death of the donor.

The mere fact of the entry of a deposit in a bank by one person in trust for another would not effectuate an indisputable gift in the form of an irrevocable trust without limitation or condition, which the beneficiary might terminate at will, and which extrinsic evidence could not control. *Savings Inst.* v. *Hathorn*, supra. The entry on the books is not conclusive. *Bank* v. *Fogg*, 83 Maine, 374. Evidence from another source is admissible to vary the effect of the entry and show the intention of the depositor. *Northrop* v. *Hale*, 72 Maine, 275; *Gower* v. *Keene*, supra. But the deposit of money in a bank by one person in trust for another raises a presumption that a trust was intended, and, when supported by evidence showing a continuing intent, or when not refuted by the showing of a contrary intent, creates a trust which is completed and irrevocable, unless the donor reserved the power of revocation. *Barker* v. *Frye*, 75 Maine, 29; *Savings Inst.* v. *Hathorn*, supra; *Norway Savings Bank* v. *Merriam*, supra; 39 Cyc., 68; *Merigan* v. *McGonigle*, supra. Granting natural import to the words, the entries on the books given Miss Cazallis declared a perfected voluntary trust. But this may be disproved. *Barker* v. *Frye*, supra; *Savings Inst.* v. *Hathorn*, supra; *Northrop* v. *Hale*, 72 Maine, 275; *Northrop* v. *Hale*, 73 Maine, 66; *Gower* v. *Keene*, supra.

That Celina Cazallis was of right entitled to deposit her own moneys in trusts and to constitute herself trustee thereof is unquestionable. *Savings Inst.* v. *Hathorn*, supra; Perry on Trusts, Secs. 96-98; *Gerrish* v. *Inst. for Savings*, supra; *McMahon* v. *Lawler*, 190 Mass., 343. The evidence mainly relied on in this case is the pass-books. The entries thereon imply an actual present gift. In the connection in which it was used on the Nancy Robinson pass-book, "Tr." was an abbreviation of, and stood for, trustee. Logically created, the prima facie case, if it shall be destroyed, must be brought to nought logically. Retention by Miss Cazallis of the pass-books was consistent and not inconsistent conduct on the part of a trustee. The books disclosed the existence and whereabouts of trust funds, and were vouchers of contract rights against the banks. They were received by her as trustee, and as such she properly kept them. *Ray* v. *Simmons*, 11

R. I., 266. She needed the books in order to perform her duties as trustee. To borrow and use the language of *Merigan* v. *McGonigle*, supra: "It was necessary for the depositor to retain the pass-book that the various sums might from time to time be entered in it." "When a deposit in a bank is made in the name of the depositor in trust for another the possession by the depositor of the bank-book is a possession by the trustee, and does not detract from the force of the entry, or indicate that no interest had been given to the cestui que trust." *Baker* v. *Baker*, (Md.), 90 Atl., 776. That the guardian retained the books in his custody is not prejudicial to the plaintiffs' cause. It is unnecessary now to inquire whether the rights of Celina Cazallis, as trustee, fell by succession upon her guardian. Upon the death of Miss Cazallis they devolved upon her administrator. *Boone* v. *Savings Bank*, 84 N. Y., 83. The administrator took the several funds as trustee, not as assets, and holds them with all the rights, and subject to all the duties of the deceased trustee. *Boone* v. *Bank*, supra. Depositing other moneys in the accounts was not incongruous. Miss Cazallis was as privileged to make the later deposits as the first. "And each deposit entered in that book was not only a declaration of a trust as to the sum thus deposited, but a recognition of the trust created by former deposits." *Merigan* v. *McGonigle*, supra. Nor, unmet by countervailing proof, were the withdrawals by her, of earned interest, aggregating little more than $670.00 in twenty years, from the Nancy Robinson account, incompatible acts. What application was made of this money does not appear. To establish the existence of a trust, the burden of proof lies on the party who alleges it; but, the trust once established, the burden is shifted upon the other party to show extinguishment. *Prevost* v. *Gratz*, 6 Wheat., 481, 5 Law. Ed., 311. Each pass-book bespeaks itself prima facie evidence of an executed trust, and points out the trustee. "The deposit was sufficient in itself as a declaration of trust to vest the beneficial interest in the cestui que trust, if that was the intention of the depositor." *Milholland* v. *Whalen*, supra. A showing that Celina made a deposit in the bank on the trust that she was to hold the title and the power to dispose of the property so long as she lived, and then what was left was to go to the cestui, would disclose an executory trust, and not an executed one. *Smith* v. *Bank*, 64 N. H., 228. But such mode of making a gift would be testamentary in character, and, parting company with the statute of wills, would be without effectiveness.

The donor also was trustee. Courts presume that where two characters are united in one person, and that person performs an act, he performs it in that capacity which would give the act legal efficacy. *Yeaton* v. *Lynn*, 5 Pet., 224, 229; 8 Law Ed., 105, 107. Fiduciaries are presumed to have acted in good faith and rightly performed their duties. True, this assumption is an administrative one and has no probative value. In this respect it differs from a presumption of law carrying an inference of fact. All of which is another way of saying that, without being obliged to overcome any adverse indicative circumstance arising from an administrative assumption, he who sets up the existence of a situation different from that presumed, takes upon himself the burden to prove it to be so. *Chamberlayne* on on Evidence, Secs. 1219-1220. In A. & E. Ann. Cases, Vol. 1, page 904, it is stated in a note that a deposit of money made in a bank by one person for another creates a presumption that an irrevocable trust was intended, and unexplained is conclusive as establishing such trust as of the time when the deposit was made, thus invalidating any subsequent dealings by the depositor with the funds deposited, except in his capacity as trustee. The point was neither related nor discussed in *Bath Savings Inst.* v. *Hathorn*, supra, but the opinion rather inferentially suggests it. In *Macy* v. *Williams*, 8 N. Y., Supp. 658, one Guion, a depositor in savings banks, declared deposits made by him to be in trust for his grandniece. He received pass-books showing the accounts to be with him as trustee for her. Subsequently he drew out all the money for his own benefit. In a suit against the executors of his will, for the recovery of the money so drawn out of the savings banks, the court said: "When the depositor, Guion, drew out the funds in question, he received the same as trustee of (the grandniece), to whom they belonged, and held them in that capacity." A widow, in a Connecticut case, *Minor* v. *Rogers*, 40 Conn., 512, deposited money in her own name as trustee for a boy who was accustomed to do errands for her; remarking to his parents that he would need it for his education. She later appropriated the money to her personal use. "It will be observed," reads a majority opinion, "that some three years after the gift was made (she) refused longer to act as his trustee, and thereupon converted the property to her own use. It may well be questioned whether the legal title to the chose in action did not instantly vest in the plaintiff by this wrongful act of hers . . . . ." The Alabama case of *Sayre* v. *Weil*, 94 Ala., 466,

10 So., 546, reveals that the defendant, over a period of ten or fifteen years, deposited money in his name as trustee for grandchildren, the account so showing. Being indebted on a promissory note to the bankers holding the deposit, he directed them to apply the trust funds toward its payment, which they agreed to do. The court held such an agreement invalid against the cestui que trust. *Milholland* v. *Whalen*, supra, a Maryland decision, contains these words: "If the delivery of the money to a bank to be placed to the credit of a depositor for another, and the declaration of the trust as evidenced by the entry made pursuant to the settler's instructions, constitute and evidence a valid trust, then no act of the depositor in subsequently withdrawing the money can affect the rights of the cestui que trust, unless the power to withdraw be reserved." "Unless the power to withdraw be reserved;"—these words are of concentrated force. In another Maryland case, *Baker* v. *Baker*, supra, a husband deposited $2,000.00 in a savings bank to the credit of himself and wife. Subsequently the account was changed by adding the names of their children, with indicated shares to each, "payable at our death." The husband collected the interest while he lived, and after his death the widow kept the bank-book and received the interest on the deposit. It was held that a valid trust was created in favor of the husband and wife for life, and to the children after their death. *Ray* v. *Simmons*, 11 R. I., 266, was a bill in equity to establish a trust, filed against the administrator of the intestate estate of the depositor by the person named on a bank-book as donee. There was evidence of a declaration by the donor that he had money deposited in the bank to as large an amount as permissible in his own name, and that he also had a deposit in another person's name, the identity of whom was not made known, and also evidence of the withdrawal by the depositor of a dividend. The court said: "The trust, except in so far as it was increased by subsequent deposits, was, in our opinion, created before the declaration was made; and no such declaration made after the creation of the trust could have any legitimate effect on it. The same is true in regard to the withdrawal of the dividend." There were several deposits and withdrawals at different times of various sums, but in what connection the withdrawals were made is not shown, in *Connecticut River Savings Bank* v. *Estate of Albee*, 64 Vt., 571: "So far as is disclosed by legal evidence, he (the donor and trustee) never said nor did anything thereafter, inconsistent with

that transaction, viewed on the theory that such a trust was intended to be created by him. The fact that he deposited other money to this account, and, as trustee drew money from it, is perfectly consistent with his being trustee." In an illuminating note on *Cunningham* v. *Davenport* (147 N. Y., 43), 32 L. R. A. at page 375, this statement is made: "If after having created a perfect trust the depositor withdraws the funds and leaves nothing on deposit at the time of his death, it will be the duty of the executor to carry out the trust in favor of the beneficiary," citing *Witzel* v. *Chapin*, 3 Bradf., 386. Under the present rule in New York, a bank deposit of one's money in his own name as trustee for another does not, standing alone, during the lifetime of the depositor, constitute other than a tentative trust, revocable at will. The case goes to this length: "In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." Matter of Totten, 179 N. Y., 112. The rule of the Totten case does not appeal to us with favor.

Whether a trust exist or not is usually a question of fact to be established or disproved by evidentiary facts. Explicitly and unreservedly, as the headings of the bank-books at first view indicate, Miss Cazallis intended all to know that the funds were deposited in her name as trustee for others. In doing this, unfettered and untrammelled English presumably was used for what it meant. No evidence having been brought forward irreconcilable with such signified intention, it seems consonant with reason and rules of law to take for granted that the words expressed her deliberate intent as trustor, and that they should be given their full effect.

The defense has not furnished evidence of facts and circumstances to upset the case against it, and to show that the real motive of Celina Cazallis was to effectuate designs opposed to the postulate of an intention to devest herself of the beneficial ownership of the funds. No statement by her, and no act of hers, essentially weighing against the prima facie evidence, has been shown. The attending presumptions have not been counterbalanced or overcome. This fundamentally distinguishes the case from others. The record is silent as to what was done with the moneys drawn out of the bank, but the parties agree that Celina counted herself responsible for accidental injury sustained in girlhood by Nancy (from whose account the

withdrawals were made), and that she assisted her pecuniarily. Besides, had she so desired, the donor might have reserved all or part of the income from the deposits, during life. *Barker* v. *Frey*, supra; *Bank* v. *Merriam*, 88 Maine at page 151; *Savings Inst.* v. *Titcomb*, 96 Maine, 62; *Smith* v. *Savings Bank*, supra; *Gerrish* v. *Inst.*, supra.

On the agreed statement of facts, the purpose of Miss Cazallis, to retain in herself as trustee, the legal title to the equitable gifts, is plain. The trusts did not survive her. Nothing signifies that if she should die, or for any cause should become unable to act in the trusts, a new trustee should be appointed. Now that she is dead, the administrator of her estate, who has but naked legal title to the trust funds, should make payment to the beneficiaries, to each his due proportion.

By error, the plaintiffs have named themselves among the defendants in the bill. Amendment will correct this inconsistency. The general guardian of Mary Cazallis, although named and answering as a defendant, is not properly a party. Mary herself, as an heir at law of the intestate donor, might have been named as defendant, and, in the event of her incapacity, a guardian ad litem appointed. *Wakefield* v. *Marr*, 65 Maine, 341. Plaintiffs may amend by discontinuing as to the general guardian. The administrator represents the estate of the decedent. It is not essential that Mary be made a party; an action for money had and received would lie against the estate of Miss Cazallis at the instance of each donee. Gaffney's Estate, 146 Pa. St., 49.

When the indicated details shall have had attention, a justice below will enter a decree sustaining the bill, and further will

Decree in accordance with this opinion.

PHILBROOK, J. does not concur.

JUDSON S. CLARK *vs.* GEORGE DOWNES.

Washington. Opinion June 17, 1920.

Assignment of a policy as collateral security. Renewal note. Presumption of payment of the original indebtedness by a renewal note overcome if security impaired. Suit on the renewal note not a waiver of the security for the original indebtedness.

In an action of assumpsit on an account annexed and the common form of omnibus count to recover money collected by the defendant on an insurance policy on the life of the plaintiff, which the defendant claims was collected by him as administrator of the estate of L. G. Downes and by virtue of an assignment of said policy as collateral security of a note given by the plaintiff to said L. G. Downes, the indebtedness for which said security was given being still unpaid, but which the plaintiff claims has been paid either in cash or by new note with his wife as co-maker, the insurance policy being left in the hands of L. G. Downes after the indebtedness was discharged, as his personal attorney. The case was reported to this court with equity powers.

Held:

That even under such a report this court cannot go outside of the issues raised by the pleadings in the exercise of its equity powers;

That a preponderance of the evidence sustains the defendant's contention that the note of the plaintiff and his wife, found among the papers of L. G. Downes after his death, was a renewal of the original indebtedness for which the insurance policy was still held as collateral security;

That the taking of the plaintiff's note with the name of his wife thereon should not be presumed to be in discharge of the prior indebtedness, as to so hold would impair the security already held by the creditor, the presumption of payment being also further overcome by the leaving of the insurance policy in the hands of the creditor and his administrator for many years and even after suit upon the note;

That suit upon the note of the plaintiff and his wife should not be deemed a waiver of the security afforded by the policy;

That the defendant as administrator of the estate of L. G. Downes had the right to collect the amount due on the policy of insurance in question and must be regarded as having acted in that capacity; and is, therefore, not personally liable in this action.

On report. An action of assumpsit on an account annexed, and omnibus count, to recover two thousand one hundred thirty-three dollars and eighteen cents of the defendant personally, alleging that

the defendant collected said amount on an insurance policy on the life of the plaintiff, assigned as collateral security by plaintiff to the late L. G. Downes, father of the defendant, of whose estate the defendant was administrator. After the evidence was taken out before a jury, by agreement of the parties, the case was reported to the Law Court for its determination with equity powers.

Plea the general issue and a brief statement alleging that the assignment of the policy of insurance declared on was assigned by the plaintiff to L. G. Downes in his lifetime, and at his death became a part of his estate, and as such was collected and distributed by defendant in his capacity as administrator of the estate of L. G. Downes. Judgment for defendant.

Case stated in the opinion.

R. J. McGarrigle, Gray & Sawyer, D. I. Gould and Ashley St. Clair, for plaintiff.

George Downes, Crosby & Crosby, and H. J. Dudley, for defendant.

SITTING: SPEAR, PHILBROOK, MORRILL, WILSON, DEASY, JJ.

WILSON, J. An action of assumpsit on an account annexed and the common form of omnibus count to recover the sum of two thousand one hundred and thirty-three dollars and eighteen cents, alleged to have been collected by the defendant on an insurance policy on the life of the plaintiff under color of an assignment of the policy to the late L. G. Downes, father of the defendant, of whose estate the defendant was administrator.

By agreement of parties, after the evidence was taken out before a jury, it was reported to this court for its determination with equity powers. Just what equity powers this court can exercise under the pleadings in this case, in addition to those it may always exercise in an action for money had and received, *Mayo* v. *Purinton*, 113 Maine, 452, 455, is not clear. No special claim of an equitable nature is set up in the declaration nor any equitable defense pleaded in the defendant's plea.

The equity powers of this court are not broad enough to include in an action between two parties the adjustment of accounts and counter claims between the plaintiff and an estate of which the defendant happens to be the administrator.

However, a review of the evidence satisfies us that the plaintiff cannot maintain his claim against this defendant, and, therefore, any equities there may be between the plaintiff and the estate of L. G. Downes do not require consideration.

The claim of the plaintiff is based upon the contention that the defendant under the color of an assignment, which was no longer valid, collected without right or authority a certain sum due on a life insurance policy which belonged to the plaintiff. The defendant contends that the collection of the sum due on the policy was done by him in his capacity as administrator of his father's estate, and by virtue of an assignment of said policy by the plaintiff to his father to secure an indebtedness which had not been paid, and which assignment was still in effect and valid.

Evidence of other claims and accounts between the plaintiff and father of the defendant was introduced in the case. It is clear, however, that if the collection of the amount due on the policy by the defendant was without right or authority, he would be liable personally and no claim due his father's estate could be set off against his debt; but if the defendant in the collection of said sum was acting under a valid assignment to his father and as the representative of his father's estate, he would not then be personally liable for any money that in such manner came into his hands.

The beginning of the transactions between the plaintiff and the defendant's father dates back to November 15th, 1892, or more than twenty-five years ago. The chief facts in dispute, and which we think are decisive of this case, are whether at the time a loan of thirty-five hundred dollars, obtained by the plaintiff of or through the defendant's father, became due, and to secure which the assignment of the insurance policy in question was given, it was paid by the plaintiff by the giving of two notes in the aggregate principal sum of fifteen hundred dollars which were afterwards paid, and by the payment of two thousand dollars in cash or by check, which would, of course, render the assignment null and of no further effect; or whether the two thousand dollar cash payment on the original loan which became due March 18, 1893, was paid by money advanced by L. G. Downes for which he took a new note for two thousand dollars payable in one year which was renewed or extended to March 18, 1895, when another note was given for the same indebtedness indorsed by the plaintiff's wife. The plaintiff claims the last note was for an entirely new and distinct loan, and if not, it was in payment of the

original indebtedness for the security of which the assignment of the insurance policy was given, so that the assignment was no longer of any validity. Mr. L. G. Downes died soon after the last note was given and the defendant administered upon his estate, and the last note and assignment of the insurance policy were found among his other securities and private papers in the vault of the Calais National Bank of which he was president and through which these transactions were carried on.

We think the fair preponderance of the evidence sustains the defendant's contentions. The plaintiff testifies from memory of transactions which took place more than twenty-five years ago and following which he suffered from a mental weakness which incapacitated him for six years or more for the transaction of any business. The defendant has furnished the books of account of his father and of the bank which satisfies us that the two thousand dollar indebtedness for which the note dated March 18, 1895, and indorsed by his wife was given, was a continuing indebtedness, and a part of the original thirty-five hundred dollar loan obtained November 15, 1892. It would be an unusual coincidence that on the exact day of the maturity of the prior loan, if extended as the books seem to indicate, he should have occasion to obtain another loan of exactly the same amount, or if the new note indorsed by his wife was regarded as a payment of the prior indebtedness, he should have left the insurance policies and the assignment in the hands of L. G. Downes and his administrator for a period of twenty years especially after he had been sued upon the note. While L. G. Downes was his counsel in all his business matters, the defendant was not. Even if the last note were for a new loan, the plaintiff contends that the taking of his note indorsed by his wife must be presumed to be a discharge of the prior indebtedness and so invalidated the assignment of the insurance policy. It does not appear, however, that the wife's indorsement afforded any adequate security for the indebtedness. The rule is that the taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired, *Bryant* v. *Grady*, 98 Maine, 389, 395; *Bunker* v. *Barron*, 79 Maine, 62, 68. The fact that to so treat the last note evidently would have impaired the security of the creditor, coupled with the leaving of the policy in the hands of the creditor and his administrator for all these years, seems to us sufficient to overcome this presumption.

Nor do we think if the insurance policies were still held by the estate of L. G. Downes as collateral security for the debt, that the suit upon the note and enforcement so far as possible against the makers and their property, which jointly proved inadequate, can be construed as any surrender or waiver of the security afforded by the policies. *Smith* v. *Strout*, 63 Maine, 205. The defendant as administrator of the estate of L. G. Downes had the right to collect the amount due on the policy in question and must be regarded as having acted in that capacity, and is, therefore, not personally liable in this action.

Entry must be:

Judgment for defendant.

JARVIS B. WOODS *vs.* FRANK M. PERKINS.

Penobscot. Opinion July 3, 1920.

Seizure in close time of a carcass of a bull moose under Chap. 131, Public Laws of 1919. The moose was killed legally in another jurisdiction, and transported into Maine. No warrant was ever issued, nor necessary steps taken to determine the question of forfeiture. The constitutionality of the act, under which the seizure was made, upheld under the police power of the State. The failure to have a warrant issued, and an arrest made, and the question of forfeiture determined, is fatal, and the act of seizure a trespass, and the defendant a trespasser ab initio.

In an action of trover brought to recover the value of a bull moose, lawfully killed by the plaintiff in the Province of New Brunswick and transported thence to Bangor, Maine, where it was seized by the defendant, a duly commissioned and qualified game warden, the court having ordered judgment for defendant and the plaintiff having excepted, it is

Held:

1. That transportation having ceased at the time of the seizure, no question under the Interstate Commerce Act, as to the right to interfere with property in transit, is involved.
2. That Chap. 131 of the Public Laws of 1919, prohibiting the having in possession except during the last ten days of November, any bull moose, "whenever or wherever taken, caught or killed," includes the having in possession of a bull moose lawfully killed in New Brunswick and afterwards brought into this State.
3. That the phrase "wherever taken, caught or killed" is unlimited, and was intended to include moose brought into this State from another jurisdiction. The legislative purpose was to prevent evasion of the law on the part of those, especially along the border, who might claim that a moose found in their possession had been killed in another jurisdiction, although in fact killed in this State, thus rendering the enforcement of the law more difficult.
4. The act in question, in so far as it relates to imported game, is a valid exercise of the police power of the State and is not in violation of the Constitution.
5. The plaintiff's claim, however, that he has been deprived of his property by the defendant without any judicial determination of his legal right thereto and therefore without due process of law must be upheld. A warrant for the arrest of the plaintiff should have been obtained by the defendant within a reasonable time after seizure. The seizure was made on October 15, 1919, and no warrant has ever been issued. This makes the warden a trespasser ab initio. He is holding the property without legal authority or justification.

6. Our conclusion therefore is that while the defendant was legally justified in making the original seizure that justification had ceased long before the institution of this suit and he had become liable through his own inaction.

This is an action of trover brought in the Bangor Municipal Court to recover the value of a carcass of a bull moose seized under the provisions of Chapter 131 of the Public Laws of 1919. The moose was lawfully killed in the Province of New Brunswick, and transported, in close time, into Maine to Bangor, where the carcass was seized by the defendant, a game warden. Upon an agreed statement of facts, that court ruled, pro forma, in favor of the defendant, and the plaintiff took exceptions, which were certified directly to the Chief Justice in accordance with the provisions of Private and Special Laws of 1895, Chap. 21. Sec. 6. Exceptions sustained.

Case stated in the opinion.

George E. Thompson, and James D. Maxwell, for plaintiff.

Willis E. Parsons, for defendant.

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

CORNISH, C. J. Chapter 131 of the Public Laws of 1919, relating to the protection of moose, contains this provision: "No person shall, between the first day of December of each year and the twentieth day of November of the following year, both days inclusive, hunt, take, catch, kill or have in possession any bull moose or part thereof, whenever or wherever taken, caught or killed" &c. By virtue of this section, the defendant, a duly commissioned and qualified game warden, on the 15th day of October, 1919, seized and still holds the carcass of a bull moose which the plaintiff had lawfully killed in the Province of New Brunswick, and had transported and delivered to the Bangor Dairy Company in the City of Bangor, Maine, to be kept in cold storage for him. Transportation had therefore ceased and no question under the Interstate Commerce Act, as to the right to interfere with property in transit is involved.

On December 24, 1919, the plaintiff brought this action of trover in the Bangor Municipal Court to recover the value of the carcass so seized, and that court having ruled in favor of the defendant upon an agreed statement of facts, the case is now before the Law Court upon

the plaintiff's exceptions which have been certified directly to the Chief Justice in accordance with the provisions of Private and Special Laws of 1895, Chap. 21, Sec. 6.

The first point in issue is the scope of the Act of 1919, before quoted. Was it intended by the Legislature to include and does it include a case of this sort where one has in possession during close time, a moose lawfully killed in another jurisdiction and afterwards imported into this State, or should its force be restricted to having in possession in close time a moose unlawfully taken, caught or killed within the limits of the State of Maine? We think the former is the true interpretation of the act. Construing the words "according to the common meaning of the language," R. S., Chap. 1, Sec. 6, Paragraph 1, leads to no other conclusion. The phrase "wherever taken, caught or killed," is unlimited as to space. It includes New Brunswick and New Hampshire as well as Maine. These words either have this meaning or they are meaningless and we are loath to assume that the Legislature had no purpose whatever in inserting them. "Wherever" as construed to mean "wherever within the State of Maine" would be a needless and useless employment of the term, because without it the Act necessarily embraces the entire State.

The history of this particular legislation emphasizes our view. The earlier statutes contained no words which would naturally indicate an intention to cover imported game. Nor did the general revision of the fish and game laws in 1913, which provided for a close time on moose throughout the year with the exception of the month of November, Public Laws 1913, Chap. 206, Sec. 28. In 1915, an absolute close time throughout the entire period until November 1, 1919, was created, the evident purpose being to preserve this diminishing species of game by every means within the power of the Legislature. The general revision of the fish and game laws in 1917, Chapter 219, retained the same provision as to close time until November 1, 1919, and provided for the entire month of November as open time after that date.

Then in 1919 the Legislature made more stringent regulations. The open time was decreased to the last ten days in November and in order to guard against possible evasion of the law when that short November open time should come into vogue, the Legislature passed this act in question, Chapter 131, which was a substitute for R. S., Chap. 33, Sec. 37, and Public Laws 1917, Chap. 219, Sec. 37, and

deliberately inserted the new and sweeping terms "whenever or wherever taken, caught or killed." The obvious purpose of this amendment was not to affect the legality of the taking of game in another State or Province, a purpose quite beyond the power of the Legislature of Maine to effectuate, but to prohibit the possession in this State, during close time, of such game wherever killed, and thus to prevent evasion of the law, on the part of those, especially along the border, who might claim that a moose found in their possession had been killed in another jurisdiction, although in fact killed in this State, thus rendering the enforcement of the law much more difficult. The amendment was simply another step toward the protection of the game within our borders, and its terms are so clear and unambiguous as to really need no construction on the part of the court.

The deer statute was similarly amended many years ago. The original act simply prohibited during close time the killing, destroying or having in possession of more than a certain number of deer, and contained no clause indicating any legislative intent to prevent the possession of deer killed elsewhere. R. S. 1883, Chap. 95, Sec. 4. Public Laws 1891, Chap. 95, Sec. 4. Under the statute in that form our court held that it was not intended to interfere with foreign game brought into the State at any time nor with game lawfully taken or killed here. *State* v. *Bucknam*, 88 Maine, 385, citing with approval *People* v. *O'Neill*, 71 Mich., 325, and *Commonwealth* v. *Wilkinson*, 139 Pa., 298, in which cases statutes of similar import were construed. In the same line are *People* v. *Buffalo Fish Co.*, 164 N. Y., 93; *People* v. *Bootman*, 180 N. Y., 1; *Commonwealth* v. *Hall*, 128 Mass., 410.

Counsel for the plaintiff confidently relies upon *State* v. *Bucknam*, supra as decisive of the case at bar, but as has been seen, that case construed a statute of limited, not unlimited, scope; therefore it cannot be regarded as a precedent here. It is interesting to note that that decision was rendered in 1896, and in 1901 the Legislature amended the deer act so as to expressly extend its range by adding the words "whenever or wherever taken, caught or killed" precisely the same words as were inserted in the moose statute in 1919. Since that amendment to the deer statute the court has had no occasion to pass upon its interpretation.

Some courts have gone so far as to hold that imported fish or game is included within the purview of a statute containing no express provision sufficient to include imported game, as in *State* v. *Shattuck*,

96 Minn., 45; ex parte Maier, 103 Cal., 476; *Roth* v. *State*, 51 Ohio St., 209; *Magner* v. *People*, 91 Ill., 320; *State* v. *Schuman*, 36 Or., 16; *Commonwealth* v. *Savage*, 155 Mass., 278; 13 R. C. L., page 696. But the comprehensive language in the present statute places the construction beyond all doubt, and renders the plaintiff a violator of the law.

In the second place, the plaintiff contends that if the statute as amended applies to imported game it is unconstitutional as depriving the owner of his property.

This contention cannot be upheld. The constitutionality of the entire fish and game law rests upon the police power of the State, and the Legislature may pass all reasonable laws to enforce that power. The fact that some owners of property may be thereby at times restricted in or deprived of its use does not make such laws unreasonable. Such a result is of frequent occurrence. Thus in *Commonwealth* v. *Gilbert*, 160 Mass., 157, an act prohibiting the sale of trout during a certain season, was held to extend to the sale of trout artificially propagated in a private preserve, and to be constitutional as a valid exercise of the police power. The constitutionality of acts applicable to imported game, similar to the one under consideration, is now beyond question. Ex parte Maier, 103 Cal. 476; *Magner* v. *People*, 97 Ill., 320; *Roth* v. *State*, 51 Ohio St., 209; *Stevens* v. *State*, 89 Maryland, 669; *Silz* v. *Hesterberg*, 211 U. S., 31. So far, therefore, as the construction of the statute and its constitutionality, as applied to imported game are concerned, the contentions of the plaintiff cannot be sustained.

But upon another point, the plaintiff's claim must be upheld, namely that he has been deprived of his property by the defendant without any judicial determination of his legal right thereto.

The Declaration of Rights in the Constitution of this State, Const. of Maine, Article I, Section 5, guarantees every person security as to his property, protection against unreasonable searches and seizures, and the right to a fair trial before his property can be lawfully taken and withheld from him. This fundamental principle of civil liberty still subsists and must be jealously guarded by the courts against invasion. That principle was clearly invaded here. A warrant for the arrest of the plaintiff should have been obtained by the defendant either before the seizure was made or within a reasonable time thereafter. The purpose is that the guilt or innocence of the

alleged offender may be judicially determined within a reasonable time. That determination is the principal inquiry. The forfeiture or non-forfeiture of the seized property is but the corollary thereto. Conviction does not follow forfeiture, but forfeiture follows conviction. The statute so provides. Public Laws 1919, Chap. 196, Sec. 32. Hence it is that in such cases the warrant must be obtained with reasonable promptness and the alleged offender given his day in court. Due process of law requires it.

In the case at bar the seizure was made on October 15, 1919, and no warrant has ever been issued. The agreed statement recites that no prosecution has been commenced against the plaintiff for the violation of the game law and that the defendant as a game warden holds the seized game without any warrant or other process whatever, awaiting the determination of the Law Court as to its forfeiture. This statement is fatal to the defense. It makes the warden an acknowledged trespasser ab initio. He is holding the property without any legal authority or justification whatever. *Edson* v. *Crangle*, 62 Ohio St., 49; *Lowry* v. *Rainwater*, 70 Mo., 153; *Russell* v. *Hanscomb*, 15 Gray, 166.

An analogous situation may be found in prosecutions under the prohibitory law. In that class of cases the statute permits the officer to seize liquors without a warrant in the first instance and to keep them "for a reasonable time until he can procure such warrant." R. S., Chap. 127, Sec. 28. In enforcing this statute it was held in *Weston* v. *Carr*, 71 Maine, 356, that an officer who had made a seizure of liquors without a warrant and had delayed six days before procuring one, was liable to the owner as a trespasser, no justifiable reason for the delay being shown. In *State* v. *Riley*, 86 Maine, 144, a similar result followed an inexecusable delay of six days. In the pending case two and one-half months had elapsed after the seizure before the bringing of this civil suit and the defendant had taken no steps whatever toward giving the plaintiff a hearing before a court of competent jurisdiction. This far exceeds any possible limit.

The defendant's contention that the plaintiff ought not to complain because he has not been arrested is untenable. *Adams* v. *Allen*, 99 Maine, 249. When his right to property that has been taken from him depends upon the determination of his guilt or innocence, and that determination can be set in motion only by the seizor, the owner has the constitutional right to a speedy trial. The very foundation

of the forfeiture is a legal seizure. *Guptill* v. *Richardson*, 62 Maine, 257, 265; *State* v. *Ford Touring Car*, 117 Maine, 232.

Nor is the warden protected by the last sentence in the statute under consideration, allowing the owner to recover the seized game by giving a bond to the officer in double the amount of fine for the alleged violation, conditioned that if convicted he will within thirty days thereafter pay such fine and costs. In the first place this presupposes a warrant issued before the bond is given, alleging the offense with which the respondent is charged so that the fine therefor may be ascertained. Here no such charge had been lodged and therefore it would be impossible to know what the terms of the bond should be. But the second and deeper reason is that this provision does not fully safeguard property rights. It may well be that an alleged offender may find himself unable to procure the necessary sureties and to give the requisite bond, in which case the provision affords him no assistance whatever. No unlawful condition or restraint can be imposed upon the constitutional privilege of every person to have his legal rights adjudicated in accordance with the law of the land. *State* v. *Gurney*, 37 Maine, 156; *Saco* v. *Wentworth*, 37 Maine, 165; *Bennett* v. *Davis*, 90 Maine, 102.

Our conclusion therefore is that while the defendant was legally justified in making the original seizure in this case, that justification had ceased long before the institution of this suit, and he had become by reason of his own inaction a trespasser ab initio. Therefore the entry must be,

Exceptions sustained.

SUSANNE GREELEY *vs.* FRED L. GREELEY, Executor.

Androscoggin. Opinion July 9, 1920.

Promissory note. Genuineness of signature. Legal consideration. Parol evidence. Burden of proof. A promise a valuable consideration.

A promissory note given by the maker to the payee, upon the promise of the latter to the former that she would hold herself in readiness to come to his home in his last days, whenever he might request, is supported by a valuable consideration.

On report. Assumpsit on a promissory note given to plaintiff by defendant's testate, Cyrus Greeley. Plea, general issue, with a brief statement alleging that the signature to the note is not the signature of defendant's testate: and that further the alleged note was without a valuable consideration. Judgment for plaintiff for $9,900, and interest from date of the writ.

Case stated in the opinion.

McGillicuddy & Morey, for plaintiff.

White, Carter & Skelton, and George C. Wing, for defendant.

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

DUNN, J. At the basis of this suit there lies a non-negotiable promissory note. It reads:

"Lewiston, Maine, Sept. 5, 1912.

$10000.

For value received I promise to pay Susanne Greeley the sum of Ten thousand dollars with out interest.

CYRUS GREELEY."

In her writ, framed against defendant as executor of Mr. Greeley's will, plaintiff sets out that the note remains unpaid, excepting as to the sum of one hundred dollars, endorsed at a time when the maker was living. At the trial there was concession that the notary, residing outside this State, before whom preliminary proof of claim was sworn, had authority to administer oaths. Save as to that, it

devolved on plaintiff to prove her case, step by step. Genuineness of signature to the instrument is beyond dispute. Body of the note is in handwriting other than that of the signer, but the record does not indicate whose. Nor is it shown by whom endorsement of partial payment was made. Supplemental to the presumption, arising from her actual possession of the note, that it was delivered to her on the day of its date, there is uncontradicted evidence that, for a year at least just before the death of the maker, the note was with payee's agent for safe-keeping. The prepositional phrase. "For value received," which introduces the promise relied on, bespeaks that material cause moved the maker to give the note existence, and affords presumptive evidence of consideration. *Bourne* v. *Ward*, 51 Maine, 191; *Small* v. *Clewley*, 62 Maine, 156; *Morrison* v. *Brown*, 84 Maine, 82; *Palmer* v. *Palmer*, 112 Maine, 149; *Palmer* v. *Blanchard*, 113 Maine, 380. But defendant offered evidence tending otherwise. Against such evidence plaintiff introduced other evidence substantiating the life and essence of her cause. A promise, not under seal, must be supported by a legal consideration. An instrument given without consideration does not create any obligation in favor of the payee named therein. *Corlies* v. *Howe*, 11 Gray, 125. As between the immediate parties, or parties having the same relative rights, the consideration of a simple contract may be the subject of inquiry. *Folsom* v. *Mussey*, 8 Maine, 400. A promissory note occupies no higher sphere than any other record of a contract in writing. Oral evidence is admissible, as between the original parties, to show that a writing in the form of a negotiable instrument, and of which there has been manual tradition, did not in fact become a binding obligation. *Burke* v. *Dulaney*, 153 U. S., 228; *Sturtevant* v. *Randall*, 53 Maine, 149; *Smith* v. *Morrill*, 54 Maine, 48; *Bradford* v. *Prescott*, 85 Maine, 482. This rule does not impinge the principle that a writing cannot be varied or contradicted by parol. The distinction is, that evidence to vary the terms of a written contract is not admissible, but evidence that there is no agreement at all is admissible. *Ware* v. *Allen*, 128 U. S., 590; *Wilson* v. *Powers*, 131 Mass., 539.

Burden of making proof of consideration is on the plaintiff. *Small* v. *Clewley*, supra; *Huntington* v. *Shute*, 180 Mass., 371. She must prove that valuable consideration furnished motive or inducement for the note. *Maynard* v. *Maynard*, 105 Maine, 567. The parties did not testify. No person gave evidence from personal knowledge

of the original affair. No one was called who could bear witness that defendant's testator had specifically told him about it. Maker and payee of the note were cousins, in degree once removed. He was of advanced years and in easy financial situation. She, a Maine girl grown to womanhood, employed in Rhode Island as school teacher. For years, while at home through vacation seasons, it was customary for her to visit at the Greeleys.' A sister of plaintiff testified that, on one day some ten months after the date of the note, and soon after the making of his will, Mr. Greeley, in acquainting her with the provisions of a voluntary trust created by him for her benefit, said, incidentally, I esteem you and Susanne before my other relatives. And, forasmuch as Susanne has promised to hold herself in readiness to come to me in my last days, whenever I may request, I have made provision for her. This witness was already designated to receive, in addition to the trust, a legacy under decedent's will; the trust and legacy together eventually investing her with money equal in amount to that called for by the note. Susanne is not mentioned in that will. Of trust she does not appear as beneficiary. Proof there is none of provision differently from the note for her. Testator's cash-book, so a witness said, is without entry concerning the note. One would scarcely expect such transaction to be set down in writing among cash receipts and disbursements, unless it had immediately to do with money. This note had not yielded cash to him who made it, and he had not been called upon to pay out money in redemption of the promise which it carried. It therefore, would seem to be yet without dignity to be listed with cash items. There is significance in the testimony of the witness that he failed, on careful examination, to find entry on the cash-book corresponding to the purported partial payment on the note. The entry may have been omitted by mistake; perhaps by design, as one not related to business dealings; and it is possible, though it seems improbable, that it may have been in form which the witness did not recognize and identify. But mere absence of the entry does not conterbalance affirmative proof in the case. Another sister of plaintiff testified, though not so minutely as the first, that Mr. Greeley told her of his affection for Susanne, of her promise to come to him as he neared life's end, and that he had provided for her. Defendant argues that the testimony of these sisters tasks credulity; that their stories apparently are designed so exactly to fit imperative requirement as to make the utterance of each its own refuta-

tion. Not so. There is precision in their statements, but precision is entirely consistent with the most scrupulous veracity, and truth naturally weaves a fine and closely fitting web. Their testimony impresses belief. From the tenor of Mr. Greeley's words, as reflected in plaintiff's portrayal of this case, inference is warranted that, in speaking of provision made by him for Susanne, he referred to the note in suit. If he had aught else in mind, it remains under impenetrable cover.

The note is not wanting valuable consideration. A promise can support a promise. Met. Con. 211. *Saco Manufacturing Company* v. *Whitney* , 7 Maine, 256; *Babcock* v. *Wilson,* 17 Maine, 372. Cyrus Greeley promised Susanne Greeley to pay her ten thousand dollars on demand, or the same thing. On Susanne's part, there was concurrent binding promise to the maker of the note, and for the note, to hold herself in readiness to come to his home, in the twilight of his days, whenever he might request. The one promise underlying the other, but neither precedent to the other. Mutual, yet independent, promises. *Waterhouse* v. *Kendall,* 11 Cush., 128. Each promisor, as promisee, had the right at once to hold the other to a positive agreement. *Preble* v. *Hunt,* 85 Maine, 267. There is distinction, well defined and understood, between delivery of a note by maker to payee to have full effect at once, and delivery thereof made to depend, on its going into operation, upon events to take place. In the one instance, the note would be a valid obligation from the moment of tradition; in the other, there would remain some essential prerequisite to endue the note with life. *Ware* v. *Davis,* supra.

The vital feature for which this note was given was that Susanne agreed to hold herself in readiness to do something in behalf of the maker. The consideration necessary to support the note is not performance of what she agreed to do, but her agreement to perform. For that agreement Cyrus Greeley paid. He made and delivered the note to command sympathetic companionship for himself when he would. The record is silent of delivery on contingency. Had Miss Greeley refused to perform her undertaking there would have been failure of consideration, complete or pro tanto. Absence of consideration, rather than failure of consideration, is the reliance of the defense. However, it is only fair to say there is no evidence that

plaintiff was unable to comply, or that she refused to comply, with her outstanding agreement. On the contrary, there is testimony that she held herself ready. And that, from the time in 1915, that her sister went to Mr. Greeley's house to live, until the latter's death in the following year, plaintiff made five different little visits at her cousin's home; a late, if, indeed, not the very latest of these visits, at the express request of Mr. Greeley, approved by his then recently appointed guardian. While his health permitted, Mr. Greeley and Susanne talked over the old days, played cards and checkers, and together went to walk. It is easy to see, in the light of what happened, that these visits did not interfere with plaintiff's engagements as school teacher, and that the note may be generous payment for the agreement into which she entered. Much may have been left to her option, and of adequacy of consideration, maker of the note alone was judge. The estimate of value placed by him on his cousin's agreement should not be disturbed.

It is our decision, that the note in suit is enforceable against the maker's estate. The conclusion is supported by authority in the field of precedents. *Pierce* v. *Stolhand*, (Wis.), 124 N. W., 259, was an action on a promissory note given in part payment of services to be performed. Defendant set up want of consideration. Said the court: "There is no doubt but that the agreement to perform the services was a sufficient consideration for the note." A promise to deliver coal sufficiently supported acceptance of a draft for the purchase price, in *Tradesmen's Nat'l. Bank* v. *Curtis*, 167 N. Y., 194. A note upon consideration payee would provide maker a home as long as he lived was held valid, notwithstanding that the maker also paid a weekly sum for board. In re Phile, 14 Phila., 330. In *Earle* v. *Angell*, 157 Mass., 294, defendant's testatrix said to plaintiff, "If you will agree to come to my funeral, I will give you five hundred dollars." Plaintiff promised to come if alive and notified in time. The court said, "We cannot say that this did not warrant a finding of promise for promise." In *Sharon* v. *Sharon*, (Cal.), 8 Pac., 614, an agreement to pay money was held valid, by a consideration that the person to whom the money was promised should cease to disturb or annoy or make demands upon the promisor. In *Traver* v. *Stevens*, 11 Cush., 167, it was held that the payee of a promissory note, the consideration of which was the payee's promise to the maker to

deliver up another note he held against him, might recover on the one without proof of having surrendered the other.

Manifestly, the note in suit is a valid, unredeemed obligation, resting on a valuable consideration. The entry will be,

Judgment for plaintiff for $9900.00 and interest from the date of the writ.

JOSEPH STEWART, et al. *vs.* JAMES S. SMALL, et als.

Piscataquis. Opinion July 12, 1920.

Real Action. Common Law Adverse Possession. Possessory Titles to Wild Land. R. S., Chap. 110, Sec. 18. The constituent elements of common law adverse possession must be established by clear proof of acts and conduct of such a character as to put a man of ordinary prudence, and particularly the true owner, on notice that the estate in question is actually, visibly and exclusively held by a claimant in antagonistic purpose. Manifestly the Legislature intended to clothe possessory titles to wild lands with status and protection comparatively equal to similar titles to other lands. The real purpose and intent of the Legislature will prevail against the general words which it used when, having regard to the object to be secured, exact adherence to verbiage obviously would lead to injustice.

Real action. Plaintiffs have the true record title to an uncultivated and uninclosed lot of land, numbered 90, containing approximately one hundred and sixty acres, in the incorporated town of Wellington. Relying on a chain of recorded deeds, the first being one on sale of the lot for non-payment of taxes, and, additionally, on common law adverse possession, defendants set up, as to the whole lot, a better title in themselves. Failing this, then, with regard to the south half of the lot, defendants maintain that they have title paramount to that of plaintiffs, by force of the ground that, continuously for twenty years next prior to the commencement of suit for recovery of the land, they, and those from whom in immediate line they derivatively claim, (1) have claimed said south half under recorded deeds, (2) have paid all taxes assessed thereon, (3) and have held an exclusive, peaceable, uninterrupted and adverse possession thereof comporting with the ordinary management of such kind of land in the State of Maine.

Substantial infirmities patent on the face of the document, and not elsewhere corrected, render the tax deed, with which paper title of defendants begins, inoperative to convey the described land. Nor have defendants sustained the proposition that common law adverse claim of the land ripened into title. However imperfect, by the standard of common law rule, their acts of ownership were, yet such acts as related to the south half of the lot must be held to have attained to peaceable, exclusive, continuous and adverse possession, tallying with the ordinary management of wild lands. And besides, defendants have fulfilled the other requisite statutory requirements.

On the record before us, defendants have the better title to the south half of demanded premises. But demanded premises include the whole lot. Plaintiffs have title to the north half.

A general verdict for defendants clearly was unwarranted.

On motion. Real action to recover an uncultivated and uninclosed lot of wild land situate in the town of Wellington. Plea, nul disseizin. The jury returned a verdict for the defendants. The case was taken to the Law Court on plaintiff's motion for a new trial. Motion sustained. New trial granted.

Case stated in the opinion.

John W. Manson, and Harry R. Coolidge, for plaintiffs.

James H. Hudson, C. W. Hayes, and J. S. Williams, for defendants.

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

DUNN, J. Real action respecting an uncultivated and uninclosed lot of land, numbered 90, containing approximately 160 acres, in the incorporated town of Wellington. Plea nul disseizin. Verdict was for defendants. Plaintiffs present the case on motion in usual form. They have the true record title. Relying on a chain of recorded deeds, the first in which is one to the corporation of the town of Wellington from its treasurer, on sale of the lot, in the year 1875, for non-payment of taxes, and, additionally, on common law adverse possession, defendants set up, as to the whole lot, a better title in themselves. Failing this, then, with regard to the south half of the lot, defendants maintain that they have title paramount to that of the plaintiffs, by force of the ground that, continuously for twenty years next prior to the commencement of suit for recovery of possession of the land, they, and those from whom in immediate line they derivatively claim, (1) have claimed said south half under recorded

deeds; (2) have paid all taxes assessed thereon; (3) and have held an exclusive, peaceable, uninterrupted and adverse possession thereof comporting with the ordinary management of such kind of land in the State of Maine. R. S., Chap. 110, Sec. 18.

Substantial infirmities patent on the face of the document, and not elsewhere corrected, render the tax deed, with which paper title of defendants begins, inoperative to convey the described land. There is failure to show that the treasurer of the town, in making sale of the lot, regarded legislative direction concerning the extent of the delinquent estate "required" to be sold to defray the unpaid tax and charges. R. S. (1871), Chap. 6, Sec. 160. The deed contains recital that the treasurer offered for sale such part of the real estate as "would be sufficient to pay the tax . . . . ," and that, "no person offering to pay the same for a fractional part," he sold the whole. But what, in the treasurer's opinion, was "sufficient" for the purpose may have been more than "was required" therefor. *French* v. *Patterson*, 61 Maine, 203. More than that, it does not appear that the treasurer actually exposed for sale, and sought offers for a purchase of, a fractional part of the land adequate to pay the tax and charges, and could obtain no bid. *Ladd* v. *Dickey*, 84 Maine, 190; *Milliken* v. *Houghton*, 97 Maine, 447. It follows that defendants' paper title is founded on a nullity.

Nor have defendants sustained the proposition that common law adverse claim of the land ripened into title. There is no fixed rule whereby actual possession of real property by a hostile claimant may be determined. Ever to be taken strictly, the constituent elements of common law adverse possession must be established by clear proof of acts and conduct fit to put a man of ordinary prudence, and particularly the true owner, on notice that the estate in question is actually, visibly and exclusively held by a claimant in antagonistic purpose. The acts here advanced as indicative of ownership, taken singly or collectively, and comprising, intermittingly over a period of at least 20 years, the cutting of timber from which, in the nearby vicinity of the lot, chiefly was built two dwelling houses, a store building, and a schoolhouse; the removal therefrom, with frequency, of fuel-wood for use at claimant's house; the cutting, sale and use of shingle stuff; of material for shovel handles; of lumber other than that for the mentioned buildings; the digging of juniper knees; together with the erecting and maintaining for some years, less, however, than 20, of a

camp on the shore of a small pond in the northeast corner of the lot, resorted to, now and then, by hunting or fishing or vacation parties, as well as other acts of lesser moment, whether personally by defendants or by others with their permission, fail to show that the lot was exclusively possessed by anybody, and fall far short of showing an ouster of the true owner from his constructive possession thereof, followed thereafter during the period for which adverse possession must be held, by that open, notorious, hostile, exclusive and continuous actuality of possession essential at common law, which would enable these defendants, in denial of a real record title unaffected by mere non-use, thereby to evince legally meritorious title in themselves. *Chandler* v. *Wilson*, 77 Maine, 76; *Hudson* v. *Coe*, 79 Maine, 83; *Adams* v. *Clapp*, 87 Maine, 321; *Smith* v. *Sawyer*, 108 Maine, 485; *Webber* v. *McAvoy*, 117 Maine, 326.

Anticipating conclusion of their failure to establish title otherwise, defendants argue, touching the south half of the lot, that they have shown in themselves, in a manner different from the common rule, a title outranking that of plaintiffs. They insist that, continuously for 20 years, counting backward from commencement of suit by true record owner for recovery of possession, all a statute (R. S., Chap. 110, Sec. 18,) exacts has been fully met. The statute adverted to reads:

"No real or mixed action, for the recovery of uncultivated lands or of any undivided 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. . . . ."

Under date of February 13th, 1885, the town of Wellington, itself the purchaser of the whole lot at tax sale, quitclaimed the south half

to Almeda F. Moulton. Her deed remained unrecorded for more than 2 years. She conveyed to one Ezra Andrews, who recorded his deed July 30th, 1887, four days after its date. Andrews, in 1890, by deed withheld from record until September 27th, 1892, transferred to Levi M. Small. Small, in 1894, also had deed of the north half of the lot, but did not record it for almost 9 years. On this branch of the case claim is not laid to the north half of the lot. In 1909, by deed dated April 17th and recorded April 19th, Mr. Small conveyed the whole lot to his son, the defendant James S. Small, who, on December 18th, 1913, by mortgage deed recorded December 23rd of the same year, conveyed the south half to Forrest A. Small, who has since died, and whose administrators are defendants here. There is no occasion to look into the effect of delay in recording certain deeds, for proof is clear enough that from 1893, following record in 1892 of deed from Andrews to Levi M. Small, to and including the year of 1914, taxes were paid on the land purporting to be conveyed by that deed, for a part of the period by Levi M. Small, and more recently by his son and grantee, defendant James S. Small. This proof comes from positive testimony of James S. Small that payment of the series of taxes was made, either by his father, with whom he lived and with whose business affairs he always was closely familiar, or by himself, as the assessments annually recurred. Odd receipts covering certain of the payments are in evidence. The taxes were laid, as the records of assessments show, at first to the one Small and later to the other, either on the south half or the whole lot, but never exclusive the south half. From the beginning of Levi M. Small's occupation forward, for full twenty years or more, the south half of lot 90 was openly and continuously claimed under recorded deeds. Lot 90 corners the Small homestead farm. It was used in connection with that farm. The Smalls had roads running through its length. Their already recited doings were executed in varying degree on the relative halves of the lot, for they claimed it all. Thus they furnished themselves lumber for a new dwelling house on the farm, and for the numerous other purposes that timber and wood there were requisite. However imperfect, by the standard of common law rule, their acts of ownership were, yet such acts must be held to have attained to peaceable, exclusive, continuous and adverse possession tallying with the ordinary management of wild lands. But the statute does not contemplate reckoning of time from an overt act initiating disseizin.

The count shall be backward from suit brought or entry made for recovery of the land. A confronting question is, from which of two suits between the same parties, for recovery of the land, payment of a tax by record title owner intervening, shall count begin? Proceedings first were instituted by these plaintiffs in 1915. In that action, at their own instance, they became nonsuit. In 1918 they brought the present action. Nor is that all. In the interval between the two suits, they caused payment of a tax assessed against defendant James S. Small, for the year of 1917, on lot 90, and overdue, to be made to the town collector. They now strenuously assert interruption of continuity of tax payments for the prescribed length of time by adverse claimants. Their insistence is that, regardless of the situation as viewed from the first suit, defendants have not proved payment of taxes "for the twenty years next prior to the commencement of (this) such action for recovery." Without pausing to discuss whether plaintiffs, in paying the tax on the south half, were other than volunteers, it is sufficient to say their contention that time should be found from the second suit may be, and likely is, within literal import of the phraseology of the statute. But the real purpose and intent of the Legislature will prevail against the general words which it used when, having regard to the object to be secured, exact adherence to verbiage obviously would lead to injustice. The reason of the law is the life of the law. The common law favors equitable interpretation of remedial statutes, and permits departure from the strict letter to arrive at manifest intent. *Holmes* v. *Paris*, 75 Maine, 559. "A thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within the letter. The intention of the law maker is the law." *Smythe* v. *Fiske*, 23 Wall., 374. "The real meaning of the statute," said EMERY, J., in *Landers* v. *Smith*, 78 Maine, 212, "is to be ascertained and declared even though it seems to conflict with the words of the statute." The intent of the Legislature, as expressed in the statute, and interpreted in the light of the apparent purpose of the legislation, shall govern; although such intent seemingly be at variance with the imprinted words. *Gray* v. *County Com'rs.*, 83 Maine, 429; In re *Penobscot Lumbering Association*, 93 Maine, 391. Context of the statute under consideration demonstrates legislative intent to clothe possessory titles to wild lands, about which, in the nature of things, there is absence of actual, physical occupation so open, so continuous

and exclusive as in similar titles to other lands, with status and protection comparatively equal to the latter. *Soper* v. *Lawrence Bros. Co.*, 98 Maine, 268. To effectuate intention the statute should receive a rational, sensible construction, lest otherwise interpretation lead to unreasonable result. Paraphrasing language of the Legislature, if defendant in a real action, and his grantors, respectively, for the period of 20 years immediately before and up to either commencement of a suit or of entry by the true record owner to regain possession of wild land, shall have satisfied all conditions of the statute, then what otherwise might be evidence only of trespass shall be disseizin, and limitation of remedy shall bar suit against him for recovery of the land. Bringing suit, voluntary nonsuit, payment of tax and suing again, did not give to these plaintiffs a footing more secure than when they sued at first. After claim under recorded deeds, payment of taxes and comparable possession all had gone on, in prescribed manner, for the period of limitation, statutory conditions were fulfilled. Those several acts together created as against the record owners a barrier not by them removable. They could not start anew running of a statute conceived by the court to be beneficial in nature and entitled to liberal reading. The Legislature intended to bar remedy when designated conditions were met. It did not intend its enactment to be meaningless or absurd.

On the record before us, defendants have the better title to the south half of demanded premises. But demanded premises include the whole lot. Plaintiffs have true record title to the north half. A general verdict for defendants clearly was unwarranted. The entry must be,

Motion sustained.
New trial granted.

ORA A. WETZLER *vs.* JOHN W. GOULD.

HENRY S. WETZLER *vs.* SAME.

Penobscot. Opinion, July 21, 1920.

Accident. Automobile. Highway. Crosswalk to regular stopping place of electric car. Due Care. Contributary Negligence. Negligence. Must have such control of automobile as to be able to stop to avoid injury to travellers at a regular stopping place with an approaching electric car in sight.

It was the duty of the defendant, approaching in his automobile a regular stopping place of an interurban electric railroad, with an approaching electric car in sight, if he would exercise due care, to observe the rights of travellers approaching or waiting to take the car, or alighting therefrom, and to so control his automobile that he could stop it, and to stop it, if necessary to avoid injury to such travellers.

It is clear that the defendant attempted to drive his automobile over a walk constructed across a highway from a waiting room to a regular stopping place of an electric car, between a car coming to a stop, or stationary, and a traveller approaching to take the car and only ten or twelve feet from it. The evening was dark, but an electric light near the waiting room illuminated the crosswalk for the entire width of the road. Such conduct falls nothing short of negligence.

The jury were warranted in finding Mrs. Wetzler not guilty of negligence in attempting to cross the street, although the lights on the automobile were burning and could have been seen for several hundred feet as the defendant approached the waiting room.

A person about to cross a highway for the purpose of taking an electric car at a regular stopping place of such car, is not required to look the whole distance that the lights of an approaching automobile may be visible, but only along the road far enough to warrant an ordinarily careful and prudent person, under like circumstances, having in mind his own safety, to conclude that no team or automobile is in such proximity, if properly managed, as to endanger his safety in crossing.

A person about to cross a highway for the purpose of taking an electric car at a regular stopping place of such car, has a right to assume that the driver of an approaching team or automobile will avail himself of an opportunity to pass in safety, or, if such approaching team or automobile cannot pass in safety, that the driver will stop, if necessary to avoid injury to travellers taking, or approaching to take, the electric car.

These two cases being against the same defendant, and Ora A. Wetzler, the plaintiff in the first case, being the wife of the plaintiff in the second case, being actions on the case to recover damages sustained by the plaintiffs in consequence of the negligence of the defendant, were tried together in the Superior Court in the county of Penobscot. Ora A. Wetzler, the plaintiff in the first case, on the fifth day of November, 1918, at about 5.45 o'clock in the afternoon, while crossing State Street in Bangor from the waiting room of the electric railroad between Bangor and Orono situate about two miles northerly from the center of the city, opposite the entrance to the grounds of the Bangor State Hospital, was struck by the defendant's automobile, and injured. The plaintiff had come to the waiting room to wait for the electric car from Orono to Bangor, and as she saw the car coming about two hundred feet away, she left the waiting room and was walking on the crosswalk across the street to the car on the other side of the street, when she was struck by the automobile. The jury returned a verdict for $400 for Ora A. Wetzler, the plaintiff in the first case, and $100 for her husband, Henry S. Wetzler, the plaintiff in the other case, for loss of services, comfort and society of his wife, and for nursing and medical attendance.

The defendant filed a general motion for a new trial in each case. Motions overruled.

Case stated in the opinion.

Daniel I. Gould, and *Clinton C. Stevens,* for plaintiffs.

J. F. Gould, George H. Morse, and *B. F. Keith,* for defendant.

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

MORRILL, J. We have no hesitation in saying that the motions to set aside the verdicts rendered against the defendant in these cases must be overruled. The evidence shows conclusively that the plaintiff, Ora A. Wetzler, sustained personal injuries upon the occasion in question, solely as the result of the defendant's negligence in the management of his automobile.

The material facts are these: On the fifth day of November, 1918, at about 5.45 o'clock in the afternoon, Mrs. Wetzler was struck by the defendant's automobile, and injured; the locality was on the highway leading northerly from Bangor to Orono, about two miles from

the center of Bangor, opposite the entrance to the grounds of the Bangor State Hospital; at this point the track of the electric railroad between Bangor and Orono is located on the southeasterly side of the highway; upon that side of the highway there is no sidewalk. On the northwesterly side of the highway, at the entrance to the hospital grounds, is a waiting room used by patrons of the electric railroad; from the side of the road at the waiting room, a crosswalk, thirteen feet wide according to the testimony of the engineer called by the defendant, extends across the highway to the tracks of the electric railroad; the width of the highway opposite the waiting room, between the ditch and the rail, is about thirty-five feet. The evening was dark, but an electric light near the waiting room illuminated the crosswalk for the entire width of the road. The locality was a regular stopping place for the electric cars between Bangor and Orono.

On the evening in question Mrs. Wetzler had come to the waiting room to wait for the electric car from Orono to Bangor; she saw the car coming when it was some two hundred feet away, and left the waiting room "walking right along" as she testified, over the crosswalk, to take the car; a man who took the car preceded her; when she was about two-thirds of the way along the crosswalk, and about ten or twelve feet from the electric car, she was struck by the left-hand mud-guard of defendant's automobile.

The defendant was driving his automobile from Bangor to Orono, on his right-hand side of the road as near to the car tracks as he could drive; he saw the electric car coming some two hundred feet away; he says that he first saw Mrs. Wetzler when she was only two or three feet away from him and a little to his left; the motorman on the electric car saw her, when she left the waiting room. It is clear that the defendant could have seen her, if he had been alert, and exercising the care required at a regular stopping place of the electric car, with which he was familiar.

The motorman on the electric car and a witness, who was in the front vestibule with him, say that the front end of the electric car struck one edge of the crosswalk about the same time as the automobile struck the opposite edge, and that the car stopped with the rear end on the crosswalk. Passengers in the rear vestibule, one of whom assisted in raising Mrs. Wetzler to her feet, say that the car was stopped and a man was stepping aboard, as the automobile drove by, hiding Mrs. Wetzler from their sight.

It is thus clear that the defendant attempted to drive his automobile over this crosswalk at a regular stopping place of the electric car, between a car coming to a stop, or stationary, and a traveller approaching to take the car and only ten or twelve feet from it. Such conduct falls nothing short of negligence.

In *Savoy* v. *McLeod*, 111 Maine, 234, this court said: "The driver of an automobile in the public highways, constantly travelled by pedestrians and teams, and occupied by children of all ages, should, to establish due care, exercise so high a degree of diligence in observing the rights of a foot passenger or team when approaching them, as to enable him to control it, or stop it, if necessary, to avoid a collision, which cannot be regarded as a pure accident or due to contributory negligence."

So in the instant case it was the duty of the defendant, approaching a regular stopping place of this interurban electric railroad, with an approaching electric car in sight, if he would exercise due care, to observe the rights of travellers approaching or waiting to take the car, or alighting therefrom, and to so control his automobile that he could stop it, and to stop it, if necessary to avoid injury to such travellers.

The defendant contends that Mrs. Wetzler was guilty of contributory negligence; that his lights were burning and could have been seen for several hundred feet as he approached the waiting room, and that it was her duty to look and not attempt to cross the street in front of his automobile. Not so. Mrs. Wetzler waited in the place provided for travellers; she, with a fellow traveller, passed over the crosswalk, as the electric car approached; she was in the place provided for her and where she had a right to be. She says that, before crossing the street, she glanced in both directions and saw no automobile in sight; this might have been caused by looking out into the darkness from a position under the electric light. But she was not required to look the whole distance that the lights of the automobile might be visible, to see if such a car was coming, but only along the road far enough to warrant an ordinarily careful and prudent person, under like circumstances, having in mind his own safety, to conclude that no team or automobile was in such proximity, if properly managed, as to endanger his safety in crossing. *Marden* v. *Street Railway*, 100 Maine, 41, 54. The result shows that she met this test; she crossed in safety two-thirds of the distance

to the electric car; behind her was a space of more than twenty feet on the crosswalk, and no team was approaching from the direction opposite to the automobile. She had a right to assume that an approaching team or automobile would avail itself of the ample opportunity to pass in safety, or if a team or automobile approaching on the side of the road, next to the car tracks, could not pass to the left on account of approaching teams, that it would stop, if necessary to avoid injury to travellers taking the electric car. The jury were amply warranted in finding Mrs. Wetzler not guilty of negligence. *Savoy* v. *McLeod*, supra, at page 238.

Motions overruled.

W. A. SOULE *vs.* HARRY L. GOODRICH.

Somerset. Opinion July 30, 1920.

Debt on a "fifteen day bond." R. S. Chap. 115, Sec. 15. Bond not returned to court as required by statute. Language of statute directory only, not mandatory.

The mere fact that a fifteen day bond, given under R. S. Chap. 115, Sec. 15, is not returned to court during the pendency of the action in which it was given, is not a defence to a suit upon the bond.

The statutory requirement that the officer "shall return it (such bond) to the court or justice where the suit is pending" is directory rather than mandatory.

On report on an agreed statement.

This is an action of debt against a surety on a "fifteen day bond" executed by Frank P. Staples as principal, and W. A. Soule, the defendant, and one J. W. Currier as sureties. The bond was given to the plaintiff by the said Frank P. Staples for the purpose of releasing said Staples from an arrest upon mean process in an action of deceit, as provided in the R. S., Chap. 115, Sec. 15. The officer who took the bond failed to return it to court where the original suit was pending, until after it went to judgment. This omission constitutes the sole ground upon which the defense relies.

In the original suit plaintiff recovered judgment on the ninth day of October, 1919, for $229 as damages, and $15.75 costs of suit. Judgment for plaintiff for $244.75 with interest from October 9th 1919.

The case stated in the opinion.

Harry R. Coolidge, for plaintiff.

J. Howard Haley, for defendant.

SITTING CORNISH, C. J., SPEAR, HANSON, DUNN, MORRILL, DEASY, J.J

DEASY, J. Agreed statement:—Action against a surety on a "fifteen day bond" given in pursuance of R. S., Chap. 115, Sec. 15.

The statute provides that "if the officer serving the writ takes such bond he shall return it to the court or justice where the suit is pending." In this case the officer took the bond, but failed to return it as the statute requires. The bond was not filed in court until the return term of the present action when the original suit having gone to judgment was no longer pending. For this reason only, the defendant denies liability.

The statute is silent as to the effect of failure to return the bond. It is for the court to determine whether the language is directory or mandatory; whether the failure to return the bond is harmless or fatal. The test is the legislative intent which the language of the statute leaves in some degree uncertain.

It is the officer and not the plaintiff who is required to return the bond. In theory, and perhaps in fact the failure was due to the fault of the officer and not to that of the plaintiff. "Although the language of the statute is imperative such omission of duty by an officer of the court without fault of the party may be regarded as directory." *Maxcy Mfg. Co.* v. *Bowie,* 96 Maine, 435. The defendant asks the court to read into the statute a provision in effect like this: "If the officer making the arrest fails to return the bond as herein required the bond shall, by reason of such omission by the officer, and without fault shown on the part of the plaintiff become void as against the sureties."

The Legislature did not insert in the act a provision to this effect, and we think did not intend that such a result should be implied.

It is for the benefit of the creditor that such bonds are required to be returned to court, and it is undoubtedly a more or less common practice for officers to deliver them to the creditor's attorney. In respect to such bonds the creditor or his attorney may be guilty of laches so gross and prejudicial as to raise a valid defense. But no evidence of such laches appears in this case.

The case of *Robinson* v. *Williams*, 80 Maine, 267 relates to so-called six months' bonds, and *Maxcy Mfg. Co.* v. *Bowie*, 96 Maine, 435 construes the statute providing for bail bonds.

Neither of these cases is directly in point, but the reasoning of the court in both tends to support our conclusion that the statutory language now under consideration is directory and not mandatory.

Judgment for Plaintiff for $244.75 with interest from Oct. 9th 1919.

DANIEL L. BOWEN *vs.* CITY OF PORTLAND.

Cumberland. Opinion August 7, 1920.

Tenure of the office of chief of police of Portland. Chapter 370, of the Private and Special Laws of 1909. Duration of term definitely fixed by law. Beginning of first term also definitely fixed by law. Intention controls in construction of statute. Terms of office are regular recurring periods of time, regardless of the time of the exercise of the perogative of appointive power. Where the length of duration of a term of office is fixed by law, and a definite time determined when the first term is to begin, the period of time to be included in each successive term begins at the fixed and definite time of expiration of each preceding term, and a holding over beyond such fixed and definite time of expiration, does not effect, prolong or change, the time of expiration of any succeeding term.

Regular terms of the office of chief of police in the City of Portland succeed each other at quinquennial intervals, beginning with the day that the statute authorizing appointments thereto first had effect.

The plaintiff's term of office as chief of police expired with the second day of July, 1919. From that time on he is without right to salary of the office.

On report on agreed statement.

An action of assumpsit to recover of defendant amount alleged to be due plaintiff as salary as chief of police of Portland which accrued from June 30, 1919 to date of writ, the salary being two thousand dollars per annum. Plea, the general issue. Defendant made a legal tender of amount due plaintiff as salary accruing between June 30, 1919 and July 3, 1919, which was refused.

The sole issue between the parties was as to whether the tenure of the office continued for five years from date of appointment, or to the expiration of the five-year period or interval, within which the appointment was made, the first and the only other five-year period or interval having had its beginning on the date the act fixing the tenure of office at five years, became effective, viz: July 3, 1909. The act referred to being Chapter 370 of the Private and Special Laws of 1909. Judgment for defendant in accordance with the stipulation of the report.

The case stated in the opinion.

Arthur D. Welch, and William C. Eaton, for plaintiff.

Henry P. Frank, John T. Fagan, and H. C. Wilbur, for defendant.

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

MORRILL, WILSON, JJ. Concur in result.

DUNN, J. For twenty-four years up to 1909, the marshal or head of police in Portland was appointed by that city's mayor, and held office at the latter's will. In 1909, by Chapter 370 of the Private and Special Laws, operative July 3rd, the Legislature enacted:

"The chief of police shall be appointed by the mayor and shall hold office for the term of five years. . . . . The present chief of police shall be eligible to appointment under the provisions of this section, and if appointed his term shall begin from the time this act takes effect. Vacancies in said office shall be filled from the unexpired term."

In point of fact it may be stated, though not specifically related to the question this case involves, that the engrossed bill in the office of the Secretary of State shows original text of the law to be that vacancies shall be filled "for" and not "from" an unexpired term.

After the act became effective, Walter H. Dresser, then head of the police department in Portland, was appointed to be chief of police.

His commission embraced a term of five years, predating in count four days to the day on which and from which the statute first was efficient. At the expiration of his term by limitation of time, on July 2nd, 1914, no one clothed with insignia of office and empowered to exercise its functions, appeared as his successor. Accordingly, Mr. Dresser held office over until plaintiff came forward, exactly four months later, bearing commission, dated some three weeks earlier, "for the term of five years . . . . from the date of qualifying of said appointee." Dresser thereupon retired from and plaintiff assumed official station. On July 3rd, 1919, while, as plaintiff claims, four months of his five-year term yet remained, Mr. Irving S. Watts was duly appointed chief of police. Mr. Watts at once qualified. Plaintiff, throughout the four-month period next following, demanded that he himself, and not Watts, should be recognized as chief. His insistence being that official term for him continued for five consecutive years, reckoning from the time he entered office. Defense is rested on the theory that regular terms of the office succeed each other at quinquennial intervals, beginning with the day that the authorizing statute first had effect. Practical inquiry is what certain language in the statute means.

In the record of legislative doings, as elsewhere, dexterity of phrase is not always revealed. Nevertheless, meaning usually is as scrutable as though all the resources of burnished rhetoric obtained. The highest of all canons for the construction of a statute is that intention will control interpretation. No clearer statement has been made as to the dominating influence of intention than that which is found in Kent's Commentaries: In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion. 1 Kent's Com., Section 462.

Modern tendency concerning incumbency of public office is toward the establishment, either by constitution or by statute, of terms of definite duration. This idea is strongly suggested in *French* v. *Cowan*, 79 Maine, 426. That case and *Wilson* v. *McCarron*, 112 Maine, 181, arose under the self-same statute. Decision in the first mentioned was shaped by the rule that mandamus is not an appropri-

ate remedy to try title to office as against one in possession under color of right. Viewing that case in the aspect of what was regarded as its merits, this court remarked that contestants each claimed the same official station under a statute which, when read in connection with the act it amended, divided the terms of office of city marshal in Lewiston into biennial periods, following each other, closely and continuously, from an initial starting point. But this statement, being alien from the determinative factor in the case, does not attain above dictum. More recently, in *Wilson* v. *McCarron*, supra, the court, differently interpreting statutory situation, held that the Legislature had created an office and designated length of its term, but had not undertaken to define the time when the term should begin or end, and that it had made no provision for filling vacancy. What Mr. Justice Foster said as dictum in the one case and Mr. Justice Haley spoke in speaking the court's decision in the other, is supported by reasoning and principle, argumentatively ascribing accuracy to respective primary premise.

In the present case, the statute provides that, subject to removal, the chief of police "shall hold office for the term of five years." Stopping there, meaning is clear. There are no words of limitation, as in the general statute relating to tenure of certain public officers, like "and no longer, unless re-appointed." R. S., Chap. 2, Sec. 41. Nor is beginning of term expressly marked as in the Constitution: "All judicial officers hold their offices . . . . . from the time of their respective appointments," Article VI, Section 4; or, "Judges and registers of probate shall hold their offices for four years, commencing on the first day of January next after their election." Article VI, Section 7. Thus far the language of the statute is virtually the same as that in the Constitution relating to tenure of office of judges of municipal courts, who "shall hold their offices for the term of four years," Article VI, Section 8. But the statute proceeds: "The present chief of police shall be eligible to appointment, ... and if appointed his term shall begin from the time this act takes effect. Vacancies in said office shall be filled for the unexpired term." Cursory reading would indicate beginning of term as fixed in the event "present chief of police" were appointed, and solely in such event. But the "present chief of police" was already eligible to new appointment. Reference in the act to him, as one eligible for appointment to office, signified not more than his holding of office manifested.

Nor did the Legislature direct his appointment; determination of that subject it left to the option of the mayor. But the existing commission of the "present chief of police" the new statute probably would terminate. To make clear it intended no discrimination against him, in removing tenure of office from the pleasure of appointive agency, but designed only to make the term more secure than it was before, the Legislature said, in substance: When this act becomes effective, the present chief of police shall be eligible for appointment to the term which shall then begin, if the mayor shall elect to appoint him. This interpretation may not follow exact purport of the words actually used, but it gives sensible and intelligible effect to language readily lending itself thereto. The statute not only measures up to all the requirements indicated in *Wilson* v. *McCarron*, supra, as essential to the fixing of a definite term, but its interpretation would find abundant support in *French* v. *Cowan*, supra, were that case authoritative in citation on the query here.

The statute became effective July 3, 1909. That day marked starting point for the first regular term. That term continued by force of the appointment to July 3, 1914. By operation of law the incumbency of the appointee for the first regular term was prolonged, beyond the expiration of specific appointment, to November 2nd, 1914, awaiting coming of a successor; such appointee, without further designation, meanwhile continuing an arm of the law, holding office as a trust of the State. *Bath* v. *Reed*, 78 Maine, 276; *Bunker* v. *Gouldsboro*, 81 Maine, 188; *Auburn* v. *Water Power Company*, 90 Maine, 71. Then plaintiff came; not to fill out what remained unexpired of a five-year term—for the office was not vacant in the sense of being destitute of lawful occupant—though for four months it was in condition that appointment thereto might have been made; but he came to occupy for the second regular five-year period, four months of which conjoined acts of the mayor and himself had caused to lapse. That lapsing they were as powerless to repair as man is to restore a day that is done. The plaintiff's term of office as chief of police in Portland expired with the second day of July, 1919. From that time on he is without right to salary of the office.

In accordance with the stipulation of the report, judgment will be entered,

For the defendant.

WELLINGTON G. SINGHI et als., *vs.* FLORENCE E. DEAN.

Knox. Opinion August 10, 1920.

Rule against Perpetuities. Vested estates not subject to its operation. Creation only of future estates may offend. Survivorship. Death of testator is the time to which survivorship relates, in determining who shall take, except where an intermediate estate intervenes, or the contrary intent is clearly expressed.

The Rule against Perpetuities only applies to the creation of future estates and in no way affects estates already vested.

When an immediate estate is given to survivors, or the enjoyment and possession of it is immediate on the death of the testator, the time to which the survivorship, which determines who shall take, will be construed to relate, is the death of the testator; and only when an intermediate estate intervenes or the contrary intent is clearly expressed is it held that the survivorship relates to the time of the termination of the intervening estate or the period of distribution.

Applying these rules, such children as survived the testatrix or the heirs of the bodies of such as did not, except the son Martin, took an equitable fee which vested immediately on her death. The interest of the son, Martin, and his daughter, also vested immediately upon the death of the testatrix.

Whether the legal estate held by the trustee is in the nature of a determinable fee and at the termination of the trust the then cestuis que trustent are entitled to receive a conveyance of the legal estate, or the entire estate then reverts to the heirs of the testatrix; in either case the estate continues vested and no future estate is created in violation of the Rule against Perpetuities.

On report on an agreed statement of facts. A bill in equity brought before the Judge of Probate for the County of Knox under Sec. 2 of Chap. 67 of the Revised Statutes, seeking the construction of the will of Susan S. Singhi, and especially and particularly as to whether the provisions of the second item offends the Rule against Perpetuities. The Judge of Probate held that said second item in the will, which created a trust including real estate, did violate the Rule against Perpetuities, and made a decree sustaining the bill, and ordered the real estate sold by the trustee, and the proceeds of the sale to be divided pro rata among the heirs.

From the decree of the Judge of Probate the defendant appealed to the Supreme Court of Probate, and from that court the case was reported to the Law Court upon the pleadings and an agreed statement of facts, for final determination. Appeal sustained; bill to be dismissed with costs including seasonable counsel fees to be paid out of the funds in the hands of the trustee.

Case more fully stated in the opinion.

Walter H. Butler, for plaintiff.

Edward K. Gould, for defendant.

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

WILSON, J. A bill in equity brought before the Judge of Probate for the County of Knox under Sec. 2 of Chap. 67, R. S., praying for the construction of the will of the late Susan S. Singhi, and particularly whether the provisions of the second item violate the Rule against Perpetuities.

The Judge of Probate held that a perpetuity was created by said second item, and ordered the real estate, which by the terms of said second item was placed in trust, sold by the trustee and the proceeds distributed among the heirs of the testatrix.

From the decree of the Judge of Probate the defendant appealed to the Supreme Court of Probate, and from the Supreme Court of Probate the case is reported to this court upon the pleadings and an agreed statement of facts.

By the second item in her will the testatrix, Susan S. Singhi, devised to her son, Wellington G. Singhi and his successors in trust all her real estate, which consists of a brick block in the City of Rockland and the land on which it stands, "to have and to hold as long as said brick block shall stand, in trust for the following purposes: To divide the net income therefrom, after paying the taxes and keeping the same in repair, equally among my children as hereinafter named, and in case of their decease their children or their children's children.

. . . . . .

In case of the death of any of said children leaving no children or grandchildren or heirs of their body, the share of such child is to

revert to the other children before named or to the heirs of their bodies per stirpes, and to be equally divided between them.

. . . . . .

The devise herein made to Martin U. Singhi is to him for life only, and subject to his life estate, I devise his share to Annie B. Cogswell, his daughter.

The real estate above devised shall remain undivided while said brick block shall stand."

The only question raised by the bill is whether the second item of the will, the substance of which is stated above, creates a perpetuity in violation of the well known Rule against Perpetuities.

An examination of the authorities discloses that the application of this Rule, though now well understood to apply only to the creation of estates in the future and in no way to affect estates already vested, *Pulitzer* v. *Livingstone,* 89 Maine, 359, has not always been free from doubt and criticism, Gray on Perpetuities, 2nd Ed. Sects. 235-245. Since its purpose if applicable at all, is to defeat the intention of the testator, it may not be surprising that the courts in their desire to carry out the intent of a testator have in some instances failed to apply this Rule in all its rigor or have adopted constructions to avoid its application.

Undoubtedly the correct rule of application is laid down in *Andrews* v. *Lincoln,* 95 Maine, 541, 544, adopting language of perhaps the highest authority on the subject, Gray on Perpetuities, 2nd Ed. Sec. 629: "The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not like a rule of construction, a test more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied." This, however, does not prevent the application of a familiar rule of construction in construing wills, that where the testator's meaning is ambiguous and is capable of two constructions, it is a fair presumption that the testator intended to create a legal estate and not one that is invalid, Gray on Perpetuities, Section 633.

The first question as to the intent of the testatrix under the second item of her will arises from the uncertainty as to the time to which the

survivorship of her children and their grandchildren or heirs of their bodies relates, and whether there is a continuing condition of survivorship so that the determination of who is to take upon failure of issue is necessarily postponed.

While the language employed does not leave it entirely free from doubt, we think the general rule should apply, that where there is an immediate estate given to the survivors, or the enjoyment and possession of it is immediate, on the death of the testator, the time to which the survivorship, determining who shall take, will relate, is the death of the testator, *Branson* v. *Hill*, 31 Md., 181, 187, 188; *Mullarky* v. *Sullivan*, 136 N. Y., 227, 231; In re Benn, 29 Ch. Div. 839, 844; Reiff Est., 124 Pa., St., 145, 151; 37 Cyc., 631; 40 Cyc. 1511, and only where an intermediate estate, as a life interest, intervenes or the contrary intent is clearly expressed, is it held that the survivorship relates to the time of the termination of the intervening estate or the period of distribution.

Applying this rule and the rule above referred to applicable in case of ambiguities, we think the intent of the testatrix in this case must be construed to be to give an equitable estate in fee to such of her children as survived her, or to the heirs of the bodies of those who did not, the latter to take per stirpes, except in case of the son, Martin, to whom she expressly gave a life interest, his daughter, Annie B. Cogswell taking an equitable fee at his death, all of which immediately vested at the death of the testatrix. *Pulitzer* v. *Livingstone*, 89 Maine, 359, 371-373; Gray on Perpetuities, 2nd Ed. Secs. 116, 235, 236.

While a trustee only takes so much of the legal title as is necessary to carry out the purposes of the trust, 26 R. C. L., 1258, Section 107; *Hersey* v. *Purinton*, 96 Maine, 166, 170; *Holcomb* v. *Palmer*, 106 Maine, 17, 24; *Gould et als.* v. *Lamb, et als.*, 11 Met., 84, 87, when an equitable fee is vested in the cestui que trust, the trustee is usually held to take the legal fee. *Gould, et als.* v. *Lamb, et als.*, supra. The estate held by the trustee in this case may then be of the nature of a determinable fee. In any event at the termination of the trust, the then cestuis que trustent are entitled to receive a conveyance of the legal estate if it does not thereupon immediately vest in them under the Statute of Uses, Perry on Trusts, 5th Ed. Vol. 1, Sec. 351; 26 R. C. L., 1213, Sec. 56, Page 1173, Sec. 8; or the title immediately reverts to the heirs of the testatrix. In either case no future estate is created in violation of the Rule against Perpetuities. Gray

on Perpetuities, 2nd Ed. Sec. 205, 283. We are therefore of the opinion that the second item of the will does not create a perpetuity, which is the only issue raised by the bill and answer, and the appeal must be sustained.

It becomes unnecessary to consider the second reason of appeal, viz: That the allegations of the bill do not warrant that part of the decree ordering a sale and distribution of the trust estate. It is sufficient to say upon this point that we think the principles laid down in *Scudder* v. *Young*, 25 Maine, 153, 155; *Hagar* v. *Whitmore*, 82 Maine, 248, 256-7; *Glover* v. *Jones*, 95 Maine, 307; *Whitehouse Eq. Pr.*, 1st Ed., Sec. 518, clearly apply.

Entry will be,

Appeal sustained, costs including reasonable counsel fees to be paid out of the funds in the hands of the trustee.

HELEN A. E. CAVERLY, pro ami, In Equity,

vs.

LIZZIE M. SMALL, et als.

Androscoggin. Opinion October 5, 1920.

An appeal in equity. Indispensable essentials required in Appellate Court.

Appeal from final decree accepting and confirming the report of a special master. *Held:*

1. As a matter of equity practice the appeal should be dismissed because the case as reported does not contain the evidence. An appeal in equity like a general motion in an action at law carries with it all the evidence in the case.
2. As a matter of equitable right the bill was properly brought and the remedy sought was appropriate. A multiplicity of suits has been avoided and the rights of all parties have been fully determined and protected.

Bill in equity to determine and ascertain the amount of the estate of Amos P. Foster which remained, at the death of Mary A. Foster,

his widow, who had a life estate in the whole estate under the provisions of his will, unexpended by her for her care, comfort and support. The cause was heard upon bill, answers, replication and proof. A master was appointed. From the finding of the Justice in favor of plaintiff an appeal was taken by defendants.

Appeal dismissed with costs. Decree of sitting Justice affirmed.

Case stated in opinion.

Tascus Atwood, for plaintiff.

Albert E. Verrill, for defendants.

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

CORNISH, C. J. Appeal in equity. The facts upon which the bill rests are these.

One Amos P. Foster, late of Auburn, died on March 26, 1913, leaving a will by the terms of which, after the payment of debts and funeral expenses, all his property was devised and bequeathed to his wife, Mary A. Foster, "during her life." Then followed this provision: "It is my intention and desire that my said wife shall hold and use to her benefit all the property real, personal and mixed owned by me at my decease, during her life the same as if absolutely hers, and at her death whatsoever of my estate may then be left, I give, bequeath and devise to my wife's niece, namely, Helen Annie Elizabeth Caverly, her heirs and assigns forever," etc. In the fourth paragraph he still further expressed his intention by this clause: "I wish it distinctly understood that I place no restrictions upon my said wife, Mary A. Foster, in regard to use of my said estate, desiring and intending and I direct that she shall use and expend every dollar of the same if necessary for her care, comfort and support and may give good and sufficient deeds for that purpose."

The wife was nominated as executrix in the will and was subsequently appointed and qualified. She afterwards filed an inventory showing real estate of the value of $1800 and goods and chattels amounting to $324.75, but filed no account. She subsequently sold the real estate and deposited the proceeds in the First National Bank of Auburn, the predecessor of the First Auburn Trust Company.

On October 3, 1917, Mrs. Foster died testate, bequeathing all her property, after the payment of debts and expenses, to Lizzie M.

Small, one of the defendants, and nominating George C. Webber, another of the defendants, as executor, and he was duly appointed.

The bill as amended alleges that there were deposits in various other savings institutions at the time of the death of Amos P. Foster, standing in his name or in the name of "A. P. Foster or Mary A. Foster," all of which formed a part of his estate, and the plaintiff prays for a determination of the ownership of said several sums, and further for an accounting of the estate of Amos P. Foster that came into the hands and possession of Mary A. Foster, in order to ascertain the balance thereof left at her decease, which balance under the terms of his will the plaintiff claims as belonging to her.

The answer of Lizzie M. Small, the sole beneficiary under the will of Mrs. Foster, in effect alleges that all the property coming into the hands of Mrs. Foster from her husband's estate was properly and legitimately used and consumed by her and the remainder was thereby defeated so that there is nothing belonging to the plaintiff.

The answer of the executor of Mrs. Foster to the amended bill also raises the question as to the proper construction of the entries on the books of the various institutions covering these joint accounts.

The sitting Justice sustained the bill and referred the cause to a special master to determine and report among other facts the amount of the estate of Mr. Foster that came into the possession of his wife as tenant for life, and the balance thereof that remained at her decease unexpended by her for her care, comfort and support, and in connection therewith the ownership of the deposits in the various savings institutions, whether in their joint or several names. The special master made an elaborate and detailed report on every feature of the case, to which no objections were filed. The sitting Justice then entered a final decree accepting and confirming the report of the special master, with the exception of an inadvertent statement which was corrected in the decree, and ordered that certain amounts on deposit in the institutions named be paid to the plaintiff as her property under the will of Amos P. Foster.

To this final decree the defendants, Small and Webber, seasonably filed their appeal and on this appeal the case is now before the Law Court.

As a matter of equity practice the appeal should be dismissed. An appeal opens the entire case for rehearing on both law and facts and "requires the transmission to the Law Court of copies of all the

pleadings, orders and evidence." *Emery* v. *Bradley,* 88 *Maine,* 357. Copies of the pleadings, master's report and decrees are before us, but not one word of the evidence taken out before the sitting Justice and on which his decrees were based. The defendants now claim that the bill cannot be maintained until further action is taken in the Probate Court. That raises a question of law which could be presented on exceptions, and would require but a small portion perhaps of the evidence. No exceptions however were filed. Instead an appeal was taken, and an appeal in equity, like a general motion for new trial in an action at law, carries with it necessarily all the evidence in the case. *Redman* v. *Hurley,* 89 Maine, 428. Its absence is ground for dismissal.

It might be added however that the remedy sought here was appropriate. The gist of the case is the trusteeship of the wife in connection with the property which came to her from her husband's estate, under the proper construction of the husband's will, and the court in equity is given full jurisdiction in all cases involving trusts. Morever the character of the entry of the deposits in the various banks raised several questions as to title, as between the claims of the two estates, and bills of interpleader might have been brought by these institutions to determine these questions. The equitable process brought here has served to determine all those questions, thereby avoiding a multiplicity of suits, and the rights of all parties have been fully protected.

The entry must be,

Appeal dismissed with costs.
Decree of sitting Justice affirmed.

IRENEE AUDIBERT *vs.* J. T. MICHAUD.

Aroostook. Opinion October 6, 1920.

Leading question. Marriage records of towns. Identification of such and by whom may be made. Rebuttal evidence otherwise inadmissible may be admissible as effecting the credibility of a witness. Verdict not excessive. Punitive as well as actual damages may be awarded by the jury.

Action on the case for alienation of the affections of the plaintiff's wife, with verdict for the plaintiff for $7,000, and before the Law Court on exceptions and motion by defendant.

Held:

1. The question "did you at any time see the children, after you had seen Mr. Michaud go to the house, try to get in," was properly admitted. The objection that it was so leading as to demand exclusion cannot be sustained.
2. The marriage records of the town of Fort Kent were properly admitted, although produced, not by the town clerk but by his wife who was acting as deputy during his absence from the State. The identification of town records need not necessarily be made by an officer of the town. It is sufficient if the identity be proved by any competent witness who knows the fact.
3. The rebuttal evidence of conversation with plaintiff's wife would seem to be admissible as affecting her credibility. In any event if error, it was harmless.
4. In view of the nature of the action, and the facts brought out in evidence, the verdict should not be regarded as so grossly excessive as to warrant a new trial.

It was within the province of the jury to award punitive as well as actual damages and to consider the wealth of the defendant in so doing, and their award must stand.

This is an action on the case for the alienation of the affections of the plaintiff's wife. It was tried to a jury and a verdict of $7000 was returned. The defendant filed a general motion for a new trial, and took three exceptions, the first to the admission of a question alleged to be leading; the second relating to the admission of the marriage records of the town of Fort Kent, containing the record of the marriage of the plaintiff and his wife, being based on the fact that the records were produced in court not by the town clerk but by the deputy town clerk, and the third being an objection to the

admission of testimony in rebuttal of a witness made, not in the presence of the defendant, for the purpose of discrediting a witness. Motion and exceptions overruled.

Case is stated in the opinion.

Arthur J. Nadeau, and Powers & Guild, for plaintiff.

A. S. Crawford, and Shaw & Thornton, for defendant.

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

CORNISH, C. J. This is an action on the case for the alienation of the affections of the plaintiff's wife. The declaration alleges criminal conversation. The case is before the Law Court on defendant's exceptions and motion. The exceptions are three in number.

1. Exception one was taken to the admission of the following question, which was put to a witness in direct examination by counsel for the plaintiff, on the ground that it was leading: "Did you at any time see the children, after you had seen Mr. Michaud go to the house, try to get in?" The ruling was clearly correct. If this interrogatory was inadmissible, as leading, it is difficult to see how any trial could be conducted and the facts of the case elicited. A question is not necessarily leading because it can be answered by "yes" or "no." The presiding Justice who has an unprejudiced view of the entire situation is allowed a wide discretion in this respect. *Blanchard* v. *Hodgkins,* 62 Maine, 119; *State* v. *Benner,* 64 Maine, 267; *Harriman* v. *Sanger,* 67 Maine, 442. The legitimate object of all examination of witnesses is the eliciting of the truth, and the danger which arises from so-called leading questions is not that the truth may thereby be extracted in an untechnical manner, but that the untrue may be stated by a witness who is either indifferent to his oath or overzealous in the cause and eager to adopt any suggestion made by the attorney although not in accordance with the fact. It is not the mere leading but the leading into temptation that is to be deprecated and avoided. This court has well expressed the reason in an early case as follows: "The end proposed in extracting testimony, is to obtain the actual recollections of the witness and not the allegations of another person, adopted by the witness and falsely delivered as his. It is obvious that suggestive interrogation leads to the despatch of business and that sometimes it may be absolutely necessary to recall the attention of

the witness to facts which had passed from his memory. This is objectionable mainly when on the part of the interrogator there is a disposition to afford information for the purpose of eliciting a false answer and a corresponding design on the part of the witness to make use of it for such sinister purpose." *Parsons* v. *Huff*, 38 Maine, 137-141. It is obvious that the question in this case did not fall within the ban.

2. The second exception relates to the admission of the marriage records of the town of Fort Kent, containing the record of the marriage of the plaintiff and his wife on June 27, 1907. The defendant's objection is based upon the fact that the records were produced in court not by the town clerk but by his wife who testified that her husband was in New York and that she was deputy town clerk. This objection cannot be upheld. The important fact is the record itself, which is made evidence by R. S., Chap. 64, Sec. 37. The person who produces it in court is important only as proving that the book produced is the identical record. That identity may be established by witnesses other than the officers of the town. In *Hathaway* v. *Addison*, 48 Maine, 440, which was a suit to recover back taxes alleged to have been illegally assessed, exceptions were taken to the admission of the town records because the book purporting to be such was not identified by the town clerk but its identity was shown by another witness. The exceptions were overruled by the Law Court, the opinion stating: "We know of no rule of law which requires the identification of such a record by any officer of the town. It is sufficient if it be proved by any competent witness who knows the fact." It should be observed that in the case at bar the witness identifying the book was not unofficial but the deputy town clerk according to her own testimony, who in the absence of the clerk was the proper custodian, and it should be further noted that the fact of the marriage was also proved by the testimony of both the husband and wife, and of numerous witnesses who were present at the ceremony which was performed by the Catholic priest in the parish church, all competent and being uncontradicted practically conclusive evidence in this class of cases. *Damon's Case*. 6 Maine, 148; *Jowett* v. *Wallace*, 112 Maine, 389.

3. The plaintiff's wife was a witness for the defendant. In rebuttal one Mrs. Dumond, a witness for the plaintiff, was permitted to testify, against defendant's objection, to a conversation with the

wife about the time of the separation from her husband, viz: "She told me that her husband was asking too much; she says he is asking us too much money; she says we would be willing to give him $2,000. but he wants $5,000." The defendant was not present at the conversation and therefore this testimony could not be regarded in the nature of an admission against him. The only ground on which it could be admitted would be as discrediting the plaintiff's wife, *Gilbert* v. *Woodbury*, 22 Maine, 246, and affecting the weight of her testimony in which she had denied any improper relations with the defendant. Under proper instructions from the court, which we are to assume were given, its force on that point would be a question for the jury to consider.

In any event however, considering all the testimony on the vital issues, this statement, even if technically inadmissible, could not be regarded as so prejudicial to the defendant as to warrant setting aside the verdict. At most, it could be considered as harmless error. This exception also must be overruled.

MOTION.

The emphasis on this branch of the case is laid by the learned counsel for the defendant not on the question of liability but on that of excessive damages.

The verdict was for $7,000. The jury must undoubtedly have found that the allegation of criminal conversation was established. It was for them to say how much the plaintiff should recover for a stolen wife and a broken home. They had the further right to award punitive damages. The evidence justified it. The uncontradicted testimony showed the defendant to be a man worth $150,000. A larger verdict would be required to punish a man of that wealth than in case of a man of moderate means. If he feels its size the punitive element is simply taking effect. We are not prepared to say that in an action of this character and under such facts as are here disclosed, which it is unnecessary to rehearse, this verdict is so extreme as to require the intervention of the court. It may stand.

Motion and exceptions overruled.

BOWKER FERTILIZER COMPANY *vs.* BANCROFT H. WALLINGFORD

Androscoggin. Opinion October 7, 1920.

Action to recover for fertilizer sold. Implied warranty. Express warranty. Guaranty. Opinion enunciated in Philbrick v. *Kendall, 111 Maine, 198 adhered to.*

Held:

1. In an action brought to recover the purchase price of fertilizer, proof of defendant's own experience with fertilizers obtained from other sources is too uncertain, speculative and conjectural to throw any real light upon percentages of the ingredients of the fertilizer purchased.
2. Such evidence alone, when the fertilizer is sold on percentage basis, is not sufficient to support defense to action brought to recover the price of the fertilizer.

This an action to recover the purchase price of about fifteen tons of fertilizer. The defendant filed the general issue and a brief statement. The plaintiff made out a prima facie case by showing a purchase, delivery, and non-payment. At the conclusion of the opening by counsel for the defense, the court ruled that if the facts alluded to in the opening by counsel for defense, were proved, it would not constitute a legal defense to the action, and directed a verdict for the plaintiff, and the jury rendered a verdict for the plaintiff for $633.89. To which ruling the defendant excepted, and the pleadings of the defendant were made a part of the exceptions. Exceptions overruled.

Case stated in the opinion.

Harry Manser, for plaintiff.

Tascus Atwood, for defendant.

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

PHILBROOK, J. This case is before us upon defendant's exceptions to a directed verdict against him. The action was brought to recover the purchase price of fertilizer sold to and used by the defendant. In his bill of exceptions he admits that the plaintiff made out a prima facie case by showing a purchase, delivery, and non-payment. He also admits that samples of the fertilizer were taken at the factory

from the same bins from which fertilizer was taken to be shipped to him; that the samples were analyzed by the Maine Agricultural Experiment Station; that the certificate of analysis showed 4-6-10, which was in accordance with the formula printed upon the bags and barrels containing the fertilizer sold him; and that the plaintiff had otherwise complied with State regulations.

The pleadings, made part of the bill of exceptions, in addition to the general issue, contain the following brief statement: "That while not denying the execution of the written contract described in the plaintiff's writ, yet nevertheless the plaintiff should not have judgment against him, the said defendant, in any sum whatever, because he says that the fertilizer or potato manure, so called, described in the plaintiff's writ was deficient in the elements necessary to aid him in the growing of a crop of potatoes and was in fact a very great damage to him, causing him to have a crop of very inferior and unmarketable potatoes whereby he sustained damages largely in excess of the amount of the plaintiff's claim, to wit, to the amount of seven hundred dollars ($700) or more; and he further alleges that said inferior, unmarketable potatoes were the result of the use of said fertilizer or potato manure, so called, and was in no way attributable to the quality of the soil or the method of planting or the care that the said potato crop had at his hands."

Presumably in support of this defense, counsel for defendant stated in his opening to the jury that he would offer evidence to show that the fertilizer was used on twelve acres of land side by side with two acres of land on which other fertilizer was used, mixed by the defendant to conform to the same formula of 4-6-10; that the same seed was used on the two acres where the defendant furnished the fertilizer as was used on the twelve acres where he claims to have gotten poor results; that evidence would be offered that the character of the soil of the two acres was the same as that of the twelve acres; that the same spraying was done on the two acres as on the twelve acres; that the same methods of cultivation were used on the two acres as on the twelve acres, and the same amount of cultivation; and that the treatment from beginning to end of the seed and the following movements connected with the contemplated crop were the same on the two acres as on the twelve acres; and that a splendid crop of potatoes was raised on the two acres, and on the twelve acres the crop proved to be wet and soggy and unmarketable, there being no claim but what the quantity on the twelve acres was approximately

the same in proportion to the acreage. The court ruled that if the evidence alluded to in counsel's opening were proved, it would not constitute a legal defense to the action, and ordered judgment for the plaintiff. This order is the basis of defendant's exceptions.

The contract referred to in defendant's brief statement is not contained in the record. Neither is the declaration in plaintiff's writ, nor any testimony offered under it, made a part of the case. Hence we have no direct means of knowing whether the plaintiff agreed to sell and the defendant agreed to pay for a fertilizer which contained certain percentages of ammonia, available phosphoric acid and potash, or whether the agreement was one in which the plaintiff guaranteed suitableness of the fertilizer or favorable results from its use. The two agreements are essentially different and certain evidence admissible to prove one would be inadmissible to prove the other. The rules of admissibility of evidence under these two contracts are clearly discussed in a recent decision of this court, *Armour Fertilizer Works* v. *Logan*, 116 Maine, 33, where it was held that proof of defendant's own experience was too uncertain, speculative or conjectural to throw any real light upon the percentages of the ingredients of the fertilizer, and that such evidence is inadmissible when the fertilizer was sold only on a guaranteed analysis basis. On the other hand, it was held in the same case that such evidence is undoubtedly admissible when the sale was accompanied by a guaranty of suitableness or results. If the sale in this case was upon a guaranteed analysis basis only, the evidence offered by the defense was inadmissible; if upon guaranty of suitableness or results, it was admissible. Hence, it becomes important, before defendant's exceptions can prevail, for him to show that this sale was of the latter character. In his brief statement is to be found the claim that the fertilizer "was deficient in the elements necessary to aid him in the growing of a crop of potatoes." We think a fair interpretation of these words conveys the idea that the defendant was intending to defend on the ground that the fertilizer was deficient in the percentages of ammonia, available phosphoric acid and potash. If this was the intended defense, and not a failure of guaranty of suitableness or results, then the ruling excluding evidence of experience was correct.

But the defendant urges that he was deprived of having the jury pass upon the question of fact whether or not the fertilizer that he bought was reasonably suited to the purposes for which he bought it, and he invokes the familiar principle that when anything is bought

for a specific purpose there is an implied warranty that it is reasonably fit for that purpose, it being admitted in the bill of exceptions that plaintiff's agent had knowledge that the fertilizer furnished the defendant was to be used for raising potatoes. In *Philbrick* v. *Kendall*, 111 Maine, 198, the court at nisi prius instructed the jury in these words: "I cannot give you the instruction that when a man buys a fertilizer, as this plaintiff bought it in the market, by name, 4-6-10 for instance, that there is no accompanying implied warranty that fertilizer will fertilize . . . . .There may be an express warranty with those brands which contain the preparation of the three different elements, the tag or stamp on them, but there is also going along with them, I instruct you, an implied contract that they are reasonably fit and suitable for the use to which they are to be put, and to which the seller knows they are to be put. . . . In this case, if you find that the defendants knew that this fertilizer was to be used for fertilizing potatoes, and that their customers throughout the state would buy it for that purpose, that it was ordered by the buyers for a special purpose known to the sellers,and if so there is an implied warranty that it was reasonably fit and suitable for the purpose for which it was ordered or sold. . . . It is not confined to a guarantee of just such a percent of one element, and such of another, and such of another, but there is an implied warranty that the whole mixture, as a mixture, is reasonably adapted to the purpose."

These instructions in the case from which it is quoted exactly state the contention claimed by the defendant in the case at bar, but this court held that the instructions were incorrect and sustained exceptions. We adhere to the opinion enunciated in that case. So far as the record in the instant case discloses the sale was for fertilizer of a 4-6-10 brand and nothing more. The defense offered was excluded in accordance with legal principles recently enunciated by this court and which we belive are not only sound in law but also well grounded in public policy. Should the opposite rule obtain then every crop failure, regardless of the causes for the same, might subject the sellers of fertilizer to litigation upon grounds not contemplated at the time of the sale, and our farm dwellers might thus make the fertilizer business so precarious in this State as soon to drive that valuable commodity from the market.

Exceptions overruled.

EDWARD C. INDERLIED *vs.* BLANCHE R. CAMPBELL.

Cumberland. Opinion October 14, 1920.

Statute of Frauds. Memorandum. Lease. Evidence. An agreement between principals that one shall procure and assign to the other, a lease of a building, is a contract concerning an interest in lands and must be in writing.

In an action to recover for an alleged breach of an agreement for the sale and purchase of certain lodging house furniture under which agreement it is alleged that the defendant also agreed to obtain from the owner of the house a lease of the premises for a term of years and assign the lease to the plaintiff, and where the breach alleged is the failure to obtain and assign the lease,

Held:

That the agreement in this case was not one of agency where one has agreed to purchase land or obtain a lease for another and in the principal's name, nor where an agent has agreed to purchase an interest in real estate and convey or assign it to his principal, but a contract between two principals, the agreement to obtain the lease being clearly a part of the consideration for the purchase of the furniture.

An agreement to assign a lease is a contract concerning an interest in lands and must be in writing.

This is an action on the case brought in the Superior Court in the County of Cumberland, to recover for an alleged breach of an agreement, wherein defendant agreed to sell to plaintiff his lodging house business and furniture carried on in Portland on Congress Street, and further agreed to procure from the owner of the lodging house premises a lease for two years, with right of renewal for same term, and assign said lease to plaintiff. Plea, the general issue, with a brief statement setting up the statute of frauds, on the ground that the contract declared on related to an interest in real estate and must be in writing. On conclusion of evidence by plaintiff, the presiding Justice ruled that the evidence was insufficient to remove the contract from the Statute of Frauds, and ordered a non suit, to which ruling the plaintiff excepted. Exceptions overruled.

Case stated in the opinion.

Strout & Strout, for plaintiff.

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

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

WILSON, J. An action on the case to recover for an alleged breach of an agreement for the sale and purchase of certain lodging house furniture, under which agreement it is alleged in the declaration that the defendant also agreed to obtain from the owner of the house in which the defendant was then doing a lodging house business a lease of the premises for a certain term of years and assign the same to the plaintiff. The breach set forth in the declaration is a failure to obtain a lease for the term agreed upon.

In the trial of the cause in the court below it appeared that the agreement, except for the part relating to the furniture, which was afterwards reduced to writing, was an oral one. At the close of the plaintiff's evidence the court ruled in substance: That the agreement to obtain a lease and assign it to the plaintiff was a contract concerning an interest in real estate and must, therefore, be in writing, and that such documentary evidence as was introduced in the case by the plaintiff was not sufficient to comply with the Statute of Frauds in this particular and ordered a non suit, to which ruling the plaintiff excepted.

The plaintiff now concedes that the evidence in writing introduced by him as to the procuring and assignment of the lease is not sufficient to comply with the statute, but contends that the agreement is not one concerning an interest in real estate and hence written evidence of the agreement was not necessary.

The contract in the case, however, is not one of simple agency by which one party agreed to obtain a lease or purchase real estate for another and in the principal's name which the authorities are all agreed need not be in writing. *Snyder* v. *Wa'ford*, 33 Minn., 175; *Carr* v. *Leavitt*, 54 Mich., 540; *Trowbridge* v. *Wetherbee*, 11 Allen, 361; *Baker* v. *Wainwright*, 36 Md., 336; nor even, we think, a contract of agency by which the agent agrees to purchase an interest in real estate and convey or assign it to his principal, concerning which and the kind of evidence required in proof, the courts are not in accord. *Johnson* v. *Hayward*, 74 Neb., 157, 5. L. R. A., (N. S.) 112 note, *Schmidt* v. *Beiseker*, 14 N. D. 587, 5 L. R. A. (N. S.), 123 and note, *Burden* v. *Sheridan*, 36 Iowa, 125, *Collins* v. *Sullivan*, 135 Mass., 461.

The case at bar, therefore, does not involve a question of agency.

The declaration does not so allege, but sets forth a contract between two principals. The agreement to obtain and assign the lease, from the plaintiff's own testimony, was clearly a part of the consideration for the purchase of the furniture, which in effect was the acquiring of the defendant's lodging house business.

That the assignment of a lease is a contract concerning an interest in lands there can be no question, *Kingsley* v. *Siebrecht*, 92 Maine, 23. The contract being between two principals and to obtain and assign a lease, it is within the Statute of Frauds and could not be proved by oral testimony. *Dunphy* v. *Ryan*, 116 U. S., 491; *Howland* v. *Blake*, 97 U. S., 624; *Kendall* v. *Mann*, 11 Allen, 15, 17, *Davis* v. *Wetherell*, 11 Allen, 19; *Parsons* v. *Phelan*, 134 Mass., 109; also see *Collins* v. *Sullivan*, *Schmidt* v. *Bieseker*, supra, *Myers* v. *Byerly*, 45 Pa. St., 368. Entry will be,

Exceptions overruled.

HAHNEL BROS. & COMPANY *vs.* ALFRED HANSON & SON, et. al.

and

THE FIRST CONGREGATIONAL CHURCH OF GARDINER.

Kennebec. Opinion October 15, 1920

Bill in equity to enforce a mechanic's lien. Appeal from finding of sitting Justice sustaining the bill. Burden of proof upon defendant to show decree appealed from to be clearly wrong. Decree modified to conform to an admission.

This is a bill in equity brought to enforce a lien claim for work done and materials furnished in repairing the First Congregational Church of Gardiner.

The sitting Justice in his decree found that the plaintiff has a valid mechanic's lien upon said land and buildings for the sum of twelve hundred and sixty-four and 98-100 dollars, and interest from the date of the bill. From which decree the defendant appealed.

Held:

1. The sitting Justice sustained the plaintiff's contention, and, as to the facts so found, the decree must stand unreversed, because the defendants have failed to maintain the burden of showing that the decree is clearly wrong.

2. The decision of a single Justice upon matters of fact in an equity hearing, should not be reversed unless it clearly appears that such decision is erroneous. The burden to show the error falls upon the defendant. He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed.
3. But it is apparent from the record that in settling the decree the sitting Justice overlooked the fact necessarily found, that the last work "was done on December 15, 1917," and ordered judgment for the full amount claimed as above, when the same should have been reduced by deducting therefrom two hundred and fifty dollars as provided in the admission in the record.

The decree will be modified by reducing the amount so found to be due from $1264.98 to $1014.98, and ordering judgment against Alfred Hanson & Son for $250, with interest from the date of the bill.

This is a bill in equity to enforce a mechanic's lien for labor and materials furnished by plaintiffs to defendants as contractors in repairing the First Congregational Church of Gardiner. The cause was heard on bill, answer and proof, and an admission in writing entered of record to be binding on both parties, which reads as follows: "It is agreed that if on the allegations in the bill, supplemented by evidence of the fact that the last labor under the slating contract mentioned as the first item on the bill was done on December 15, 1917, for labor and materials furnished, judgment can be rendered against the Church on the lien demand so reserved for the amount of the bill less $250, and judgment against Alfred Hanson & Son for the balance." The sitting Justice found that the plaintiffs had a valid mechanic's lien from which decree the defendant appealed. The decree of $1,264.98 was modified by reducing the amount of the decree to $1,014.98, in conformity with the written admission. Appeal dismissed. Bill sustained. Decree in accordance with the opinion.

Case stated in the opinion.

Getchell & Hosmer, for plaintiff.

McLean, Fogg & Southard, for defendants.

SITTING: SPEAR, HANSON, PHILBROOK, MORRILL, WILSON, JJ.

HANSON, J. This is a bill in equity brought to enforce a lien claim for work done and materials furnished in repairing the First Congregational Church of Gardiner. Alfred Hanson & Son were the contractors. The bill alleges, "That at the special instance

and request of said defendants, Alfred Hanson and Henry A. Hanson the plaintiffs, furnished certain material to the value of twelve hundred sixty-four dollars, ninety-eight cents ($1264.98) in repairing and improving a certain building with the appurtenances, standing upon a lot of land owned by said association or corporation otherwise the owner of which is to the plaintiff unknown, which lot of land is situated in Gardiner in said County of Kennebec located on Brunswick Avenue, so called, in said Gardiner;" and "that said materials were furnished by consent of said Congregationalist Church Society, so called, the owner of said building and land and by virtue of a contract with said Alfred Hanson and Henry A. Hanson who were not at the time said materials were furnished the owners of said building and its appurtenances nor the lot or land on which said buildings, its appurtenances stand."

The cause came on to be heard on February 19, 1919, and in addition to the documentary evidence, there was entered of record an admission to be binding on both parties, which reads as follows: "It is agreed that if on the allegations in the bill, supplemented by evidence of the fact that the last labor under the slating contract mentioned as the first item on the bill was done on December 15, 1917, for labor and materials furnished, judgment can be rendered against the Church on the lien demand so reserved for the amount of the bill less $250, and judgment against Alfred Hanson & Son for the balance."

The sitting Justice in his decree found that the plaintiff has a valid mechanic's lien upon said land and buildings for the sum of twelve hundred and sixty-four and 98-100 dollars, and interest from the date of the bill. From which decree the defendant appealed.

The record discloses that there was controversy as to whether the lien claimed had been seasonably perfected, the plaintiff contending that some of the labor performed and material furnished under the slating contract were actually done or furnished on December 15, 1917. The defendants contended that the lien was not preserved and cannot be enforced, because it is alleged in the bill that the last items were furnished on the 20th of November, 1917, and that the statement required by statute was filed in the office of the city clerk of Gardiner more than sixty days after the last labor was performed or materials furnished.

The sitting Justice sustained the plaintiff's contention, and, as to the facts so found, the decree must stand unreversed, because the defendants have failed to maintain the burden of showing that the decree is clearly wrong.

"The decision of a single Justice upon matters of fact in an equity hearing, should not be reversed unless it clearly appears that such decision is erroneous." "The burden to show the error falls upon the defendant." "He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed." *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26; *Hartley* v. *Richardson*, 91 Maine, 424.

But it is apparent from the record that in settling the decree the sitting Justice overlooked the fact necessarily found, that the last work "was done on December 15, 1917," and ordered judgment for the full amount claimed as above, when the same should have been reduced by deducting therefrom two hundred and fifty dollars as provided in the foregoing admission.

The decree will be modified by reducing the amount so found to be due from $1264.98 to $1014.98, and ordering judgment against Alfred Hanson & Son for $250, with interest from the date of the bill.

Appeal dismissed.
Bill sustained.
Decree in accordance with this opinion.

GEORGE Q. NICKERSON *vs.* HOULTON LODGE OF ELKS, NO. 835.

Aroostook. Opinion October 15, 1920.

Benevolent and charitable organizations. Funds of a Lodge of Elks, even under a vote of the Lodge cannot be used for purposes outside the scope and intention of the laws governing the organization.

Action of assumpsit to recover one hundred and eighty-seven dollars, reported to this court under the usual stipulation.

Held:

1. It is the opinion of the court that the vote by which it was attempted to use the funds of the lodge for the purpose of paying a fine, or expenses of counsel, was an illegal vote, unlawful in its origin and purpose, and wholly beyond the power of the lodge to pass, legalize or ratify.
2. The votes in question could create no liability on the part of the lodge to the plaintiff, who admittedly chose his debtor when he made his check payable to C. H. Wheeler, and which check was used in part payment of the fine in question, a personal fine, and not for an offense chargeable against the lodge.

The payment of the order in such circumstances would be a diversion of the funds of the lodge, for which there is no warrant under the laws of the defendant organization.

On Report. An action of assumpsit to recover $171.50 and interest of $15.50 on same, which plaintiff alleges he paid for the purpose of paying or helping to pay a fine imposed by court upon one Caleb H. Wheeler who pleaded guilty to an indictment for maintaining a public nuisance, and for the illegal sale and keeping of intoxicating liquors, and who was a member of the defendant corporation.

The defendant corporation voted to reimburse the plaintiff and in pursuance of said vote the secretary of the lodge drew an order on the treasurer which order the exalted ruler refused to sign, taking the position that it would be an illegal expenditure of the funds of the lodge. Plea the general issue with a brief statement. At the conclusion of the testimony by agreement of the parties the case was

reported to the Law Court for its determination upon so much of the evidence as was legally admissible. Judgment for the defendant.

Case stated fully in the opinion.

Bernard Archibald, for plaintiff.

Charles P. Barnes, Harry M. Briggs, and W. S. Lewin, for defendant.

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

HANSON, J. Action of assumpsit to recover one hundred and eighty-seven dollars, reported to this court under the usual stipulation.

The following is used as the account annexed to the writ:

"1918

January 22, Houlton Lodge, No. 835, B. P. O. E.

To George Q. Nickerson, Dr.

To money then paid by the plaintiff for the use of the defendant at its request, and for money then received by the said defendant for the use of the plaintiff, and for money then lent by the plaintiff to the defendant at its request, and for money found to be due from the defendant to the plaintiff on an account then stated between them, and in consideration thereof then and there promised the plaintiff to pay the same on demand, 171 50

To interest since due and demanded 15 50

$187 00"

And the plaintiff outlines his claim as follows:—

"Under this count the plaintiff will prove that he paid the said sum of $171.50 for the purpose of paying or helping to pay or in part payment of a fine imposed by court upon one Caleb H. Wheeler, who was then and there in the employ of the defendant which said fine was imposed as a result of the said Wheeler's conduct in his said employment, that the said Wheeler was then and there a member of the defendant corporation, and that the plaintiff was to be reimbursed by said corporation and said corporation voted and agreed to reimburse him by its vote taken for that purpose Jan. 22, 1918.

That thereafter on Sept. 26, 1918, the secretary issued an order over his signature as said secretary directed to the treasurer of the defendant, as per said vote of Jan. 22, 1918, directing him to pay to the plaintiff the said sum of $171.50."

The fine referred to was imposed by the Supreme Judicial Court in and for the County of Aroostook, in which court said Caleb H. Wheeler pleaded guilty to an indictment for maintaining a public nuisance, and for the illegal sale and keeping of intoxicating liquors. The plaintiff was a member of the board of trustees of defendant lodge at the time the fine was imposed, and it appears his interest and sympathy for Mr. Wheeler were shared by Mr. Buzzell, also a trustee and active member of the lodge. The payment for which this suit is brought was made on May 1, 1917. It also appears that previously, on December 8, 1916, the lodge "voted to reimburse Bro. Wheeler for any expense of court or counsel as the result of the trouble while acting as steward, not to exceed $300."

The remaining vote necessary to be considered is this:—
"February 22, 1917." "that the lodge rescind the vote whereby the lodge voted to pay $300 and no more, re Bro. Wheeler matter, and now that the Lodge assume bill of Bro. George Q. Nickerson for $171.50 for cash paid out for Bro. Wheeler, was voted by a rising vote."

The latter is the vote under which the secretary drew an order on the treasurer, and which order the exalted ruler refused to sign.

The plaintiff says that the exalted ruler refused to sign, either arbitrarily, or taking the position that it was an illegal expenditure of the funds of the lodge for an illegal purpose, and further, "that it cannot be an illegal expenditure of money to pay a fine legally imposed, the prior illegal acts out of which a prosecution arose being in no way material in this case, except to explain the circumstance out of which the defendant took upon itself the responsibility of acting."

We think it is material in disposing of this question, in view of the laws and rules governing the defendant organization, to take into consideration the object and source of all expenditure of lodge funds. The purposes of the organization are well defined, its membership is selected with care, and the duties and rights of its members are set out in the constitution, statutes and by-laws of the organization in clear and unmistakable language. The purposes and authority

of the subordinate lodge itself are as clearly defined in its fundamental law. And no provision can be more definite in its scope and limitation than that in its by-laws relative to its use of funds for or on account of any of its members. Section 1, Article XI of the By-Laws, entitled "Help" provides:—"All applications for help shall be referred to the Standing Relief Committee, who shall recommend relief according to the circumstances of the case."

"Section 2. When a worthy Elk of this Lodge is destitute, unable to procure employment after diligent efforts, and actually without the necessities of life, he may make application in writing to the Lodge, or during the intervals between the sessions of the Lodge, to the Standing Relief Committee, and may if found worthy, be assisted from the funds of the lodge to a sufficient extent to provide him with the necessaries only."

Again the funds are guarded by a provision that "the Lodge shall not have power to loan its funds to any of its members," and another that the exalted ruler shall sign all orders for the payment of money.

It requires no straining of the rules of construction to hold that the purposes for which the various votes were taken are entirely outside the scope and intention of the laws governing a Lodge of Elks, or to find that in this case such a vote, or payment if made has not within the meaning of the law a benevolent or charitable purpose. It is very apparent that the law making body in providing for "help" for its members, meant not only that such members should be worthy, but must be in actual need of help.

It is the opinion of the court that the vote by which it was attempted to use the funds of the lodge for the purpose of paying a fine, or expenses of counsel, was an illegal vote, unlawful in its origin and purpose, and wholly beyond the power of the Lodge to pass, legalize or ratify.

It follows for the same and additional reasons that the exalted ruler was doing only his duty in declining to sign the order. His obligation to the order and duty during his term of office, are clearly defined. The additional reasons are found in the law laid down for his guidance in Art. 5, Sec. 2, of the By-Laws, which reads: "Art. 5, Sec. 2. It shall be the duty of the Exalted Ruler to preside at all sessions of this Lodge, call special sessions when necessary, appoint all committees created by the by-laws or by vote of the Lodge, have general supervision over all matters pertaining to the Lodge, and

see that harmony is preserved and the laws of the Order enforced."

The votes in question could create no liability on the part of the lodge to the plaintiff, who admittedly chose his debtor when he made his check payable to C. H. Wheeler, and which check was used in part payment of the fine in question, a personal fine, and not for an offense chargeable against the lodge.

The payment of the order in such circumstances would be a diversion of the funds of the lodge, for which there is no warrant under the laws of the defendant organization.

The entry will be,

Judgment for the defendant.

AUGUSTUS CURRIER, JR. *vs.* BANGOR RAILWAY & ELECTRIC COMPANY.

Penobscot. Opinion October 15, 1920.

The testimony of a witness at a former trial of the same case, may be offered in evidence for the purpose of contradicting his statements at the present trial, without first having called his attention to such former statements and inquire of him in regard to same.

A witness testifying in a cause on trial may be impeached by offering in evidence said witness' own testimony at a former trial of the same cause, for the avowed purpose of contradicting said witness' statements at the present trial, which said former testimony does tend so to contradict said witness, without first calling the attention of said witness to his former testimony. To exclude said former testimony upon the ground that it is necessary, before introducing evidence of said witness' former statements tending to contradict him, to first call the attention of said witness to such former statements and inquire of him in regard to same, is erroneous, and exceptions will lie.

It has not been the practice in this State to require interrogation of the witness sought to be impeached, upon the questionable matter before introducing the impeaching evidence.

On exceptions and general motion. This is an action on the case for personal injuries alleged to have been sustained by plaintiff while a passenger on a car of defendant. Plea, the general issue.

Verdict for plaintiff. The defendant offered in evidence the testimony of a witness at a former trial of the same cause, for the avowed purpose of contradicting the statements of the same witness at the present trial, which said former testimony did tend to contradict the statements of the witness at the present trial. The defendant had not called the attention of said witness to his former testimony, and the presiding Justice excluded it, on the ground that defendant should first have called the attention of the witness to his former testimony, to which ruling defendant excepted, and the exception is sustained. The other exception and motion thus became unnecessary to be considered.

Case stated in the opinion.

Daniel I. Gould, and Clinton C. Stevens, for plaintiff.

Ryder & Simpson, for defendant.

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

HANSON, J. This is an action on the case for personal injuries alleged to have been sustained by the plaintiff while a passenger on a car of the defendant company. The jury returned a verdict for plaintiff, and the case comes before the court on exceptions and general motion by the defendant.

It will be necessary to consider the first exception only, viz: "that the plaintiff introduced as a witness at the trial of the issue Dr. Charles D. Edmunds, who testified as to changes for the worse in the physical condition of the plaintiff since and as a result of the accident. After said witness had finished his testimony, defendant offered in evidence said witness' own testimony at a former trial of the same cause, for the avowed purpose of contradicting said witness' statements at the present trial relative to the change in plaintiff's physical condition above stated, which said former testimony did tend so to contradict said witness. The defendant had not called the attention of said witness to his former testimony; and the presiding Justice excluded said former testimony upon the ground that it is necessary, before introducing evidence of a witness's former statements tending to contradict him, to first call the attention of said witness to such former statements and inquire of him in regard to same."

We think this exception must be sustained. It has not been the practice in this State to require interrogation of the witness sought to be impeached, upon the questionable matter before introducing the impeaching evidence.

The first expression of this court upon the point here raised will be found in *Ware* v. *Ware,* 8 Maine, 42; the last in *Inhabitants of New Portland* v. *Inhabitants of Kingfield,* 55 Maine, 172.

It will be unnecessary to consider the second exception, or the motion.

Exceptions sustained.

CHARLES D. FOULKES *vs.* GEORGE A. NEVERS, et. al.

Penobscot. Opinion October 15, 1920.

Real action. Sale of land for taxes in unincorporated places. Deed of State Treasurer, ineffectual by reason of insufficient description in advertisement of the list of assessment.

In a real action brought to recover real estate in an unincorporated place sold by the State for State and County taxes assessed thereon, in accordance with the provisions of R. S. of 1903, Chap. 9, Sec. 41 et seq., as amended by the Laws of 1905, Chaps. 69 and 150, and Chap. 226 of 1909, where the plaintiff relies on or claims under a deed from the Treasurer of the State of Maine, obtained through a sale of said land as aforesaid, where said land was described in the advertisement of the list of the assessment as follows:—"Penobscot County, 6 R. 7, W. E. L. S. 320, 6,90." and the list signed by the Treasurer of State, the plaintiff can not prevail, for the reason that the land demanded was not sufficiently described in the list advertised, and said deed is utterly ineffectual to pass any title to any specific tract or acre of land or to convey any title whatever.

This is a real action to recover a certain tract of land in the northwest part of Township No. 6, Range 7, W. E. L. S., known as the "Seboeis Farm," in Penobscot County, containing three hundred and twenty acres, more or less. The land was sold for State and County taxes assessed thereon for the year 1917, by the State under R. S. of 1903, Chap. 9, Sec. 41 et. seq., as amended by the Laws of 1905, Chaps. 69 and 150, and Chap. 226 of 1919, and the State Treas-

urer gave a deed of it to the plaintiff upon which he relies. Defendants claim that in several respects the substantial requirements of the statutes authorizing a sale of land for taxes in unincorporated places were not strictly complied with. The land in question was described in the advertisement of the list of the assessment as follows:— "Penobscot County, 6 R. 7, W. E. L. S. 320, 6, 90," and the list was signed by Pascal P. Gilmore, Treasurer of State. The description in the list, so advertised, of the land demanded is not sufficient. Plea the general issue. At the completion of the testimony, by agreement of the parties, the case was reported to the Law Court for the full determination of all the rights of the parties under so much of the evidence as was legally admissible. Judgment for the defendant.

Case stated in the opinion.

P. B. Gardner, and J. S. Williams, for plaintiff.

Ryder & Simpson, and C. P. Connors, for defendants.

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

HANSON, J. This is a real action brought to recover a certain tract of land in the northwest part of Township No. 6, Range 7, W. E. L. S., known as the "Seboeis Farm," according to a plan and survey of said Township made by Frank Fisk, containing three hundred and twenty (320) acres, more or less, in Penobscot County, and comes before this court on report.

The plaintiff claims under a deed from the Treasurer of the State of Maine, obtained through a sale of said land for the State and County taxes assessed thereon for the year 1907, and that the proceedings herein were in accordance with the provisions of R. S. of 1903, Chap. 9, Sec. 41 et seq., as amended by the Laws of 1905, Chaps. 69 and 150, and Chap. 226 of 1909.

The plaintiff says that he has established his title in full compliance with the requirements of the statute, and that no defect therein fatal to such title is, or can be shown.

The defendants' counsel in their brief claim that in several respects the substantial requirements of the statutes authorizing a sale of land for taxes in unincorporated places have not been strictly complied with.

It will be necessary to consider but one of the provisions and plaintiff's proceeding thereunder. R. S., Chap. 9, Sec. 42, 1905, Chap. 69, Sec. 2, 1909, Chap. 235, 1916, Chap. 10, Sec. 44, provides: "When the legislature assesses such state tax, the treasurer of state shall within three months thereafter cause the lists of such assessments, together with the amounts of the county tax on said lands so certified to him, both for the current year, to be advertised for three weeks successively in the state paper, and in some newspaper, if any, printed in the county in which the land lies, and shall cause like advertisement of the lists of such state and county taxes for the following year to be made within three months after one year from such assessment."

The record shows that the land in question was described in the advertisement of the assessment as follows:—

"Penobscot County

6 R. 7, W. E. L. S. 320, 6, 90," and the list was signed by Pascal P. Gilmore, Treasurer of State. We think the land demanded was not sufficiently described in the list so advertised, and in consequence the plaintiff has failed to show a compliance with the statute, and therefore cannot prevail in this action.

It has been uniformly held in numerous decisions of this court that such a description in a deed is utterly ineffectual to pass any title whatever. *Larrabee* v. *Hodgkins*, 58 Maine, 412; *Griffin* v. *Creppin*, 60 Maine, 270; *Moulton* v. *Egery*, 75 Maine, 485; *Skowhegan Savings Bank* v. *Parsons*, 86 Maine, 514; *Millett* v. *Mullen*, 95 *Maine*, 400; *Powers* v. *Sawyer*, 100 Maine, 536. See *Hatch* v. *Hollingsworth & Whitney Co.* 113 Maine, 255.

The entry will be,

Judgment for the defendant.

EDWARD S. SNOW, et als., In Equity,

vs.

EDWARD K. GOULD, Adm'r., et. als.

Knox. Opinion October 15, 1920

Bill in equity for specific performance. Bill dismissed. Appeal.

This is an appeal from the final decree of the sitting Justice dismissing a bill in equity brought to compel specific performance of a written contract between appellants and defendant's intestate.

Held:

1. The sitting Justice made no finding of fact, but having before him all the witnesses and documentary evidence, and considering as he must have the appellee's claim of fraud, rescission, and abandonment, it is very clear that the decree is well founded, and especially so upon the grounds of rescission on the part of defendant's intestate, and abandonment upon the part of the appellants.
2. The last section of the contract declares "that the intention of the agreement was to make a final settlement of all matters which are now somewhat in doubt, and to form a basis for the settlement of the estate of Lucy A. Snow,"—an intent necessarily to settle with defendant's intestate during her life, and not with her administrator,—and to settle in a reasonable time an intestate estate then being settled in Probate Court. Waiting more than four years under such circumstances is in itself evidence of abandonment.
3. In an appeal from the decision of a sitting Justice, the appellant has the burden of showing the decree to be clearly wrong, especially when the credibility of witnesses is an issue. In this case the credibility of the witnesses was an important issue. The sitting Justice had the advantage of observation of the persons testifying, and their testimony weighed by him must have aided in forming his judgment. It is sufficient to say that the testimony as a whole satisfies us that the decree of the sitting Justice is justified by the record.

On Appeal. A bill in equity to compel specific performance of a written contract between appellants and defendant's intestate. The cause was heard on amended bill, answers, replication and proofs,

and the bill was dismissed by the sitting Justice. From which final decree an appeal was taken. Appeal dismissed.

Case stated in the opinion.

Charles T. Smalley, for plaintiff.

Edward K. Gould, for defendant.

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

HANSON, J. This is an appeal from the final decree of the sitting Justice dismissing a bill in equity brought to compel specific performance of a written contract between appellants and defendant's intestate. The contract follows:—

"THIS AGREEMENT made at Rockland, Maine, May 17, 1912.

WHEREAS: Owing to the death of the late Lucy A. Snow, it is deemed necessary and expedient to adjust certain matters at issue between Lavinia M. Snow and the heirs of Lucy A. Snow.

There are certain papers of record at the Knox County Register of Deeds consisting of deeds, assignments, mortgages and bonds for deeds executed to Lucy W. Snow, Lavinia M. Snow and C. G. Moffitt and now standing by assignment in the name of Lavinia M. Snow.

It is the intent of this agreement to make a settlement of all these matters as they pertain to Lavinia M. Snow and Lucy A. Snow, in order to avoid confusion in the settlement of both estates in the future.

Following is the agreement:

FIRST: That the deed to Lavinia M. Snow of the interest of Lucy A. Snow in the South Marine Railway shall stand and remain the sole property of Lavinia M. Snow.

SECOND: A mortgage of sixteen Hundred Twenty-one (1621) Dollars, and interest at five per cent (5 per cent), shall be executed on the property known as the Pleasant Street Property, in favor of Lavinia M. Snow.

THIRD: The said Lavinia M. Snow agrees to deed back to the Lucy A. Snow heirs certain quarry property covered by deed, now recorded at Knox County Register of Deeds, to Lucy W. Snow and assigned to Lavinia M. Snow, also to cancel or discharge a mortgage in favor of Caleb G. Moffitt and assigned to Lavinia M. Snow for

Five Hundred (500) Dollars, also a mortgage for Fifteen Hundred (1500) dollars in favor of Lucy W. Snow and assigned to Lavinia M. Snow, both on the Pleasant Street Property.

By this agreement it is intended to make a final settlement of all the matters which are now somewhat in doubt, and to form a basis for the settlement of the estate of Lucy A. Snow."

The record shows that in November, 1912, while the condition of the parties remained as before the contract, defendant's intestate declined to carry out the terms of the contract and repudiated the same. Correspondence followed in which Edward S. Snow inquired the "reason" for such refusal, and on receiving an answer wrote defendant's intestate as follows:—

"Boston, Mass.

Dear Aunt Lavinia,

Your kind note at hand and noted. I do not blame you one mite and I have already taken the matter up with Annie and something will be done. Do not sign the deeds as we understand the matter until you get ready. In fact in thinking the matter over I have decided that it is better to leave it as it is until we can talk it over. If you should sign now it would only make trouble. Mary would get hers, sell it to any one right away and it might make trouble for us all. Regarding the trouble you are having it is a shame and I shall see what I can do. Mary will have to be brought up here or you can come up to our house if you prefer and let them stay there. Regarding the deeding of the quarry property the signing of the agreement is binding to all of us there is no need to do anything about it now. I prefer to let it wait and I am glad you did not make out any deeds to the individual heirs. Perhaps when it is done it can be arranged so that it can not be sold without the consent of the other owners or of the administrator. Wouldn't you like to come up and stop with us this winter. Would you be willing to buy the part of the house Annie deeded to C. W. Snow. This would settle the whole matter and would prevent Mary from being there.

Sincerely yours,

E. S. SNOW."

There was oral testimony on each side as to the circumstances attending the contract, and from the record it appears that from the date of the above letter until the demand upon the defendant before the bringing of the bill, no steps were taken to enforce any claim or right under the contract. The defendant's intestate died about four and one-half years after the date of the contract.

During these years Edward S. Snow does not appear to have sought an interview with his aunt "to talk over" her refusal to sign deeds or in any manner to have the terms of the contract complied with.

The sitting Justice made no finding of fact, but having before him all the witnesses and documentary evidence, and considering as he must have the appellee's claim of fraud, rescission, and abandonment, it is very clear that the decree is well founded, and especially so upon the grounds of rescission on the part of defendant's intestate, and abandonment upon the part of the appellants.

The last section of the contract declares "that the intention of the agreement was to make a final settlement of all matters which are now somewhat in doubt, and to form a basis for the settlement of the estate of Lucy A. Snow." An intent necessary to settle with defendant's intestate during her life, and not with her administrator, and to settle in a reasonable time an intestate estate then being settled in Probate Court. Waiting more than four years under such circumstances is in itself evidence of abandonment.

In an appeal from the decision of a sitting Justice, the appellant has the burden of showing the decree to be clearly wrong, especially when the credibility of witnesses is an issue. In this case the credibility of the witnesses was an important issue. The sitting Justice had the advantage of observation of the persons testifying, and their testimony weighed by him must have aided in forming his judgment. It is sufficient to say that the testimony as a whole satisfies us that the decree of the sitting Justice is justified by the record. *Hartley* v. *Richardson,* 91 Maine, 424.

Appeal dismissed.

ALLEN C. MCLEAN'S CASE.

Cumberland. Opinion October 22, 1920.

Workmen's Compensation Law. Appeal from a decision of the Industrial Accident Commission. Construction given to the phrase "the loss of a foot" in Sec. 16, Chap. 50, of the R. S., before the amendment of Public Laws 1919, Chap. 28. Differentiation between the loss of an entire foot and a fractional part thereof. Decree modified.

Appeal from decision of the Industrial Accident Commission. The claimant, an employe of the American Railway Express Company, on January 6, 1919, sustained an accidental injury to his right foot while in the course of his employment in consequence of which so much of the foot as lay forward of the plane of the front surface of the tibia or shin bone was amputated. The ankle joint retains its motion and the heel support is the same as before the accident. The claimant has lost the toes and instep but not the heel, and walks upon what remains with the aid of a specially constructed boot having a steel support running up the front of the tibia.

The Commission decided that this constituted "the loss of a foot" under R. S., Chap. 50, Sec. 16.

Held:

1. That this accident occurred before the amendment of Public Laws 1919, Chap. 28, was passed and at a time when loss of a member was construed to mean loss by severance and not by incapacity, a distinction being drawn between loss and loss of use.
2. Applying this rule it is obvious that the loss of two-thirds of a foot, as in this case, is not the loss of a foot. The words mean the loss of an entire foot and not of a fractional part thereof.
3. This construction is strengthened by a study of other portions of the statute which shows that when the Legislature intended to make the loss of a part equal to the loss of the whole it expressly so provided.
4. That the decree be modified and the claimant be awarded, in addition to his medical expenses $132.50, compensation at the rate of $8.88 per week for a period of sixty-five weeks from January 20, 1919.

This is an appeal from a decree by a Justice of the Supreme Judicial Court, in conformity with the decision of the Industrial Accident

Commission, that the claimant on January 6, 1919, while in the employ of the American Railway Express Company, sustained an injury to his right foot, in consequence of which so much of the foot as lay forward of the plane of the front surface of the tibia was amputated. The Industrial Accident Commission held that the injury constituted "the loss of a foot" within the meaning of R. S., Chap. 50, Sec. 16, and awarded claimant in addition to his medical bills, one-half his average weekly wages, for a period of one hundred and twenty-five weeks. Appeal sustained. Decree to be modified in accordance with the opinion.

Case stated in the opinion.

Harry E. Nixon, for claimant.

Verrill, Hale, Booth & Ives, and Leon V. Walker, for respondents.

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

CORNISH, C. J. On January 6, 1919, the claimant, an employe of the American Railway Express Company, sustained an injury to his right foot in consequence of which so much of the foot as lay forward of the plane of the front surface of the tibia or shin bone was amputated. The Industrial Accident Commission decided that this constituted "the loss of a foot" under R. S., Chap. 50, Sec. 16, and accordingly awarded the plaintiff in addition to his medical bills $132.50, the sum of $8.88, being one-half his average weekly wages, for a period of one hundred and twenty-five weeks, beginning January 20, 1919.

It is admitted that the injury arose out of and in the course of employment and the only question to be decided by this court on appeal is whether the Commission erred as a matter of law in so construing the statute as to hold that the claimant had sustained the loss of a foot under Section 16. Nor is there any controversy as to the extent of the injury and amputation. Dr. Twitchell who performed the operation and the only surgical witness in the case, testified that the length of his foot was $9\frac{3}{4}$ inches, that six inches were removed, and $3\frac{3}{4}$ inches were left, including the calcaneum or heel and the portion next the heel up to the line of severance; that it was necessary to take off the head of the astragalus or ankle bone where the shin bone articulates with it because otherwise he could

not get flap enough to cover it; that the ankle joint retains its motion, and that the heel support is the same as before the accident. In other words the claimant has lost the toes and instep but not the heel, and walks upon what remains of the foot, with the aid of a specially constructed boot having a steel support running up the front of the tibia. It further appears that the claimant began work September 2, 1919, at a wage of $20.75 per week which is greater than he was receiving at the time of the accident and has been at work continuously since that time.

In determining the question whether the claimant has lost his foot it must be remembered that the accident occured in January, 1919, before the amendment (Public Laws 1919, Chap. 238) took effect whereby this provision was added to Section 16 of the original statute: "In all cases of this class where the usefulness of a member or any physical function thereof is permanently impaired, the compensation shall bear such relation to the amount stated in the above schedule as the incapacity shall bear to the injuries named in this schedule and the commission shall determine the extent of the incapacity." This addition provided for cases of loss or impairment of use of a member where the member itself was not lost. Previous to this amendment the words "loss of a member" were construed to mean loss by severance and not by incapacity. Merchant's Case, 118 Maine, 96. In other words a distinction was drawn between loss and loss of use.

Applying this rule, which must apply to this case, and eliminating the question of use, the single problem remains whether the loss of two-thirds of a foot, as in this case, is the loss of a foot, whether in other words the part is equal to the whole. Anatomically speaking the foot extends from the ankle joint to the end of the toes and is divided into three parts, the tarsal bones or ankle, the metatarsal bones or instep, and the phalanges or toes. In the case at bar the metatarsal bones and phalanges were severed, while the ankle bone and the heel were left practically unimpaired. If the loss contemplated by the statute is not of the entire foot, then what fractional part shall be fixed by the court as equal to the whole? Shall it be a loss of one-third or one-half or two-thirds or four-fifths? Where shall the line be drawn? Such a construction would seem to be rather in the nature of judicial legislation then of judicial construction, and

we think it more consonant with judicial interpretation to hold that according to the common meaning of the language the statutory words "the loss of a foot," mean the loss of an entire foot and not a fractional part thereof.

Especially does this construction seem reasonable when we consider the fact that the Legislature seems to have had in mind this very question in many instances, and when it desired to make the loss of a part equivalent to the loss of the whole it expressly provided for it. Thus after specifying the compensation for the loss of a thumb and for the loss of each finger at a given rate, and the loss of the first phalange of the thumb or of any finger as one-half of the amount for the whole, it added, "The loss of more than one phalange shall be considered as a loss of the entire thumb or finger." Again after specifying the amount for the loss of a toe, and of the first phalange of any toe, the Legislature expressly said: "the loss of more than one phalange shall be considered as the loss of the entire toe." In each of these instances it is indisputable that the words "thumb," "finger" and "toe" as used in the first clause mean the entire thumb, finger or toe, and that when the intention was to make any part less than the whole equivalent to the whole, it was expressly so stated. If the claimant's contention is sound then these special provisions were entirely unnecessary because without them the loss of a substantial portion of a member is equivalent to the loss of the entire member.

Still again, "For the loss of an arm or any part above the wrist" and "the loss of a leg or any part above the ankle," are provisions carrying out the legislative intention with precision. But in the clause of Section 16, now under consideration, there is no such modifying provision. It does not say "For the loss of a foot or the parts in front of the heel," nor "the loss of the toes and instep shall be considered as the loss of the entire foot," but simply and baldly "for the loss of a foot" without any diminution or qualification whatever. This must mean the entire foot and nothing less.

Counsel for claimant calls our attention to a line of cases in other States, but upon examination these are found to have arisen under statutes given compensation for loss of use and therefore are not authorities in the case at bar.

Our conclusion therefore is, that the decree should be modified, and the claimant should be awarded in addition to his medical ex-

penses, $132.50, compensation for the loss of his toes at the rate of $8.88 per week for a period of sixty-five weeks from January 20, 1919.

Appeal sustained.
Decree to be modified in accordance with the opinion.

THE JAMES BAILEY COMPANY *vs.* ARTHUR E. DARLING, et al.

Cumberland. Opinion October 25, 1920.

Partnership. Elements necessary to constitute. There must be some contract, express or implied, between the parties. Sharing in profit and loss does not necessarily constitute a partnership. There must be a community of interest and of property.

Whether a partnership exists or not is an inference of law from the established facts, and the relation is based upon some contract, express or implied, between the parties.

The mere fact of participation in profit and loss does not necessarily constitute a partnership; an essential element of a partnership is a community of interest in the subject matter of it; but community of interest alone does not make a partnership.

Such a community of interest involves a community of property as well as of profits, from which arises the right of each partner to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power, as all the partners could when acting together, with the right of the survivors, upon the death of a partner, to retain and dispose of the partnership effects for the settlement of its affairs.

However the rule of partnership liability may be stated, an agent or servant, whose compensation is measured by a certain portion of the profits of the business in which he is employed, is not thereby made a partner in the business; and receiving a share of such profits in lieu of or in addition to interest, by way of a compensation for a loan of money, has of itself no greater effect.

It is a fair conclusion from the evidence that the position of the defendant, Carr, was not that of a partner, but was that of a money lender, who, having optimistic views of profits derived from the automobile business, was willing to measure his compensation for the accomodation by a share in the profits. His advances did not constitute capital. In such case there is no partnership.

The question, "Whether or not it was generally understood by the people in the garage and the customers that Mr. Carr and Mr. Darling were partners?" was rightly excluded.

Where a witness has been fully examined on a certain matter, the right of the presiding Justice in his discretion to limit further examination on the same point cannot be doubted.

This is an action of assumpsit brought by the plaintiff, a corporation, to recover for merchandise sold and delivered, amounting with interest to $167.06. The plaintiff attempts to charge the defendant, S. P. H. Carr, with liability as a partner with the other defendant, Arthur E. Darling, who offered no defense, having two years prior filed a petition in bankruptcy as an individual. Defendant Carr filed a plea of the general issue, and also filed an affidavit denying partnership. At the conclusion of the plaintiff's testimony on motion by counsel for the defendant, the presiding Justice ordered a non suit, and plaintiff took exceptions, and plaintiff also took two exceptions as to admission and exclusion of evidence. Exceptions overruled.

The case is fully stated in the opinion.

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

Maurice E. Rosen, for defendant.

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

MORRILL, J. The plaintiff claims to charge the defendant, Carr, with liability as partner with the defendant, Darling, for a bill of automobile supplies and accessories charged by the plaintiff on its books to A. E. Darling, and delivered to said Darling or at a garage operated under the name of A. E. Darling. The articles were delivered between February 28, 1916, and June 3, 1916, at which time plaintiff did not know that defendants had been in any way associated in business. The plaintiff claims to have discovered after Darling became bankrupt that the defendants were in partnership from about August 15, 1915, to February 15, 1916, in the management of said garage, and says that no notice of dissolution of the partnership was given.

In this case the question of estoppel is not involved; Mr. Carr did not hold himself out to the plaintiff as a partner, and they did not know of the alleged partnership for several months after the goods were

sold. Under these circumstances it is incumbent upon the plaintiff to prove that a partnership in fact existed between the defendants.

Whether a partnership existed or not is an inference of law from the established facts, (*Dwinel* v. *Stone*, 30 Maine, 384; *Cummings Mfg. Co.* v. *Smith*, 113 Maine, 351) and the relation is based upon some contract, express or implied, between the parties. *Dunham* v. *Lovelock*, 158 Pa. St., 197; 38 Amer. St. Rep. 838. As was said by Judge Cooley in *Beecher* v. *Bush*, 45 Mich., 188, 40 Amer. R. 465, 472: "Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless, by contract and with intent, he has formed a relation in which the elements of partnership are to be found;" and in the same case: "It is possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangment shows them to be inapplicable." In this case the agreement between the defendants was not in writing; its terms must be determined from the testimony, which seems to establish the following facts:

For about one year prior to August, 1915, the defendant, Darling, had been in the automobile business, occupying a garage on Union Street, in Portland, and in that business had dealt with the plaintiff; in that month he made an arrangement with the defendant, Carr, by which they were to engage in the business of selling automobiles, Carr furnishing money to finance the business in consideration of receiving one-half the net profits. Mr. Darling is the only witness who testifies to this agreement; we therefore give it in his own words:

"Q. Tell the jury just what the proposition was in the first place when you and Mr. Carr became associated in any business?

A. Mr. Carr said he would like to get in the automobile game, and I had a chance to take on the Oldsmobile car, and Mr. Carr and I talked it over, and he said he would like to go in with me on it, and he said he would furnish—finance to buy the cars, and when a car was sold I was to pay him back the money that he loaned me to buy the cars, and I to work without a salary on the Chandler and Oldsmobile, and what profit we took in was to pay the overhead expenses, and if there was any profit left we was to equally divide it, and then

afterward we got a chance to take on the Chandler and we did the same, had the same conversation and the same transaction, some cars here in town, and he paid for them, and if there was any profit he was supposed to have half of it. Nothing drawn up, any writings or anything, one way or the other.

. . . . . .

Q. (By the Court): In your arrangement with Mr. Carr at the outset, was anything said about the sharing of losses, or on whom losses should fall if losses were made? Was that subject gone into, and if so, in what way?

A. Your Honor, I can't remember that it was ever brought up." He further testifies that, "there was nothing said about interest of the money."

For this business a store on Congress Street was leased in the name of Mr. Darling, Mr. Carr standing good for the rental, which was paid from the business as other expenses; it does not appear that Mr. Carr was called upon to pay on his guaranty. In November, 1915, Darling took over the agency for the Chandler car in his name, assuming the liabilities; Carr gave a bond to the representatives of the former agents and they gave Carr a bond that the bills taken over were all good. The business was carried on in the name of A. E. Darling; the bank account stood in his name, and he managed all details, conferring with Carr as to the purchase of cars.

From time to time as payments for cars became due Mr. Carr furnished the money to pay for them, and as each car was sold, he was repaid from the proceeds the amount advanced for that particular car, and the balance was used to pay the expenses of the business. After September Darling gave notes to Carr for the purchase price of the cars; that was not the original agreement.

No division of profits was made; the expenses consumed all the profit from the sale of the cars. In February, 1916, the arrangement was terminated. To again quote from Darling's testimony: "We had four cars coming in that our contract called for for that month, and I asked Mr. Carr for the money to finance the bill of lading, and he refused to let me have it, said he couldn't furnish it. Of course they were coming and I had to get it elsewhere, and that was agreeable to Mr. Carr." Thus ended all dealings between the defendants, and Darling continued the business for a time.

The plaintiff argues that the relation thus established constituted a partnership; this the defendant, Carr, denies and claims that his advancements were loans made in consideration of Darling's promise that he should receive one-half the net profits of the business for the accommodation.

This opinion need not be extended by a discussion of the rule of partnership liability, and of the exceptions and limitations which have been engrafted upon the early rule that participation in the profits of a business renders the recipient a partner as to third persons, in the business from which such profits are derived. *Waugh* v. *Carver*, 2 H. Bl. 235; 1 Smith Lead. Cas. *908, 8th Ed. 1316; *Eastman* v. *Clark*, 53 N. H. 192, 16 Am. Rep., 192. The subject has been fully discussed in this state. *Dwinel* v. *Stone*, 30 Maine, 384; *Knowlton* v. *Reed*, 38 Maine, 246, holding that the mere fact of participation in profit and loss does not necessarily constitute a partnership, that an essential element of a partnership is a community of interest in the subject matter of it, and defining the characteristics of that community of interest; but community of interest alone does not make a partnership. *Woodward* v. *Cowing*, 41 Maine, 9; *Braley* v. *Goddard*, 49 Maine, 115; *Winslow* v. *Young*, 94 Maine, 145, 160.

However the rule of partnership liability may be stated, it must be considered settled that an agent or servant, whose compensation is measured by a certain portion of the profits of the business in which he is employed, is not thereby made a partner in the business, and that receiving a share of such profits in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect. *Meehan* v. *Valentine*, 145 U. S., 611; Law Ed. Bk. 36, Pages 835, 841. Additional authorities are collected in 115 Amer. St. Rep. 400, at Pages 439, 441, and in 18 L. R. A. (N. S.) 963, at Pages 1019, 1032, 1047, 1055.

The difficulty in each case arises in determining whether there has been a bona fide loan of money to the proprietor of the business, or whether a relation, having the essential elements of a partnership, has been formed, from which the court must declare that a partnership exists. In the instant case the advances did not constitute capital, were not contributed as capital, but were to be, and were, repaid from the sale price of each car, and the balance only became assets of the business. There was no mortgage given, but the arrangement was in effect, between the parties, like a pledge of each car for

the repayment of the purchase price. It is a fair conclusion from the evidence that Mr. Carr's position was not that of a partner, but was that of a money lender, who, having optimistic views of profits derived from the automobile business, was willing to measure his compensation for the accommodation by a share in the profits. In such case there is no partnership. *Richardson* v. *Hughitt*, 76 N. Y., 55, 32 Amer. Rep., 267, 269. So where the money advanced is to be repaid in all events without regard to the profits, there is no partnership; to have that effect, the payment must depend upon the profits. *Eager* v. *Crawford*, 76 N Y. 97. In a later New York case, *Hackett* v. *Stanley*, 115 N. Y. 625, the court reviewed the cases and, while holding that a loan may be made in aid of an enterprise on conditions by which the lender may secure a limited or qualified interest in the profits, said that "when the agreement extends beyond this and provides for a *proprietary* interest in the profits as a compensation for money and time and services bestowed, *as a principal in its prosecution*," the rule requires that such party be held as a partner; and so held in that case upon the ground that the defendant was to render service as a principal.

In this class of cases the determining factor is the existence or nonexistence of such community of interest that the parties are "mutually principals of and agents for each other, with general powers within the scope of the business," subject, however, to the limitation of those powers, as between the parties, by agreement. *Beecher* v. *Bush*, supra. The cases on this point are collected in a note to *Brotherton* v. *Gilchrist*, (144 Mich., 274) 115 Amer. St. Rep., 420. Such a community of interest involves a community of property as well as of profits, from which "arises the right of each partner to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power, as all the partners could when acting together," with the right of the survivors, upon the death of a partner, to retain and dispose of the partnership effects for the settlement of its affairs. *Dwinel* v. *Stone*, 30 Maine, 384, 386; *Knowlton* v. *Reed*, 38 Maine, 246. For one to share in the profits as profits, and thus to become liable as a partner, is "to stand in such relations to the business that the profits, or a share of them, are in his ownership as they accrue. He must have a proprietary interest in each dollar of profits as it is earned, so that he then has a right of possession or con-

trol of it for the purpose of retaining his share. This involves an ownership of an interest in the business that produces the profits. Through this comes the implied agency on which the liability of a partner for the contracts of his copartners is founded." *Estabrook* v. *Woods*, 192 Mass., 499, 503.

Nothing of the kind is apparent in this case; the right of the defendant, Carr, to a share of the profits was not based upon a common ownership of the property or profits, but was a personal obligation of Darling. Carr was not a principal, and had no control over the business; this is clear from their course of dealing and the manner in which their relations were terminated. The case is clearly distinguishable from *Bearce* v. *Washburn*, 43 Maine, 564. The defendants clearly did not intend to establish a partnership; the defendant, Carr, agreed to make advances for the purchase of the cars, to be repaid when the cars were sold, and he was at liberty to cease the advances at any time. The authorities upon the question of the intent of the parties as bearing upon the partnership relation are collected in115 Amer., St. Rep. 412. In the absence of evidence that Carr held himself out as a partner, he cannot be charged as a partner by operation of law. Other pertinent cases are *Loomis* v. *Marshall*, 12 Conn., 69; *Dunham* v. *Rogers*, 1 Penn. St., 255; *Perrine* v. *Hankinson*, 11 N. J. L. 181; *Denny* v. *Chabot*, 6 Met., 82; *Bradley* v. *White*, 10 Met., 303; *Harvey* v. *Childs*, 28 Ohio St., 319, 22 Amer. Rep., 387.

The non suit was rightly ordered.

The other exceptions of plaintiff require only brief mention. Exceptions were not taken at the trial to the first five rulings mentioned in the bill of exceptions. Counsel apparently acquiesced in those rulings; they were clearly right.

The sixth exception is to the exclusion of the following question propounded to a witness who worked in the garage: "Whether or not it was generally understood by the people in the garage and the customers that Mr. Carr and Mr. Darling were partners?" The question was rightly excluded.

The seventh and last exception cannot be sustained. The question excluded was leading in form, and the witness had already been fully examined on the subject matter. The right of the presiding Justice to limit further examination on the same point, in his discretion, cannot be doubted.

Exceptions overruled.

LEON R. BOWIE *vs.* MERTON G. STACKPOLE.

HOWARD J. MERRILL *vs.* SAME.

HENRY M. SNOW *vs.* SAME.

Androscoggin. Opinion October 25, 1920.

Malicious prosecution. Probable cause does not depend on the actual state of facts, but upon the honest and reasonable belief of the prosecutor. Actual belief and reasonable grounds for that belief are essential to constitute probable cause.

Upon trial of an action of malicious prosecution, for causing the arrest of the plaintiff under R. S., Chap. 7, Sec. 105, for fraudulently receiving the vote of a person not qualified to be an elector, an instruction that if the jury finds that such person s voting residence was established in another town, or was not established in the town where he voted, on the day in question, their verdict will be for defendant, is erroneous.

Probable cause does not depend on the actual state of facts, but upon the honest and reason ble belief of the prosecutor.

Actual belief and reasonable grounds for that belief are essential to constitute probable cause.

By the instruction given, the jury could not inquire into the question of probable cause.

These are three actions of malicious prosecution tried together. A verdict of not guilty was rendered in each case. Plaintiffs took exceptions to certain instructions given by the presiding Justice to the jury in his charge. Exceptions sustained.

Case stated in the opinion.

McGillicuddy & Morey, for plaintiffs.

George C. Wing, and George C. Wing, Jr., for defendant.

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

MORRILL, J. These actions of malicious prosecution were tried together, and are presented upon a single bill of exceptions. The

plaintiffs were selectmen of the town of Durham at the annual town meeting in March, 1919, and upon application of one William E. Lent placed his name upon the voting list, as a qualified voter in the town of Durham; his residence at some time before had been in the town of Lisbon; Lent voted at the meeting. The defendant was the complainant in a prosecution of the plaintiffs before the Municipal Court of the City of Auburn, under R. S., Chap. 7, Sec. 105, upon the charge of fraudulently receiving the vote of said Lent. The plaintiffs were adjudged not guilty. These actions were then brought. The verdicts being for defendant, the plaintiffs present a bill of exceptions to certain instructions of the presiding Justice.

The presiding Justice after instructing the jury that the evidence did not show, in his judgment, upon the whole, that the plaintiffs did fraudulently receive the vote of Lent, proceeded carefully to define the qualifications of a voter as to residence, and then instructed the jury as follows:

"Now then, gentlemen, the important question here for you is (and it is almost a question of law) did this voter, Mr. Lent, have his residence established in the town of Lisbon, where he had lived for about two years previous to that time, and where his family were living at the time, and during the time, in a house in which he was responsible for the rent (you have heard how it was paid, out of the wages of himself and daughters) and where his wife and family were living during this time up to and beyond March 3, and where their minor boy went to school when school was keeping. The question for you is whether he had a voting residence established under the law and the constitution in Durham or in Lisbon. *For I shall say to you that if, under the law, you find that his voting residence was in the town of Lisbon, that this defendant is not guilty of the offense.* And that is a matter of law. Therefore the first important question is where his residence was established."

The presiding Justice further commented upon the question of an established place of residence, quoting from the opinion in *Brewer* v. *Linneus*, 36 Maine, 428, that "the residence of the wife, her husband being more than twenty one years of age, is prima facie evidence of his domicile, and in the absence of controlling proof is conclusive," and instructed the jury as follows:

"Now it may be important to know, and I think the court will take judicial notice that the election in September was the 9th of September, the second Monday of September, 1918. So his settlement

would have to begin in the town of Durham, as I stated, three months before the third day of March, in order to give him the three months established residence in Durham. And September 9 he voted in Lisbon. I just call your attention to those dates, and you may draw such inferences from them as the facts require. *So I say gentlemen, to you again, that if you find under the law that I have given you that Mr. Lent's voting residence was established in Lisbon, or was not established in Durham on the third day of March last, then your verdict will be for the defendant.*"

Upon a careful examination of the entire charge, the exceptions of plaintiffs to these instructions must be sustained. The issue was not whether Lent had an established place of residence in Lisbon, nor yet whether the defendant had probable cause to charge that the plaintiffs had received the vote of a person (Lent) not qualified to be an elector, but whether he had probable cause to charge the plaintiffs with having fraudulently received such a vote. The presiding Justice had instructed the jury that the evidence did not show, in his judgment, upon the whole, that the plaintiffs did fraudulently receive the vote of Lent; the plaintiffs contended that the defendant did not have probable cause for alleging that they had fraudulently received the vote of Lent; the instructions of the presiding Justice prevented the jury from considering that question. Whether the circumstances, including the conduct of the defendant, which were relied upon to show that he had or did not have, probable cause, were true and existed, was a question of fact for the jury. *Humphries* v. *Parker*, 52 Maine, 504. Probable cause does not depend on the actual state of facts, but upon the honest and reasonable belief of the prosecutor. *Fitzgibbon* v. *Brown*, 43 Maine, 174. *Humphries* v. *Parker*, supra. 2 Greenleaf Ev. Sec. 455. Actual belief and reasonable grounds for that belief are essential to constitute probable cause. *Humphries* v. *Parker*, supra. Even if the facts showed prima facie that Lent had an established place of residence in Lisbon, the defendant cannot be said to have had probable cause, if he knew of facts negativing that prima facie case, or disproving fraud on the part of the plaintiffs. *James* v. *Phelps*, 11 Ad. & Ellis, 483; 39 E. C. L. Rep. 267, 269. There was evidence on both these points; but, by the instructions given, the jury could not inquire into the question of probable cause.

It is unnecessary to consider the other exceptions.

Exceptions sustained.

EMILE THIBEAULT'S CASE.

Androscoggin. Opinion October 25, 1920.

Workmen's Compensation Act of 1919. Intent of Act is to compensate an injured employee for loss of capacity to earn. The finding of any essential fact in favor of the claimant without proper evidence, by the chairman of the Industrial Accident Commission, may be ground for attacking the decree upon appeal. Decree modified

The payment to an injured workman under The Workmen's Compensation Act of 1919 is intended to compensate him for his loss of capacity to earn, which is measured by the amount earned by him before the injury; in the varying conditions of work, a period of employment must be taken sufficiently long, to obtain a fair average of his earnings as a basis of computation, and to show the variations in his earning power incident to the employment.

By paragraph IX of Sec. 1 (Public Laws 1919, Chap. 238) three methods of computing the "average weekly wages, earnings or salary" of an injured employee are stated; these methods are not to be applied in the alternative as a matter of choice, but are to be applied in the order stated, to the facts as they exist in the particular case, upon the principle of resorting to the best evidence obtainable in determining the employee's average wage.

If the chairman of the Industrial Accident Commission applies a wrong rule of law in computing the average weekly wages of the claimant, or finds any essential fact in favor of the claimant without proper evidence, the decree may be attacked upon appeal.

In the instant case the chairman applied the third method of computation, and found that "having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or a neighboring locality" the sum of twenty-seven dollars reasonably represented the weekly earning capacity of the injured employee at the time of the accident in the employment in which he was then employed.

Held:

Error, because (1) the amount of the previous wages, earnings and salary of the injured employee was not shown; hence it was impossible to have regard to such wages; and (2) because the only evidence of wages of other employees was the schedule of wages of one fellow employee, and the finding can be supported upon the evidence only by considering the wage schedule of this fellow employee for six months, being thus limited by the period of claimant's employment.

The law does not sanction a finding of the average weekly wage of the claimant, based solely upon the wage schedule of a fellow employee for six months; to do so is to sanction the use of a wage schedule of a fellow employee for a shorter period than is permissib e in determining under sub-paragraph (a) the claimant's average weekly wage from a schedule of wages actually earned by him.

The claimant's compensation should have been determined by the second method stated in paragraph IX. The claimant and the fellow employee, whose wage schedule was offered as a standard, were shown to be in the same class.

When the wage schedule of a fellow employee, submitted as a standard, shows reduction in time and output, occasioned by causes incident and common to the employment, and not by causes peculiar to the fellow employee, such fellow employee may still be regarded as working substantially the whole of the year immediately preceding the injury.

If the work is discontinuous, that element must be considered.

This is an appeal from a decree by a Justice of the Supreme Judicial Court, in conformity with a decision of the Industrial Accident Commission, that the claimant be paid by respondent the sum of fifteen dollars per week during such period he is totally incapacitated for work by reason of his injury, beginning on the eleventh day following the date of the accident, and reasonable medical and hospital expenses, less such amount claimant had received as compensation on account of the injury. Appeal sustained. Decree modified by substituting the sum of thirteen dollars and seventy-one cents in place of fifteen dollars as the weekly compensation awarded.

Case is stated in the opinion.

Claimant was not represented by counsel, and *A. L. Thayer, Chairman of the Industrial Accident Commission,* conducted his examination.

Andrews & Nelson, and Eben F. Littlefield, for respondents.

SITTING: SPEAR, HANSON, PHILBROOK, MORRILL, WILSON, JJ.

MORRILL, J. The amount of money involved in this case is small, but the decision is important as determining the correct procedure in computing the "average weekly wages, earnings or salary" of an injured employee, under the Workmen's Compensation Act of 1919.

The payment to an injured workman is intended to compensate him for his loss of capacity to earn, which is measured by the amount earned by him before the injury; in the varying conditions of work, a period of employment must be taken sufficiently long, to obtain a fair

average of his earnings as a basis of computation—not his earnings at the time of the injury or for a short period before, when they may be at an unusually low figure, thus operating unfairly to him, or at an unusually high figure, thus operating unfairly to the employer, but taken over a period long enough to show the variations in his earning power incident to the employment. This principle is at the foundation of the theory of compensation embodied in the Maine Act.

By paragraph IX of Sec. 1 (Public Laws, 1919, Chap. 238) the methods of computing the "average weekly wages, earnings or salary" are stated; sub-paragraphs (a), (b), and (c), of that paragraph describe three methods of computation; these methods are not to be applied in the alternative as a matter of choice, but are to be applied in the order stated, to the facts as they exist in the particular case, upon the principle of resorting to the best evidence obtainable in determining the employee's average wage.

The first method, sub-paragraph (a), is to be applied if the injured employee "has worked in the same employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury;" and affords the most satisfactory method of determining the employee's actual average wages, earnings or salary.

The statute does not provide for computing the average weekly wage solely from the wages actually earned by the claimant, during a less period than "substantially the whole of the year immediately preceding his injury."

If the first method is not applicable to the facts of the particular case, recourse must next be had, under sub-paragraph (b), to the average daily wages, earnings or salary of "an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment, in the same or a neighboring place," as the next most available standard. The language of this sub-paragraph indicates at least two minor degrees of availability; the wages of a substituted employee working in the same employment are a more satisfactory standard than those of one working in a similar employment; and so the wages of one working in the same place are a more satisfactory standard than those of one working in a neighboring place.

If neither of the preceding methods can "reasonably and fairly be applied," the third method, sub-paragraph (c) is to be used.

In the instant case the claimant, at the time of his injury, was working as a weaver in the Bates Mill, and had then been working at that employment for about six months; previous to being so employed he worked at sweeping in the spinning room. It is therefore conceded that the first method of computation, sub-paragraph (a), cannot be applied.

The appellant contends that the second method, sub-paragraph (b), should have been applied, and that the findings of the chairman of the Commission are not supported by proper evidence and result in the finding of an "impossible wage" upon the evidence.

If the chairman applied a wrong rule of law in computing the average weekly wages of the claimant, or found any essential fact in favor of the claimant without proper evidence, the decree can be attacked on this appeal. *Mailman's Case*, 118 Maine, 172.

The chairman in his decision held: "From the evidence introduced, the schedule of wages of the fellow employee offered by the insurance carrier did by no means fulfill the requirements of subsection (b), of paragraph IX of Section 1 of the Act, therefore could not 'fairly and reasonably' be used as a basis of computation of compensation." He then proceeded to find, "that 'having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or a neighboring locality,' the sum of twenty seven dollars reasonably represents 'the weekly earning capacity of the injured employee at the time of the accident in the employment in which he was engaged at such time';" he thereupon awards compensation at fifteen dollars per week, the maximum provided by the Act. The procedure was manifestly under sub-paragraph (c).

The chairman's finding of twenty-seven dollars per week, the respondents contend is not supported by any legal evidence. This contention must be sustained. The chairman states that he had regard "to the previous wages, earnings and salary of the injured employee." But the record does not show the amount of such earnings; the claimant was unable to testify thereto in detail, and no schedule of his wages during the period of his employment, or any part thereof, was produced; consequently it was impossible to have regard to such wages. The chairman also states that he had regard to the previous wages "of other employees of the same or most

similar class." But the only evidence of wages of other employees was the schedule of wages of one Rebecca LaLiberte, submitted by the insurance carrier as a basis of computation of compensation under sub-paragraph (b), which was rejected for that purpose, as not fulfilling the requirements of that sub-paragraph. That schedule shows an average weekly wage of $22.84 for the entire year, while an average of that schedule for the last six months beginning with June shows an average daily wage of $4.724, or an average weekly wage of $27.25 for a year of 300 days. The chairman's finding can be supported upon the evidence only by considering the wage schedule of this fellow employee for six months, being thus limited by the period of claimant's employment. The law does not permit the use of claimant's actual wage schedule for six months, under sub-paragraph (a); nor does it permit the use of a fellow employee's wage schedule for six months, under sub-paragraph (b); in both cases the period for computing the average weekly wage must be substantially one year; we think that it is contrary to the law to base a finding of the average weekly wage of the claimant, solely upon the wage schedule of a fellow employee for six months; to do so is to sanction the use of a wage schedule of a fellow employee for a shorter period than is permissible in determining the claimant's average weekly wage from a schedule of wages actually earned by him. It follows that the chairman's finding is not supported by legal evidence.

The record, however, contains sufficient evidence to enable the court to award compensation.

The claimant presented no evidence from which his actual wages can be determined; the employer presented the wage schedule of a fellow employee, supported by the testimony of claimant's overseer and the clerk in charge of compensation cases; and contended and now contends that compensation should be determined under sub-paragraph (b). The chairman overruled that contention and rejected the schedule presented, by the ruling hereinbefore quoted.

We think that the schedule of the fellow employee met the statutory requirements and could "reasonably and fairly be applied" in determining the claimant's "average weekly wages."

The weaver whose wage schedule was offered as a standard, was a woman, one Rebecca LaLiberte; she had worked in the same room where the claimant was employed for a year or more prior to the accident; she, like claimant, was paid by the piece, and at the same

rate of wages; they worked the same number of hours for a day's work, nine and three quarters hours for five days in a week, and five and one quarter hours on Saturday, or fifty-four hours per week; they were both capable of operating six looms when work ran full, and were subject to the same contingencies of short work incident to the operation of the mill at the time in question; the woman was of the same earning capacity as the claimant as disclosed by a comparison of the payrolls of both for six weeks prior to the injury, as made and testified to by the overseer. We think that they must be considered "of the same class."

The wage schedule submitted began with the last week in November, 1918, and ended with the week of November 22, 1919; the total time was two hundred and forty working days; during the first six months the weekly wage ranged between seven dollars and ninety-nine cents, and eighteen dollars and thirteen cents, with one week at twenty-three dollars and thirteen cents; during the last six months the weekly wage ranged from twenty dollars and twenty-three cents to thirty dollars and eighty-six cents, with two weeks at seventeen dollars and ninety-one cents, and ten dollars and seven cents, respectively; this weekly wage varied with the supply of work necessary to keep the maximum of six looms running; for two weeks in January and four consecutive weeks in February and March the employee did not work.

The question is: Can this employee, whose wage schedule was submitted, be said to have worked "substantially the whole of such immediately preceding year?" The answer must depend upon whether the reduced time, and reduction in the number of looms operated was occasioned by causes incident and common to the employment, or from causes peculiar to the employee. If the latter class of causes was operative, the wage schedule cannot be applied to determine the claimant's earning capacity. "The object sought is the ascertainment of the earning capacity of the workman as shown by his constant employment in the past, in order that the remuneration after shall have relation to the remuneration before the injury." *Hight* v. *Manufacturing Co.*, 116 Maine, 81, 85. Computation of the wages actually earned by the employee "during substantially the whole of the year immediately preceding the injury" being impossible, the next most reliable basis of computation is to be used if available, viz: the wage schedule of a fellow employee of the same class

"working substantially the whole of such immediately preceding year." It is clear that if such substituted wage schedule is reduced in amount by causes incident and common to the employment, the injured employee could not have earned more than the employee whose schedule is substituted, earned. The inquiry is: What were the claimant's average weekly wages, computed by the statutory method, having regard to the known and recognized incidents of the employment, including the element of discontinuance? If the work is discontinuous, that is an element which cannot be overlooked. *Littler* v. *George A. Fuller Co.*, 223 N. Y., 369; 119 N. E., 554. "The object of the Act broadly stated is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident." *Anslow* v. *Cannoch Chase Colliery Co.*, 1909, A. C., 435.

The Legislature has seen fit to establish certain fixed methods for computing "average weekly wages." The result may be said to be an artificial average; but it is the standard established by the Act. At the present point in the case we are concerned with the question whether Rebecca LaLiberte was an employee "working substantially the whole of such immediately preceding year;" we think she must be so regarded. The relation of employer and employee was not interrupted; the mill regularly ran during the whole of the year, and the loss of time and reduction of wages resulted from the suspension of government work following the armistice and the change to the regular product of the mill, temporarily affecting all weavers alike. The testimony on this point is undisputed.

We are of the opinion that upon the evidence presented the average weekly wages should have been computed under sub-paragraph (b) of paragraph IX of Section I, giving an average weekly wage of twenty two dollars and eighty-four cents, and a weekly compensation of thirteen dollars and seventy-one cents. The decree must be modified accordingly.

In view of the somewhat meagre evidence presented before the chairman, we take this occasion to say that in all cases where compensation under sub-paragraph (b) or sub-paragraph (c) may be resorted to, a full wage schedule of the injured employee for the whole period of his employment should be presented; and where a wage schedule of a fellow employee is relied upon, wage schedules of more

than one such fellow employee should be produced if available; comparison may then be made by the chairman in the presence of the parties and witnesses, and a better understanding of the incidents of the employment be obtained.

Appeal sustained.
Decree modified by substituting the sum of thirteen dollars and seventy-one cents in place of fifteen dollars as the weekly compensation awarded.

JOHN DAMERS, et al. *vs.* THE TRIDENT FISHERIES COMPANY.

Cumberland. Opinion October 25, 1920.

Broker. Commission. Differentiation between a broker employed to sell, and one employed to find a purchaser. A contract lawful when made, which becomes illegal by subsequent statutory enactment, is to be considered at an end. When the principal refuses on good grounds to complete the transaction, the broker is not entitled to commissions.

This is an action of assumpsit on an account annexed for brokers' commissions and interest, amounting to $13,920, as claimed to be due for the sale of two steamers, and is before the court on the plaintiffs' exceptions to a ruling of the Justice of the Superior Court for Cumberland County granting defendant's motion for a non suit. The account annexed to the writ follows:

The Trident Fisheries Co., Portland, Maine

To

			Dr.
		John Damers And Company, New York City,	
Feb.	3, 1917	To commissions as broker upon the sale of the Steamer "Easthampton", 5% of selling price ($125,000), as agreed	$6,250
"	" "	To commissions as broker upon the sale of the Steamer "Long Island", 5% of selling price ($115,000), as agreed	5,750
			$12,000

Oct. 3, 1919, To interest thereon at 6% per annum from Feb. 3, 1917, when demand was duly made 1,920

$13,920

The money count was also added, under which the same evidence was presented as that in support of the account annexed.

Held:

1. As a general rule a broker is not entitled to compensation until he has performed the undertaking assumed by him; and in the absence of any contrary provision in his contract, it matters not how great have been his efforts nor how meritorious his services; if he has been unsuccessful he is not entitled to compensation. The plaintiff's principal witness on being questioned as to the commission said that the same were to be paid "in the event we sold the boats." That understanding of the contract can only mean an actual sale, or the procuring a completed, definite and unconditional contract of sale binding upon both parties.
2. But in order to entitle a broker to commissions, the customer produced by him, and the principal, must come to a final agreement on the terms of the transaction. Consequently, the conclusion of a preliminary or tentative agreement which is not binding on the parties, and which is not carried into effect, does not give a right to compensation.
3. To entitle a broker to a commission when no sale is actually consummated, a broker employed to find a purchaser must either produce to the owner a customer who is able, ready, and willing to buy on the terms prescribed by the owner, or else take from the customer a binding contract of purchase, unless those requirements are waived by the principal's refusing to proceed after notice by the broker that he has such a contract or purchaser.
4. A broker employed to sell, as distinguished from a broker employed to find a purchaser, is not entitled to compensation until he effects a sale, or procures from his customer a binding contract of sale.
5. To entitle a broker to his commissions, he must accomplish what he undertook to do in his contract of employment, for, as a rule nothing short of that is sufficient to constitute a performance on his part. In the absence of hindrance or fraud on the part of his employer, he must perform all the conditions of the contract made with his principal, or he cannot recover.
6. The question whether a sale of personal property is completed or only executory, in cases between buyer and seller and where neither the Statute of Frauds nor the rights of third parties are involved, depends upon whether it was the intention of the parties at the time the contract was made that the title to the property should immediately pass to the buyer; and when no such intention is expressed in the contract itself, then all the facts and circumstances under which the contract was made are to be examined to discover if such an intention is the meaning of the acts of the parties. Keeping in sight always the fact that it is the real intention of the parties that is to control, courts have adopted certain rules to aid them in discovering that intention.

7. It was the duty of the plaintiffs to make a sale or obtain a binding and enforceable agreement for the sale and transfer of the steamers in the first instance, but, even then, in the presence of the circumstances in this case, assuming that the plaintiffs had performed all of the conditions required by the contract, they are presumed to have acted with full knowledge of the existence of the law; for while the statute was to be without effect until an emergency was proclaimed to exist, it was still the law, and they are charged with a knowledge of its existence and provisions, and are bound thereby. Any other conclusion would work an injustice not heretofore tolerated by courts of law.
8. When a contract legal at its inception becomes illegal by subsequent statutory enactment, no action can be maintained on such contract for a failure to perform the conditions of such contract after the illegality has attached.
9. It is a general principle of law that where a contract is lawful when made and a law afterwards renders performance of it unlawful, neither party to the contract shall be prejudiced and the contract is to be considered at an end. When the principal has good grounds for refusal to complete the transaction and does so, the broker is not entitled to commissions. But the grounds for refusal must be substantial.

This is an action of assumpsit on an account annexed to recover brokers' commissions of 5% of $240,000, the selling price of two steamers, amounting to $12,000, and interest on same of $1,920, making a total of $13,920.

The defendant filed a plea of the general issue, and a brief statement of special matter of defense, alleging that on the fifth day of February, A. D. 1917, the President of the United States of America by proclamation of that date declared a national emergency to exist and in accordance with said proclamation the United States Shipping Board declined to permit the proposed sale of the steamers mentioned in the declaration of the plaintiff. At the conclusion of the plaintiffs' evidence, on motion by counsel for the defendant, the presiding Justice in the Superior Court for Cumberland County, where the case was being tried to a jury, ordered a non suit, to which ruling plaintiff excepted. Exceptions overruled.

Case fully stated in the opinion.

Maurice E. Rosen, for plaintiff.

Bradley & Linnell, and Carl C. Jones, for defendant.

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

HANSON, J. This is an action of assumpsit on an account annexed for brokers' commissions and interest, amounting to $13,920, claimed to be due for the sale of two steamers, and is before the court on the plaintiffs' exceptions to a ruling of the Justice of the Superior Court for Cumberland County granting defendant's motion for a non suit. The account annexed to the writ follows:

THE TRIDENT FISHERIES Co., Portland, Maine

To

John Damers And Company, New York City, Dr.

Feb. 3, 1917	To commissions as broker upon the sale of the Steamer "East Hampton," 5% of selling price ($125,000), as agreed	$6,250
" " "	To commissions as broker upon the sale of the Steamer "Long Island", 5% of selling price ($115,000), as agreed	5,750
		$12,000
Oct. 3, 1919,	To interest thereon at 6% per annum from Feb. 3, 1917, when demand was duly made	1,920
		$13,920

The money count was also added, under which the same evidence was presented as that in support of the account annexed.

The essential facts to be considered are taken from the exceptions. The plaintiffs are ship brokers. In December, 1916, the plaintiffs' agent, Layton, became acquainted with one Robb, who represented a firm known as Leonard Bros. of Montreal, Canada, who were desirous of purchasing certain ships. Robb gave Layton a description of the kind of boats that they were interested in, which Layton reported to his firm, the plaintiffs. The plaintiffs then sent out a circular letter to concerns who might have such boats and received a reply from the defendant. Upon receipt of the reply Layton came to Portland and talked to W. F. Leonard, treasurer of the defendant concern, who was fully authorized in whatever he might have done as treasurer of the defendant concern, on January 27th, 1917, in reference to the sale of the steamers "Long Island" and "East Hampton" then owned by the defendants.

Layton told the defendant's treasurer that he had a prospect in Leonard Bros. of Montreal and it was then agreed that the defendant was to pay the plaintiffs a commission of 5% on the selling price of the steamers "East Hampton" and "Long Island" in the event of sale. Layton then requested that the defendant give them a writing to that effect, and the defendant on January 27th, 1917, directed a letter on their letter head to the plaintiffs and delivered to Layton in hand, and which reads as follows:

"We offer you for your clients, Messrs. Leonard Bros. of Montreal, subject to prior sale, the steamer 'East Hampton' at a price of $125,000 and the steamer 'Long Island' at a price of $110,000. Both steamers are equipped for beam trawler fishing and the above prices include such equipment. Should you effect a sale of either or both steamers we would allow you a brokerage of 5% on the selling price."

Upon receipt of this letter Layton went back to New York and immediately got in touch with Leonard Bros. through Mr. Robb, who was representing them, and got the parties negotiating between themselves by telegram, etc. The plaintiffs then arranged for a meeting between Mr. Robb, representing the purchaser, and Mr. Leonard, the treasurer of the defendant concern and brought the two of them together at the Hotel Manhattan in New York City on Feb. 3rd, 1917. Robb and Leonard at that time talked the terms of the trade over and then sent for a public stenographer in the hotel and drew up the following agreement:

"New York, Feb. 3rd, 1917.

We, the Trident Fisheries Company, of Portland, Maine, agree to sell to Leonard Brothers of Montreal, Quebec, the steamer 'East Hampton' for $125,000.00, and the steamer 'Long Island' for $115,000.00. The steamer 'East Hampton' having already been reported upon by your surveyors as being in good condition. Below the water line, however, has not been inspected and this is subject to final inspection.

And the Trident Fisheries Company agrees to put the steamer 'Long Island' also in good condition and this is subject to final inspection of your surveyors.

The transaction covering the 'East Hampton' to be completed within ten days from date and payment made in United States

currency before steamer leaves Portland. Delivery of the 'East Hampton' to be made on any day arranged for within that time.

The 'Long Island' sale to be concluded upon completion of repairs, not later than March 1st.

The Trident Fisheries Company agrees to send both steamers to Halifax or St. John, and also to keep them covered by insurance until delivered to either of these ports.

The Trident Fisheries Company agrees to supply and pay for the crew, fuel, and stores covering the trip from Portland to Halifax or St. John.

The above is made binding in the consideration of one dollar in U. S. currency paid by Leonard Bros. of Montreal to the Trident Fisheries Company of Portland, Maine, receipt of which is acknowledged by said Trident Fisheries Company.

IN WITNESS WHEREOF the Trident Fisheries Company has caused this agreement to be concluded in its name and on behalf of one of its officers thereunto, duly authorized, and Leonard Brothers have signed this agreement by their agent thereunto fully authorized by them, this day and year first above written.

THE TRIDENT FISHERIES COMPANY
W. F. LEONARD,
Treasurer.

LEONARD BROTHERS,
(W. F. Leonard & D. J. Bryne)

THOMAS ROBB,
Attorney in Fact.

In presence of C. T. CLAYTON."

The plaintiffs contend that the agreement entered into between Leonard Brothers and the defendant on February 3, 1917, is not only a binding agreement of sale, but an actual sale, and that the instrument above mentioned (dated Feby. 3rd) in and of itself sustains the claim. In effect the plaintiffs' contention is that the contract of January 27, 1917, was a general broker's contract, and that they have performed all they were bound to do by producing a customer able, ready and willing to buy and who entered into a binding agreement with the defendant.

The defendant contends that the "instrument dated February 3, 1917, was not a binding agreement to buy and sell, but was an option, and that the contract relied upon by the plaintiffs cannot be considered a general broker's contract because it expressly required the plaintiffs to sell to a specific purchaser, Leonard Bros., for a specific price, commissions to be earned in event of a sale, and that the contract is therefore a special broker's contract."

The defendant by way of brief statement further says: "That in accordance with Section 9 of 39 Statutes at Large of the United States, Chapter 728, on the fifth day of February, A. D. 1917, the President of the United States of America by proclamation of that date declared a national emergency to exist and in accordance with said proclamation the United States Shipping Board declined to permit the proposed sale of the vessels mentioned in the plaintiffs' declaration."

As to the instrument dated January 27th, 1917, we are of the opinion that it is a special broker's contract, and by its terms clearly to be distinguished from the general broker's contract commonly held to be a contract to produce a customer, ready, willing and able to buy. The language used demonstrates this:—"We offer you for your clients Messrs. Leonard Brothers of Montreal, subject to prior sale;" . . . . and "should you effect a sale . . . . we would allow you a brokerage of 5% on the selling price." There is nothing in the words used here of a general nature; on the contrary every reference to the subject matter, as well as the compensation, is specific, and nothing is left to inference. The document speaks for itself.

Under such circumstances, and in view of the terms of employment here used, courts have uniformly held that a broker employed to sell, as distinguished from a broker employed to find a purchaser, is not entitled to compensation until he procures from his customer a binding contract of sale. 9 C. J. 609, Section 94 (a), and cases cited. "As a general rule a broker is not entitled to compensation until he has performed the undertaking assumed by him; and in the absence of any contrary provision in his contract, it matters not how great have been his efforts nor how meritorious his services. If he has been unsuccessful he is not entitled to compensation." 9 C. J. 587, and cases cited. *Hutchins* v. *Lewis*, 104 Maine, 27. The plaintiffs' principal witness on being questioned as to the commission said

that the same were to be paid "in the event we sold the boats." That understanding of the contract can only mean an actual sale, or the procuring a completed, definite and unconditional contract of sale binding upon both parties. *Hutchins* v. *Lewis*, 104 Maine, 27. But in order to entitle a broker to commissions, the customer produced by him, and the principal, must come to a final agreement on the terms of the transaction. Consequently, the conclusion of a preliminary or tentative agreement which is not binding on the parties, and which is not carried into effect, does not give a right to compensation. 9 C. J. 603; *Clark* v. *Bonner*, 217 Mass., 201; *Wiggin* v. *Holbrook*, 190 Mass., 157. To entitle a broker to a commission when no sale is actually consummated, a broker employed to find a purchaser must either produce to the owner a customer who is able, ready, and willing to buy on the terms prescribed by the owner, or else take from the customer a binding contract of purchase, unless those requirements are waived by the principal's refusing to proceed after notice by the broker that he has such a contract or purchaser. 9 C. J., citing 608 *Jamieson* v. *U. S. Farm Land Co.*, 206 Fed., 889; *Payseno* v. *Swenson*, 178 Fed., 999. The same authority, page 609, under sub-section 96, note (a) cites *Wiggins* v. *Wilson*, 55 Fla., 346, as supporting the foregoing, and with other authorities supporting the rule that, "A broker employed to sell, as distinguished from a broker employed to find a purchaser is not entitled to compensation until he effects a sale, or procures from his customer a binding contract of sale." See cases cited Page 609 (a). To entitle a broker to his commissions, he must accomplish what he undertook to do in his contract of employment, for, as a rule, nothing short of that is sufficient to constitute a performance on his part. In the absence of hindrance or fraud on the part of his employer, he must perform all the conditions of the contract made with his principal, or he cannot recover. 4 R. C. L. 303, citing *Strout* v. *Gay*, 105 Maine, 108; *Garcelon* v. *Tibbetts*, 84 Maine, 148. In *Condict* v. *Cawdrey*, 139 N. Y. 273, in an action by a real estate broker for commissions, based upon a written memorandum of employment, as follows: "I hereby agree to pay you a commission of ten per cent on the price I may accept for the 435,000 acres of land in Eastern Kentucky belonging to me, if sold through your agency. I hereby acknowledge your agency in bringing Jere Baxter and his associates to me, whereby a refusal until Sept. 10 next was given to me." An option was given Baxter

on the same day. The court say: "By the contract between the plaintiff and defendant he was not entitled to commissions, unless there was an actual sale of the property effected through his agency. . . . . It must appear to have been a binding and enforceable agreement for the sale and conveyance of the land; and it is not sufficient to show a provisional arrangement which has failed because of the non-fulfilment of a condition not dependent upon the action of the vendor." In *Clark* v. *Bonner*, 217 Mass., 201, it was held, that a real estate broker does not earn a commission for procuring a purchaser for certain real estate at a stated price by bringing about the execution of a contract in writing in which the alleged purchaser agrees to buy the real estate at that price, if by the terms of the contract the owner accepts the purchaser only upon the condition that he shall pay a substantial part of the price in second mortgages on the purchased property and "other properties satisfactory to" such owner, and it appears that this condition never was performed by the proposed purchaser. In *Gilman et al.* v. *Stock*, 95 Maine, 359, it was held "that an agent with full authority to bind his principal absolutely may yet properly stipulate that the contract shall not be binding until confirmed by his principal. . . . . The plaintiffs in this case were limited by the contract they saw fit to make with the salesman, however far short of his actual powers. Their action at law is based on this contract and cannot be sustained for want of the confirmation stipulated for therein. In *Russell* v. *Clark*, 112 Maine, 160, an action on a contract for the delivery of certain lumber, it was held, that "the question whether a sale of personal property is completed or only executory, in cases between buyer and seller and where neither the statute of frauds nor the rights of third parties are involved, depends upon whether it was the intention of the parties at the time the contract was made that the title to the property should immediately pass to the buyer; and when no such intention is expressed in the contract itself, then all the facts and circumstances under which the contract was made are to be examined to discover if such an intention is the meaning of the acts of the parties. Keeping in sight always the fact that it is the real intention of the parties that is to control, courts have adopted certain rules to aid them in discovering that intention. And it is too well settled to require the citation of authorities, that where anything remains to be done to identify the particular property to be sold; or to ascertain the price to be paid for it by selecting it as to quality,

and weighing or measuring it as to quantity; or where the seller is to do certain things to the property to put it in that condition or situation in which it may or ought to be accepted by the buyer, the performance of those things are to be deemed presumptively a condition precedent to the passing of the title to the buyer." It is apparent from the repeated reference to "subject to inspection," as well as from other features of the contract of sale, that it was not the intention of the parties at the time the contract was made that the title to the property should immediately pass to the buyer. The plaintiff's testimony discloses that if inspection of the steamers did not result to their satisfaction, they could reject the contract.

The document offered by the plaintiffs as above is therefore an option. It possesses all the elements of an option and especially the general characteristic that only one party is bound by its terms in the first instance, although signed by both parties. The instrument is neither a sale nor an agreement to sell and buy; it gives but the right to buy, and imposes no duty to buy; it is therefore unilateral, binding the vendor only. Such an instrument is an option. *Hanscom* v. *Blanchard*, 117 Maine, 501. It was not a sale because it was not the intention of the parties that the property should pass until the conditions were performed and payment should be made later; nor was it a contract to sell because the optionee was not bound to buy. Tiffany on Sales, 2nd Ed., Page 8, and cases cited.

As to defendant's plea by way of brief statement: That part of Sec. 9, Chap. 451, U. S. Statutes at Large, 1915-1916, entitled an Act to establish a United States Shipping Board, etc., invoked by the defendant, reads as follows:—"When the United States is at war, or during any national emergency the existence of which is declared by proclamation of the President, no vessel registered or enrolled and licensed under the laws of the United States, shall, without the approval of the board, be sold, leased, or chartered to any person not a citizen of the United States, or transferred to a foreign registry or flag. No vessel registered or enrolled and licensed under the laws of the United States, or owned by any person not a citizen of the United States, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States, or transfered to a foreign registry or flag, unless such vessel is first tendered to the board at the price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section ten."

While the question is one of first impression in this court, we are of the opinion that the statute is a complete bar to the action, and this conclusion is supported by reason and the weight of authority. The option was enforceable, and the testimony shows that both parties intended to carry it out in detail until it was known that a Presidential order declaring an emergency and calling into effect the section of the statute above referred to had been issued. And after the emergency was declared, both parties sought relief by appeal to the United States Shipping Board, and were unsuccessful. The fact and date of the President's declaration are admitted. The final question is, does such declaration making the statute effective excuse the defendant from the performance of its agreements in its option? We think it does. The general rule is that if, after such contract is entered into, a statute is passed rendering it illegal, the promissor is no longer bound. Tiffany on Sales, Page 310, and cases cited. But it is urged that the statute was not passed after the contract was entered into, but was enacted six months before, to wit, on September 7, 1916, and that the statute does not apply for that reason. We do not see the force of this contention. The statute was passed for a definite, serious purpose, by legislators who had in view the gravity of that purpose, and whose intentions were as serious and definite as the expected emergency could induce. The statute was but a preparation, a means to be used instantly if the emergency arose, and was necessarily inactive and without full effect until the emergency was declared by the President to exist. It then became active, and only then had the force and effect of laws passed without limitation or restriction. It could not operate before the emergency was declared, but it was the law nevertheless. It could and did operate thereafter and possessed all the force which the Congress intended it should have. It therefore was the law after the contract was signed on February 3, 1917, and was a legal excuse and justification for the defendant's refusal to transfer the steamers involved in this action. The proclamation was issued February 5th, 1917. All the conditions named in the option were to be performed after that date. It was the duty of the plaintiffs to make a sale or obtain a binding and enforceable agreement for the sale and transfer of the steamers in the first instance, but even then, in the presence of the circumstances in this case, assuming that the plaintiffs had performed all of the conditions required by the contract, they are

presumed to have acted with full knowledge of the existence of the law; for while the statute was to be without effect until an emergency was proclaimed to exist, it was still the law, and they are charged with a knowledge of its existence and provisions, and are bound thereby. Any other conclusion would work an injustice not heretofore tolerated by courts of law. Clark on Contracts, 2nd Ed., 474-475; *Jones* v. *U. S.* 96 U. S. 24; 3 A. L. R. 21 Note. In *Hartford* v. *McGillicuddy*, 103 Maine, 224, where action was brought by a real estate agent to recover commission on the price fixed by the owner, the plaintiff claiming that he procured a customer on the authorized terms, but that the defendant refused to make the conveyance, this court while sustaining a verdict for the plaintiff, restated the rule ,that, "Contracts of agency may be terminated by operation of law, but such cases fall within one of three classes;—a change in the law making the required acts illegal, a change in the subject matter of the contract as the destruction of the property by fire, or change in the condition of the parties, as by death or insanity. 1 Clark and Skyles Agency, Sec. 181. In *American Mercantile Exchange* v. *Blunt*, 102 Maine, 128, an action on a contract by a collection agency, whose business of advertising claims was curtailed by statute after the contract was entered into, the court held that, "When a contract legal at its inception becomes illegal by subsequent statutory enactment, no action can be maintained on such contract for a failure to perform the conditions of such contract after the illegality has attached. "The opinion quotes from *Odlin* v. *Insurance Company*, Federal Cases, Vol. 18, No. 10433—"It is a general principle of law that where a contract is lawful when made and a law afterwards renders performance of it unlawful, neither party to the contract shall be prejudiced and the contract is to be considered at an end." See *Dingley* v. *Bath*, 112 Maine, 93. "When the principal has good grounds for refusal to complete the transaction and does so, the broker is not entitled to commissions. But the grounds for refusal must be substantial." 9 C. J. 626 and notes.

It is sufficient to say that the grounds rendering the defendant unable to perform its contract were not only substantial, but were recognized by the plaintiffs and the buyers as well, as an excuse, unless by their combined efforts the consent of the Shiping Board could be procured. The failure to transfer the ownership cannot be regarded as a refusal, but was rather an acceptance of the law as

declared to which they must yield obedience. The plaintiffs are similarly affected by the same provisions of the statute. It is evident that all concerned were disappointed at the outcome, and that the statute and proclamation by the President alone prevented the sale. Non suit was therefore properly ordered.

Exceptions overruled.

GILBERT BRISSON *vs.* GLEN FALLS INSURANCE COMPANY.

SAME *vs.* THE FIRE ASSOCIATION OF PHILADELPHIA.

Androscoggin. Opinion October 25, 1920.

Action on two fire insurance policies. Proof of loss. Verdicts manifestly against the weight of evidence.

Action upon two policies of fire insurance covering household goods and furniture issued April 26, 1918, each for the sum of $750. The fire occurred November 7, 1918. The jury returned a verdict for the plaintiff for the full amount claimed in each case.

Upon defendant's motion for new trial, it is,

Held:

1. That the main issue was whether prior to the fire a substantial part of the insured goods, including a piano valued at $350., had been removed from the plaintiff's house in Turner and taken to a tenement in Auburn, and still were fraudulently included in the plaintiff's proof of loss.
2. That this was a question of fact for the determination of the jury, but a careful study of all the evidence, in the light of the circumstances, leads to the conclusion that these cases call for the supervisory power of the court, the verdicts rendered being manifestly against the weight of the evidence.

These two actions of assumpsit on policies of fire insurance covering household goods and furniture, each for the sum of $750, were tried together. Plea, the general issue, in each case, with a brief statement, alleging that before the fire certain articles of the property covered by the policies in suit were removed from the premises where they were when the policies were issued, and where they were to remain

under the terms of the policies, without the assent of defendants in writing. Verdict for plaintiff for $778.12 in each case. Defendants file a general motion to have the verdicts set aside. Motion sustained.

Case stated in the opinion.

George C. Wing, and George C. Wing, Jr., for plaintiff.

William H. Newell, for defendants.

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

CORNISH, C. J. Actions upon two fire insurance policies on household goods and furniture, dated April 26, 1918, and each for the sum of $750. The fire occurred November 7, 1918, and the house in which the goods were situated, together with its contents, was totally destroyed.

That the fire was set by or with the connivance of the plaintiff is not directly charged, although its origin is unexplained and the defendants regard the situation as suspicious. That the goods and furniture represented a value equal to or in excess of the amount of the insurance at the time the policies were issued is not contested. The insurance agent before issuing the policies examined the property and testified that it was a well furnished house and that he satisfied himself that that was the proper amount of insurance to issue.

Nor do the defendants claim fraudulent over valuation in the plaintiff's proofs of loss. Two or three days after the fire, the plaintiff who cannot read, and is able to write only his name, sat down with his wife and daughter and together they made out a list of the articles claimed to have been lost, assigning a value to each. This list was given to the defendants. Subsequently at defendants' request another proof of loss was furnished.

The value of two of the articles named in both lists was admitted by the plaintiff to have been wrong; a leather set of three pieces which should have been one hundred dollars for the whole instead of one hundred dollars each or three hundred dollars, and a sofa which should have been forty dollars instead of one hundred dollars. With the exception of these two items which the plaintiff claims, and we think properly, to have been erroneously and not fraudulently overvalued, none of the valuations as stated in the proofs of loss was attacked by the defendants.

This left a single issue of fact to be decided by the jury, and by that issue the plaintiff's case was to stand or fall. That issue was whether prior to the fire the insured goods, or a substantial part of them, including a piano valued at $350 had been removed from this house in the town of Turner and taken to a tenement in the City of Auburn by one Lebarge, a brother-in-law and employe of the plaintiff on the Turner place, and therefore went around the fire instead of through it.

That Lebarge did haul several loads, three or four or five, with a team made up of the plaintiff's horse and a neighbor's farm wagon, is testified to by various neighbors. The exact time when the removal took place is not definitely fixed, but in a general way is left as having occurred in the Summer or Fall of 1918.

The plaintiff admits that Lebarge, who was his brother-in-law, but did not testify, hauled several loads of furniture and furnishings to the Auburn tenement, but replies to the charge of fraud by stating that those goods formed no part of the property insured and situated in the house, but belonged to one Montreuil, his son-in-law. In this he is corroborated by Montreuil and his wife, the daughter of the plaintiff. Their story is that they were married in September, 1917, and were living together in Worcester, Mass. until the Summer of 1918, he during that time or just previously being employed as a bar tender and she as a waitress in a Chinese restaurant. They did not keep house but were living at a rooming house, so called, and neither had nor had need of any household furniture. In June, 1918, Montreuil says he saw an advertisement in a Worcester paper for the sale of household furniture, and with his wife visited the place and bought it of a woman who was a stranger to him and whose name he does not remember. He purchased complete furniture and furnishings for two bed rooms, kitchen, parlor and dining room, together with rugs, carpets, stove, mattresses, etc. At this trial he stated that he paid her $350 cash for the entire lot; at a former trial of Brisson he testified that he paid $500 for the lot. He took no bill of sale of the property, nor a receipt for the money paid. Then he says he brought these goods by auto truck from Worcester to the plaintiff's place at Turner, about the first of July, 1918, and stored them in the plaintiff's stable loft. He paid the driver of the truck sixty dollars for transportation but took no receipt and does not know the driver's name. Montreuil says he came on the truck with the goods and remained in Turner until early September, working a part of the time

on the farm and a part in the shoe shop, and then he went to Auburn. Mrs. Montreuil came from Worcester to Maine by train at the same time, and lived at the Turner place with her father and mother up to the time of the fire.

Early in October Mrs. Montreuil hired a tenement in Auburn, and to that tenement the Montreuils say their goods were taken from the stable loft during the month of October. After the fire they went to this Auburn tenement and the plaintiff and his wife with them to make their home.

The plaintiff's story as to the upright piano which after the fire was found in the Auburn tenement uninjured was this, as stated by himself and his daughter, Mrs. Montreuil. The daughter in 1914, three years before her marriage, bought an upright piano make unknown, from her sister, and it was taken to the parlor of the Turner house. Then in 1916, the plaintiff bought another upright piano of one Goodnowsky for $350 and that was placed in the parlor and the daughter's removed to the dining room. Then at Christmas, 1917, they exchanged pianos and what had been the daughter's became now the father's and was placed in the parlor, and the Goodnowsky piano now belonging to the daughter, was placed in the dining room. So that there were two pianos in the house from 1916 to October 11, 1918, a few days before the fire, when the Goodnowsky instrument was removed to Auburn, leaving the other to be burned. That is the explanation offered for the existence of the Goodnowsky piano after the fire.

The defendants rely, and with reason, upon the inherent improbability of the testimony of the plaintiff and his family as above related, an improbability which increases the more the case is studied.

"Mere words are not necessarily proof and Courts are not compelled to allow justice to be preverted because incredible evidence is not contradicted by direct and positive testimony." *Rovinsky* v. *Assurance Co.*, 100 Maine, 112. Here however the incredible evidence corroborated by no one outside the plaintiff's family is contradicted by direct and positive testimony from neighbors and others, all apparently disinterested and trustworthy, who had occasion to be there; one negativing the storage of any goods in the stable loft, no less than eight who had been at the house on various occasions knowing of only one piano, and it is quite unlikely that an article of furniture as bulky as a piano would have escaped the attention of

all these people, especially as two pianos in one small house are rather unusual; others who looked in the windows soon after the fire started, when the occupants were absent and the house was locked, and saw no furniture of any amount; and still others who examined the contents of the cellar three weeks after the fire and found the only metallic substances to be the parts of a stove, one part of an iron bedstead, a part of two springs, a wash boiler, some tin kettles and pieces of stove funnel. Yet the proof of loss contains many articles which could not wholly burn, such as a piano, a sewing machine, three iron bedsteads, three bed springs, a grafanola and various smaller articles. No remnant of these was found. True this search was made three weeks after the fire, but there is no evidence that anything had been removed or disturbed and we see no reason why it should have been.

A careful study of all the evidence, in the light of the circumstances, leads us irresistibly to the conclusion that these cases call for the supervisory power of the court, the verdicts rendered being manifestly against the weight of the evidence.

Motion sustained.

JOHN W. BRACKETT, Judge of Probate

vs.

ALVIN L. THOMPSON, et als.

Lincoln. Opinion October 25, 1920.

Administrator's bond. Failure to return an inventory and to file an account, constitute two breaches of the conditions of the bond.

Action of debt on bond of administrator de bonis non with will annexed. Exceptions to directed judgment for the plaintiff.

Held:

That as a breach of at least two of the conditions of the bond was proved, namely, the failure to return an inventory and to file an account, judgment against the principal and sureties necessarily followed, for the penal sum of the bond with the right to have execution issue for so much of the penalty as may be adjudged on trial to be just.

This is an action of debt on a bond of an administrator de bonis non with will annexed. Plea the general issue, with a brief statement alleging that no assets came into the hands of the administrator. The case was tried to a jury, but at the conclusion of the evidence the presiding Justice ordered a verdict for plaintiff, to which ruling the defendant took exceptions. Exceptions overruled.

Case stated in the opinion.

A. S. Littlefield, for plaintiff.

E. O. Greenleaf, for defendant.

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

CORNISH, C. J. Edith M. Thompson of Bristol died testate on October 12, 1912. On January 7, 1913, her will was duly allowed by the Probate Court of Lincoln County and her husband, Joseph L. Thompson, was appointed executor without bond. The executor filed an inventory showing real estate of the appraised value of $450, and personal property of the appraised value of $1100. Joseph L. Thompson died May 29, 1914, no account of his executorship having been filed.

On July 6, 1914, a petition was filed by Alvin L. Thompson in the Probate Court, alleging that Joseph L. Thompson had died without having fully administered the estate, that there were goods and estate still remaining to be administered and praying for his own appointment as administrator de bonis non with will annexed. On this petition he was duly appointed and gave bond in the sum of $1,000 dated October 6, 1914, for the faithful performance of his duties. The co-defendants in this suit were sureties on this bond.

Among the conditions and obligations of the bond, which was in the usual statutory form, were these:

FIRST: "Make and return to the Probate Court within three months a true inventory of all the real estate and all the goods, chattels, rights and credits of said testatrix, which are by law to be administered, and which shall come to his possession or knowledge."

THIRD: "Render upon oath a just and true account of his administration within one year and at any other times when required by the Judge of Probate."

At the September Term, 1915, of the Probate Court a petition was filed asking that Alvin be required to file both inventory and account and on this petition notice was duly ordered on him. But he failed to comply with the prayer of the petition and on October 25, 1916, two years after his appointment this action of debt on bond was brought in the name of the Judge of Probate, and at the close of the testimony at the trial, a verdict was directed in favor of the plaintiff by the presiding Justice.

On defendant's exceptions to this ruling the case is now before the Law Court. The exceptions cannot be sustained. A large amount of testimony was introduced as to the acts of Joseph L., the first executor, during the time of his executorship, his dealings with Alvin in conveying to him all the real and personal property in the estate, in consideration of Alvin's agreement to support him through life, and the acts of Alvin since his appointment as administrator de bonis non with will annexed. The powers of Joseph L. as devisee and legatee under the will were also made an issue. But in none of these acts can anything be found in the nature of a defense to this action. The conditions of the bond are specific and positive. In two of these at least, the failure to return an inventory, and to file an account, the defendant, Thompson, is guilty of a breach and therefore judgment against the sureties and himself necessarily follows for the penal sum of the bond with the right to have execution issue for so much of the penalty as may be adjudged on trial to be just. R. S., Chap. 77, Sec. 10; *Miller* v. *Kelsey*, 100 Maine, 103. Only one verdict could have been rendered and that in favor of the plaintiff, as the facts were disclosed. What the defendants may be able to show when the bond is chancered is not of consequence at this stage of the proceedings.

Exceptions overruled.

W. R. SPORIE *vs.* S. H. FITTS.

Androscoggin. Opinion October 25, 1920.

Assumpsit to recover a balance alleged to be due. Set-off. Verdict for plaintiff after a report from an auditor. Verdict set aside.

In an action of assumpsit to recover an alleged balance of $2068.34 claimed to be in the defendant's hands, $96.04 for commissions, and $1972.20 for one-half of the joint profits on sales of hay, the defendant filed an account in set-off for $1892.61 due to him. The cause was sent to an auditor who reported that if the contentions of the plaintiff were sustained he is entitled to recover $1501.12 from the defendant, while if the defendant's contentions are sustained he should recover $2024.13 from the plaintiff.

The jury sustained the plaintiff's contentions and found in his favor in the sum of $1501.12.

Upon defendant's motion for new trial it is,

Held:

1. That as to the claim for $96.04 there is no substantial controversy.
2. That as to the claim for share of joint profits the plaintiff's contention is based upon the existence of three different contracts between the parties while the defendant claims that there was only one.
3. That the plaintiff's testimony on this point is vague, unsatisfactory and unconvincing and is corroborated neither by testimony nor by circumstances.
4. That the defendant's testimony as to the existence of only one contract governing joint profits bears the stamp of truth and is corroborated not only by circumstances, correspondence and conduct of both parties but by the plaintiff's writ in this very case. The writ sets forth one contract for profits covering the entire transaction from beginning to end.
5. The verdict is so clearly wrong that it cannot be allowed to stand.

This is an action of assumpsit to recover an alleged balance of $2,068.24 due plaintiff from defendant on account of transactions between the parties embracing the purchase and marketing of hay. At the return term the defendant filed his pleadings of the general issue, and an account in set-off alleging a net balance of $1,892.61 due him. An auditor was appointed by the court, who after hearing the entire case, reported that, if the plaintiff's contentions were correct, the defendant owed him $1501.12; and that if the defendant's contentions were correct, the plaintiff owed him $2024.13. The

report of the auditor was accepted and the matter was submitted to a jury who returned a verdict for plaintiff for $1501.12, and the defendant filed a general motion for a new trial. Motion sustained. Verdict set aside.

Case stated in the opinion.

McGillicuddy & Morey, for plaintiff.

William H. Newell, for defendant.

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

CORNISH, C. J. The plaintiff brought this action to recover an alleged balance of $2,068.24. The declaration contains two counts, one for a balance of $96.04 claimed to be in the defendant's hands for hay sold by him on commission under an agreement made between the parties prior to the Summer of 1917; the other count seeks to recover his one-half of the profits realized in the purchase and sale of hay under an agreement made between the parties in the Summer or Fall of 1917, the net balance of these profits alleged to be retained by the defendant being $1,972.20. There is some discrepancy as to figures in the two counts but the net balance claimed on both counts is distinctly stated as $2,068.24. At the return term the defendant filed an account in set-off alleging a net balance of $1,892.61 due him.

The cause was then sent to an auditor who heard the parties, thoroughly investigated the accounts, stated them clearly and in detail, and in conclusion found that if the plaintiff's contentions are sustained, he is entitled to recover from the defendant the sum of fifteen hundred and one dollars and twelve cents; while if the defendant's contentions are sustained he should recover from the plaintiff a balance of two thousand twenty-four dollars and thirteen cents. This report is accepted by both sides as correct, and is in no way attacked. The cause was then submitted to a jury who sustained the plaintiff's contentions and found a verdict in his favor for the sum of $1,501.12 in accordance with the auditor's report under those circumstances. The case is now before the Law Court on a general motion for a new trial.

This action grew out of the business dealings of the parties in the purchase and sale of hay extending from the Spring or Summer of 1917 to the Summer of 1918. It appears that the defendant was

an extensive buyer and seller of pressed hay for the market; the plaintiff was engaged in the same business but on a much smaller scale. In the Summer of 1917 the plaintiff had fifteen cars of hay that he had bought on his own account and he made an arrangement or oral contract with the defendant by which the latter was to sell the same for the plaintiff on a commission of fifty cents per ton. There is no dispute between the parties as to the making of this first arrangement nor its terms. They are in accord on this first contract. The hay was disposed of by the defendant and on November 24, 1917, the parties met at the defendant's house to make a settlement. The returns had come in for twelve cars but not for the other three. They therefore balanced the account for the twelve cars and a check for the amount due the plaintiff was delivered to him. There is no controversy over that. As to the remaining three cars the parties do not agree, the plaintiff claiming that the defendant gave a check at the same time for $300, that is $100 on account of each of the three remaining cars, and the defendant, that the three cars were to be included under another and new agreement made the same day as, and immediately after, the settlement, and that the $300 check was given on account of that new agreement. It is unnecessary however to pass upon this issue. It is a minor one in the consideration of the case and eventually disappears.

The important controversy pertains to the dealings between these parties from and after November 24, 1917, to the close of the transactions. The plaintiff claimed in his testimony before the auditor, as appears by the report, and again before the jury, that three separate and distinct agreements were made as the bases of their dealings beginning with November 24, 1917, and it is this contention which the auditor refers to in his report and which, if sustained, would give the plaintiff a balance of $1501.12, the amount which the jury found due him; while the defendant contends that there was only one agreement, the one made on November 24, 1917, and that this agreement continued unchanged and unmodified to the end. It is this contention which the auditor refers to in his report and which if sustained would give the defendant a balance of $2024.13 against the plaintiff.

We can narrow the issue to still closer limits. Both parties agree as to the terms of the new arrangement made on November 24, 1917. They were these. The defendant was to furnish the money for the

purchase of hay on receipt of bills of lading and was to make the sales; the plaintiff was to make the purchases and attend to the pressing and shipment. After the payment of all bills, they were to share equally in the profits and the losses. It was a joint enterprise, each to do his agreed part and both to gain or lose in equal proportions.

The plaintiff entered upon this second contract and says that he purchased only eleven cars under it, when a third arrangement was made by which the defendant who had then secured a government contract for $18 per ton, in effect guaranteed the plaintiff one-half the profits on the basis of $18 per ton on board car, and that ten cars were shipped under that third arrangement; that then a fourth agreement was made by which the selling price was raised to $20 per ton on board car, the defendant having a government contract at that figure and that this was a guaranteed sum for the basis of profits to the plaintiff. The plaintiff's testimony on these points is vague, unsatisfactory and unconvincing, and there is no corroboration of these claims as to the third and fourth contracts either in testimony or circumstances, and there is much to negative them.

On November 24, 1917, when the second admitted arrangement was made, the defendant had no government contracts and expected to and did sell in the open market. Then on January 26, 1918, he secured a contract with representatives of the government for ten cars at $18 per ton, f. o. b., and on February 7, 1918, he obtained a contract for twenty-five cars at $20 per ton, f. o. b. Both contracts however specified that the hay must be of a particular quality, viz: No. 2 Timothy. It is obvious from the plaintiff's own testimony that he had talked the matter over with the defendant many times and knew the quality required to fulfil these contracts. At first he denied any knowledge that the hay would be rejected if not up to contract grade, but he finally, though reluctantly, admitted that he supposed that would be the case.

It is also proven that a large number of cars were rejected by the government inspectors because of inferior quality and were disposed of by the defendant at a compelled loss. These losses however, all of which appear in the auditor's report and are therefore admitted to be correct, the plaintiff seeks to avoid, and he would force the defendant to pay him one-half of the profits which would have been realized had the price of $18 under the alleged third agreement, or

$20 under the alleged fourth agreement, been received, while the defendant must bear the entire loss due to the rejection of a portion of the hay which the plaintiff had purchased and which the defendant had never seen. That the defendant should have entered into any such one-sided arrangement is little short of preposterous. It taxes human credulity too severely. He says that the contract of November 24 was never changed or modified, and the subsequent conduct of the parties, their interviews and their correspondence stamp this statement as true.

The plaintiff was called to Federal service on June 24, 1918, but all the hay had been purchased before that time. His letter to the defendant under date of July 9, 1918, reveals his appreciation of the fact that it had been a losing venture. But most significant of all is the statement of his claim in his writ, when he sets up not four contracts but two, one in the Summer of 1917 on the commission basis and the other "in the Summer and Fall of 1917" on the division of profits basis followed by the allegation "that in pursuance of said contract the plaintiff in the Summer and Fall of 1917 and down until 1918 purchased hay to the amount of $17,473.18 for the defendant and that the amount of profit due him on the sale of said hay according to the contract aforesaid was the sum of $2292.89." Not three contracts, but one, and that one continuing from the Summer or Fall of 1917 down until the Summer of 1918, and, as the amount of the sales shows, covering the entire transaction to the very end. From this statement of his own claims in the writ made on July 15, 1919, one year after the dealings had been closed, there is no escape. That declaration, so far as the number and substance of the agreements between the parties are concerned, expresses the defendant's contention as well as the plaintiff's at that time. The only matter in dispute was the amount due to either party. That computation was referred to an auditor, and then it was that the plaintiff first claimed three agreements on and after November 24, 1917, instead of one as alleged in his writ. The defendant has been consistent throughout and has always maintained the existence of only the one agreement. That position is fully substantiated by the acts of the parties and the circumstances of the case.

As the verdict is palpably in opposition to the evidence, the entry must be,

Motion sustained.

BURRILL NATIONAL BANK *vs.* RUBEN EDMINISTER.

Penobscot. Opinion October 28, 1920.

Trespass quare clausum under R. S., Chap. 100, Sec. 9. Mortgagee's title paramount to that of mortgagor even though not in possession. Mortgagee is "the owner" within the meaning of the statute. Double damages. Without evidence of wilfulness verdict for single damages to stand. An allegation of a greater, ordinarily includes a lesser, liability or breach of duty.

Under R. S., Chap. 100, Sec. 9 giving to an owner of land a statutory action for wasteful trespass with double damages if trespass is also wilful, the word "owner" includes a mortgagee though not in possession.

In an action under R. S., Chap. 100, Sec. 9 for trespass alleged to be wilful, if a trespass is shown without evidence of wilfulness, a verdict for single damages rendered upon appropriate instructions will not be set aside on motion.

It is ordinarily true that where an allegation of a greater, properly includes all the elements of a lesser liability or breach of duty, judgment may be for either as the evidence warrants.

This is an action of trespass quare clausum brought by the plaintiff, mortgagee of the locus, against the defendant to recover the value of certain shovel handle blocks removed from the locus by permission of the mortgagor of the land in possession, having been severed and piled up on the land by one Card, without the permission, consent or knowledge of the plaintiff, mortgagee. Plea, the general issue, with a brief statement. The defendant took exceptions to certain parts of the charge of the presiding Justice to the jury. Verdict for plaintiff for $14.21, and the case went to the Law Court on defendant's exceptions, and a general motion for a new trial. Exceptions overruled. Motion overruled.

Case stated in the opinion.

U. G. Mudgett, for plaintiff.

B. W. Blanchard, for defendant.

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

DEASY, J. Trespass quare clausum. The scene of the trespass is a lot of woodland in Dixmont. The parties interested are Burrill National Bank, mortgagee, plaintiff; Reuben Edminister defendant and E. L. Johnson, mortgagor in possession.

In 1916 the defendant who owned a wood-lot adjoining the locus permitted a man named Card to cut timber on his land. Card went over the line, cut trees on the locus and later seems to have abandoned the operation. The defendant took possession of the timber which had been cut. By consent of the mortgagor, but without the license or knowledge of the plaintiff, the defendant took and carried away with the timber on his own land, that which had been cut by Card on the mortgaged premises. The action is brought under R. S., Chap. 100, Sec. 9 reading as follows:

"Whoever cuts down, destroys, injures or carries away, any ornamental or fruit tree, timber, wood, underwood, stones, gravel, ore, goods or property of any kind, from land not his own, without license of the owner, or injures or throws down any fences, bars or gates, or leaves such gates open, or breaks glass in any building, is liable in damages to the owner in an action of trespass. And if said acts are committed wilfully or knowingly, the defendant is liable to the owner in double damages."

The declaration alleges that the trespass was committed knowingly and wilfully. The defendant however, appears to have had no knowledge of the mortgage. There is no evidence of wilful trespass.

The presiding Justice left it to the jury to determine whether or not the trespass was committed knowingly or wilfully, and to return either double or single damages as the facts might warrant. No exception was taken to this part of the charge. The jury returned a verdict for $14.21 evidently as actual and not double damages.

The only exceptions reserved are to the charge of the presiding Justice that "The owner of the logs for the purpose of this action is the Burrill National Bank" and "that the permission of Johnson given to Mr. Edminister was not sufficient." What follows in the bill of exceptions is mere repetition.

The second instruction above quoted is a corollary of the first. If the first is correct, the other is sound. The first is clearly correct.

It is true that the mortgagor is commonly and correctly referred to as "the owner." The word owner is frequently used in contradistinction to mortgagee. The mortgagor is the owner except in

those situations wherein the paramount title of the mortgagee is involved. It has been held by the Federal Court that a mortgagee out of possession is not an owner within the meaning of the Maine lien law. *Allis-Chalmers Co.* v. *Bank,* 190 Fed., 700.

But the question we are considering is the meaning of the word "owner" as it is employed in R. S., Chap. 100, Sec. 9.

The mortgagee as between the parties is the holder of the legal title. This has been repeatedly so held in this jurisdiction. *Blaney* v. *Bearce,* 2 Maine, 137; *Stowell* v. *Pike,* 2 Maine, 389; *Leavitt* v. *Eastman,* 77 Maine, 119; *Hawes* v. *Nason,* 111 Maine, 195. It is not inappropriate to call him owner who holds the legal title.

The mortgagee out of possession it is true, has no action for mere wrongful entry on the mortgaged premises. *Look* v. *Norton,* 94 Maine, 550.

But for acts of trespass which injure the freehold and impair the security, in short for acts of trespass like those described in the statute under consideration, the mortgagee though out of possession may at common law maintain trespass quare clausum. *Smith* v. *Goodwin,* 2 Maine, 175; *Stowell* v. *Pike,* 2 Maine, 387; *Leavitt* v. *Eastman,* 77 Maine, 119; *Vehue* v. *Mosher,* 76 Maine, 469.

Such action by a mortgagee may be maintained against one who takes away trees or other fixtures wrongfully severed from the freehold by another hand. *Woodruff* v. *Halsey,* 8 Pick., 333. A literal reading of the statute leads also to this conclusion. The language is "injures or carries away" &c.

It must be assumed that the Legislature intended not to limit, but rather to extend and enlarge liability for wasteful trespass i. e. for acts of trespass like those specified in the statute. Before the enactment of the statute a mortgagee had a remedy for such trespasses. In affirming and enlarging the remedy for wasteful trespass, it is reasonable to believe that the Legislature did not mean to exclude mortgagees.

The exceptions must be overruled.

Presumably under the motion, as no exception touches the point, it is contended that the defendant having been charged with trespassing wilfully and knowingly, these elements not being proved, is entitled to have the plaintiffs verdict set aside notwithstanding that a trespass is clearly shown.

The case was tried on its merits. No exceptions were reserved to the admission or exclusion of testimony, or to the charge of the presiding Justice, except as to the definition of the word "owner" as used in the statute.

The jury returned a verdict for actual damages which verdict is supported by evidence. Substantial justice has been done. It is too late after verdict to raise the objection that the declaration is redundant. *Winslow* v. *Bank*, 26 Maine, 10; *Raymond* v. *County Commrs.*, 63 Maine, 110; *Kelsey* v. *Irving*, 118 Maine, 307.

Moreover the verdict for actual damages is supported by the pleadings. It is ordinarily true that when a charge of a greater, properly contains all the elements of a lesser liability or breach of duty, judgment may be for either as the evidence warrants.

This principle has been applied by other courts in the interpretation of statutes substantially like that of Maine. "It (statute providing double damages for certain trespasses) only affects the rule for assessing damages." *Fairfield* v. *Burt*, 11 Pick., 246.

"It is not an objection to his recovery of single damages that the complaint goes upon the statute of willful trespass." Head note to *Dubois* v. *Beaver*, 25 N. Y., 123.

"The objection that since there was no count demanding other than treble damages, no recovery could therefore be allowed unless the facts authorized one for treble damages, is not a valid one." *Clark* v. *Field*, 42 Mich., 346.

"Failing to show an intentional or wanton conversion of his property, such as would entitle him to the increased damages, but showing a conversion in law, why may he not recover the damages sustained, as in an ordinary action of trover? We surely can see no objection to his doing so." *Cohn* v, *Neeves*, 40 Wis., 401.

It is urged that Section 9 is a consolidation of two statutes enacted at different times, one affirming and the other extending the common law and that the sections should be construed as though such consolidation had not taken place.

But Section 9 is plain. If we read the section without reference to its history and development, we are left in no doubt that the last sentence relates only to the assessment of damages.

A statute which within itself is clear should be construed as it reads. Resort may be and should be had to the genesis and evolution

of statutes to explain, but not to discover ambiguities. *Thornley* v. *U. S.*, 113 U. S., 310. 28 L. Ed. 999. *U. S.* v. *Musgrave*, 160 Fed., 703; *State* v. *St. Paul*, 81 Minn., 381, 84 N. W., 127. *Tremblay* v. *Murphy*, 111 Maine, 38.

Exceptions overruled.
Motion overruled.

IN RE PHILIP GOODRIDGE, et als.

Applts. from Decree of Judge of Probate.

Cumberland. Opinion November 1, 1920.

In contesting the probating of a will, the burden of proving fraud or undue influence is on the contestants. Not essential for testator to declare in the presence of the three attesting witnesses, it to be the last will and testament, if acknowledged by the testator to be her instrument in the presence of the three attesting witnesses. Neither is it essential that the witnesses sign in the presence of each other. Attestation clause prima facie evidence of compliance with requisite formalities, in case of failure of memory or death of witnesses. Instrument executed "animo testandi".

The probate of the will of the late Gertrude Archambeau is protested on grounds that may be classified under three heads: (1) That the instrument was not her will, but was obtained by the fraud and undue influence of her husband, (2) that it was not executed in accordance with the requirements of the statutes and laws of this State; (3) that it was not a completed instrument.

Held:

That the burden of proving fraud or undue influence is on the contestants and there is no substantial evidence of either in this case.

That the testatrix signed the instrument in question with her own hand with full knowledge of its contents as her last will and testament, and by her words or acts declared or acknowledged it to be her instrument in the presence of the three witnesses who attested it, and who were all disinterested and signed it as witnesses in her presence and at her express request or with her consent. It is not essential that she declare it to be her last will and testament in the presence of the witnesses, if she acknowledges it to be her instrument, or that the witnesses sign in the presence of each other.

The signatures of three witnesses under the usual attestation clause in case of death, absence from the jurisdiction of the court or failure of memory is prima facie evidence of all the requisite formalities having been complied with; but other evidence and the attendant circumstances may also be considered in proof that the necessary formalities were complied with.

The ordinary form of attestation clause includes matters not essential under the statutes of this State to be proved to entitle a will to be admitted to probate. Because the evidence shows that certain of these non-essentials were not complied with, it does not deprive the attestation clause, duly signed, of its effect as prima facie evidence of the essential formalities having been complied with in case of the failure of memory or death of witnesses.

Notwithstanding certain blanks in the instrument presented were not filled out, the instrument as presented was executed *animo testandi* and as her last will and testament.

This is an appeal from the decree of the Judge of Probate of Cumberland County, approving and allowing the last will and testament of Gertrude Whittier Archambeau. Philip Goodridge and Daniel M. Goodridge, brothers of the deceased, resisted the petition for the allowance of the will, alleging fraud, and undue influence, and a failure to comply with the requirements of the statutes and laws of this State in the execution of the will. The cause was reported to the Law Court by agreement of parties on the testimony taken out at the hearing before the Probate Court, and an agreed statement of certain facts.

Appeal dismissed with one bill of costs.

Case stated in the opinion.

William H. Gulliver, and John B. Thomes, for appellant.

Guy H. Sturgis, and Carroll S. Chaplin, for appellee.

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

WILSON, J. The will of Gertrude Whittier Archambeau was admitted to probate by the Judge of Probate of Cumberland County. From his decree an appeal was taken by the appellants to the Supreme Court of Probate, and now comes before this court on a report of the evidence taken out in the Probate Court and on an agreed statement of certain facts.

The reasons assigned for the appeal, eight in number, may be summarized under three heads: (1) That the instrument was not

her will, but was obtained by the fraud and undue influence of her husband, (2) that it was not executed in accordance with the requirements of the statutes and laws of this State, (3) that it is not a completed instrument.

Fraud and Undue Influence.

The burden of proving either fraud or undue influence is on the contestants, *Norton et als., Applts.*, 116 Maine, 370. There is no substantial evidence of either. Fraud or wrong-doing is never presumed. To save the expense of an attorney in drafting, the will was prepared by the husband obtaining the ordinary printed form from a stationery store, and taking his own will which had been prepared by his lawyer and in which his wife was made the chief beneficiary, and having a stenographer make a copy substituting his wife's name for his own as the maker, and his name for that of his wife as the chief beneficiary, leaving blanks in the clauses providing for a disposition of such of her estate as remained at his death so that she might fill them in according to her wishes. According to her husband's testimony, and as the will itself discloses, she filled in with her own hand her mother's name in one of the blanks left for that purpose, dated the instrument and wrote the word "Woodfords" as the place of execution and signed it. That so much was done in her own hand does not seem to be questioned.

The testimony as to the manner of execution discloses no fraud or improper influence or conduct on the part of the husband or any other person, no acts or suggestions other than their intimate relations might naturally prompt him to do or make. True he is an interested witness, but not an incompetent one as to the preparation and drafting of the instrument as bearing on the issue of fraud and undue influence on his part. No adequate reason is shown why his testimony should be wholly disregarded. The testatrix was a comparatively young woman, in apparent good health, and as the evidence shows unquestionably of sound mind. Upon the ground of either fraud or undue influence the appeal cannot be sustained.

Execution.

According to the attestation clause, which is in the common form, the will was executed in compliance with the law. The appellants,

however, allege in their reasons for appeal that the will was not signed by her or by any person at her request in her presence, nor was it subscribed to in her presence by three disinterested witnesses, nor did she state to the subscribing witnesses that it was her will or acknowledge to them it was her signature attached thereto, nor did the witnesses subscribe to it in the presence of each other.

That she signed it by her own hand, and the three witnesses subscribed to it in her presence and were disinterested, there can be no doubt from the evidence, or that she signed it *animo testandi*, as her last will and testament. The attendant circumstances of signing, her filling in of the blanks, the testimony of the first subscribing witness and her later declarations testified to by her sister-in-law establish these facts, we think, beyond question.

It is not essential that she should declare the instrument to be her last will and testament in the presence of the subscribing witnesses, *Small* v. *Small*, 4 Maine, 220, 221; *Ela et als., Exrs.* v. *Edwards*, 16 Gray 91, 92; *Deake Applt.*, 80 Maine, 50, 53; *Osborn* v. *Cook*, 11 Cush., 532, or that the witnesses should subscribe in the presence of each other.

It is sufficient under the statutes of this State if it appears that she did sign her name to the instrument as her will, that she by words or acts acknowledged it as her instrument in the presence of the subscribing witnesses either already signed by her, or signed it in their presence, and that the witnesses at her request subscribed to it in her presence. R. S., Chap. 79, Sec. 1; *Tilden et als.* v. *Tilden, Ex.*, 13 Gray, 110; *Hogan* v. *Grosvenor*, 10 Met., 54; *Osborn* v. *Cook*, supra; *Ela et als., Exrs.* v. *Edwards*, supra; *Nickerson* v. *Buck*, 12 Cush., 332; *Gerrish* v. *Nason*, 22 Maine, 438; *Barnes* v. *Barnes*, 66 Maine, 286; *Deake Applt.*, 80 Maine, 50, 53-54.

The evidence shows that on Sunday morning after the will was drafted and brought home, the first witness, a neighbor and intimate friend of the family, called at their home, and went upstairs with the husband in his "den" so-called, the wife being at work below. While there the husband called to the wife to bring his fountain pen which she did and sat down at his desk and in the presence of the witness signed the instrument which she then or previously had dated and filled in certain blanks. The witness then affixed his signature thereto under the attestation clause. Later in the day, as was their custom on Sunday, the testatrix and her husband drove to the home

of the husband's parents, where she stated on coming into the house that she had made her will and wanted the men to sign it, apparently referring to two men who had long been members of the senior Archambeau's household as boarders, one of them occupying a responsible position in a bank in Portland. Whereupon a sister-in-law summoned the men from their apartment, and when they came to the room where the testatrix was she produced the instrument already signed by her and, as the sister-in-law states, said it was her will and asked them to sign it, which they did in the presence of the testatrix and under the name of the witness who had already attested it, and in the usual place under the attestation clause. The testatrix then took it and placed it in the family safe deposit box where it was found after her death. The witnesses are all living, but while the first witness, after his memory was refreshed recalled the execution at the home as stated above, the last two witnesses have no recollection of what occurred at the time of their attestation, though they identify their signatures.

Not only do we think the signatures of the three witnesses under the usual attestation clause, in case of the death, absence from the State, or failure of memory must be given the usual effect of prima facie evidence of all the requisite formalities having been complied with, but the attendant circumstances, and evidence of other witnesses may be also considered.

The ordinary form of attestation includes matters not essential under the statutes of this State to be proved to have been done to entitle the will to be probated. Because the evidence shows that certain of these non-essentials were not done, it does not, we think, deprive the signing by three disinterested persons as witnesses to such a solemn instrument entirely of its effect as prima facie evidence of the necessary formalities to its proper execution having been complied with in case of failure of memory of the witnesses. In the case at bar such prima facie evidence is also supported by other evidence which we deem sufficient to warrant the admission of the instrument in question to probate as a will.

From all the evidence in the case we are satisfied that the testatrix knew the contents of the instrument she signed, that she signed it as her last will and testament, and that the first attesting witness saw her execute it, and his attestation was done in her presence and with her knowledge and consent and in contemplation of law at her

request, *Gross* v. *Burneston*, 91 Md., 383, 387; *Hull* v. *Hull*, 117 Iowa, 738; *Osborn* v. *Cook, et ats.*, supra; *Tilden et als.* v. *Tilden, Ex.*, supra.

As to the attestation by the last two witnesses who subscribed later and at another place and when the first witness was not present, we think the evidence clearly shows that the testatrix went to the home of the father-in-law with the intent to obtain the signatures of the two men as witnesses, that at her request they were called for that purpose, that she produced the instrument already signed by her for their attestation and that at her request they signed it in her presence. Even though she did not then state in so many words that it was her will, we think the evidence of what was done under the attendant circumstances constituted a sufficient acknowledgment that it was her instrument and that it was her wish that they attest it as witnesses. *Non quod dictum, sed quod factum est inspicitur. Gross* v. *Burneston*, supra, *Hull* v. *Hull*, supra, *Ela et als., Exs.* v. *Edwards*, supra, *Nickerson* v. *Buck*, 12 Cush., 342. We are therefore of the opinion that the evidence warrants the conclusion that all the formalities for the execution of a valid will were complied with though not done in the manner usually followed by experienced practitioners at the bar.

A Completed Instrument.

The blanks left for the names of those it provided should take her property after the death of her husband were not filled in except in the case of her mother. It is for this reason it is urged that it was not a completed instrument, and hence should not be received as a will. We are of the opinion, however, that the instrument as it stands was executed by her as her last will and testament. Her husband testified that after talking it over they decided it was unnecesssary to fill in the other blanks.

Upon the proper construction of the provisions of the will we express no opinion, but having executed it as her will, the failure to fill in the blanks left in it will not defeat it. Schouler on Wills, Vol. 1, Page 363; *Harris* v. *Pue, Admr.*, 39 Md., 548; *Kultz* v. *Jaeger*, 29 App. Cases (D. C.) 300; *Everett* v. *Carr*, 59 Maine, 325.

Entry will be,

Appeal dismissed with one bill of costs.

WALTER S. LADD

vs.

MARTHA J. MERRILL, EVA E. BEAN, EXECUTRIX.

York. Opinion November 1, 1920.

Judicial notice by the court of its own records. Must be pertinent to the issues in the case at bar. If offered for a purpose not relevant or material, may be excluded.

In an action to recover for labor performed by the plaintiff on the farm of the defendant, a copy of a writ in an action brought by the representative of the estate of the defendant against the plaintiff in which a credit for labor appeared was offered in evidence by the plaintiff in rebuttal.

Held:

While the court will in proper cases take judicial notice of its own records, it will not consider them unless they are pertinent to the issues in the case at bar. Ordinarily it will not go outside of the records of the case before it, unless the records are offered in evidence; and if offered for a purpose that is not relevant or immaterial they may properly be excluded.

There is nothing in the evidence in this case to identify the labor for which credit was given in the action brought by the representative of the estate of the defendant with any labor for which the plaintiff seeks to recover in this action.

The exclusion of testimony that was not inconsistent with the evidence for the rebuttal of which it was offered was not prejudicial to the plaintiff in this case.

On exceptions, and general motion for new trial. This is an action of assumpsit on account annexed to recover for labor alleged to have been performed by plaintiff for defendant, who died before the cause came on for trial, and Eva E. Bean, Executrix, came in and defended. In rebuttal, plaintiff offered in evidence a copy of a writ in an action brought by the representative of the estate of the defendant against the plaintiff in which a credit for labor appeared, which was excluded by the presiding Justice, to which ruling plaintiff excepted. The jury returned a verdict for defendant, and the case went to the Law Court on exceptions and a motion for new trial. Motion and exceptions overruled.

Case is stated in the opinion.

John P. Deering, for plaintiff.

Clarence Webber, and Eva E. Bean, for defendant.

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

WILSON, J. An action of assumpsit to recover for personal services performed on the farm of the defendant, Martha J. Merrill, extending over a period of years from 1911 to 1915. After suit was brought the defendant died and her executrix, Eva E. Bean, then became a party and defended. The same action was tried at the January term, 1918, and resulted in a verdict for the plaintiff, but on motion for a new trial the verdict was set aside as being clearly wrong, see *Ladd* v. *Bean, Exrx.*, 117 Maine, 445.

At the second trial the jury brought in a verdict for the defendant. The plaintiff now comes before this court on a motion for a new trial on the usual grounds and on an exception to the exclusion of certain evidence.

The motion is not urged by the plaintiff and clearly could not be sustained. The exception is to the exclusion as evidence of a certain writ and account annexed brought by said Eva E. Bean in her representative capacity as executrix of the will of Martha J. Merrill against the plaintiff in this action, in which account annexed there appears a credit for labor performed by the plaintiff for five weeks amounting to $52.50. The only ground urged at the trial for the admission of this evidence, and the only ground on which it can be considered here, *Hathaway* v. *Williams*, 105 Maine, 565, is that the credit for labor contained in the account annexed to the writ would rebut certain testimony introduced by the defense to the effect that the occupation of the farm by the plaintiff was under an agreement by which the plaintiff, Ladd, was to have a home there, raise such produce as he might wish for his own use, have sufficient hay for a horse, and in consideration of which he was to assist in cutting the hay, and keep down the bushes, and as a further result of this arrangement beneficial to the defendant, the buildings could be kept insured.

It is now urged by the plaintiff that since the writ is a part of the records of the court, it is *ipso facto* admissible and the court should have taken judicial notice of its own records. While the court may in proper cases take judicial notice of its own records, it will not

consider them unless they are pertinent to the issues under consideration. Ordinarily it will not go outside of the record of the case before it, unless the records are offered in evidence; and if offered as evidence for a purpose that is not relevant, they may be properly excluded. Such seems to be the better practice, and has the support of the authorities. Wigmore on Ev. Vol. 4, Sec. 2579, Wharton on Ev. Vol. 2, Sec. 326, *Anderson* v. *Cecil*, 86 Md., 490.

It in no way appears from the evidence in this case, or from the account annexed to the writ that was excluded, when or where the labor for which the credit was given was performed or that it was in any way connected with the relations between the parties out of which the action at bar has grown. It is not, therefore, inconsistent with the evidence of the defendant's witness for the rebuttal of which it was offered. And from an examination of the case we are of the opinion that the plaintiff was not prejudiced by the exclusion of this evidence. Greenleaf on Evidence, Vol. 1 (16 Ed.) Sec. 186 (3); *Rockland* v. *Farnsworth*, 89 Maine, 481; *Dennie* v. *Sullivan*, 135 Mass., 28.

Entry will be,

Motion and exception overruled.

METROPOLITAN INSURANCE COMPANY *vs.* HARLEY M. DAY.

Cumberland. Opinion November 5, 1920.

A claim for damages to property resulting from a tort, is assignable. Waiver by filing general issue. The finding by the presiding Justice without the intervention of a jury, on a question of fact, is conclusive.

1. A claim for damages arising from a tort concerning property is assignable, and under R. S., Chap. 87, Sec. 152, an action may be maintained by the assignee in his own name.
2. The negligence of the defendant was a question of fact which was submitted to the determination of the presiding Justice without the intervention of a jury, and his finding for the plaintiff was conclusive.

This is an action of tort brought by the plaintiff as assignee of the United Baptist Convention of Maine, in the Municipal Court for the City of Portland in Cumberland County, and from that court on appeal by the defendant it was taken to the Superior Court for the County of Cumberland, where it was tried by the presiding Justice without the intervention of a jury, with the right of exceptions in matters of law. The action grew out of the following alleged facts.

The defendant drove a loaded auto-truck up Middle Street, in Portland, and left it standing near the right-hand or northerly curbing, at a point where there was a substantial down grade in the direction opposite to the course of the truck, and the truck moved backward down and diagonally across Middle Street until it came in contact with a building owned by plaintiff's assignor, doing damage to the building. Defendant set up in defense that such a claim for damages was not assignable and that the plaintiff could not maintain the action in its own name, and further denied negligence of defendant. Plea, the general issue.

The presiding Justice ruled adversely to contentions of the defendant, and rendered a decision in favor of the plaintiff for the sum of $93.61, and the defendant alleged exceptions.

Exceptions overruled.

Case stated in the opinion.

George F. Noyes, for plaintiff.

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

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

CORNISH, C. J. Action of tort brought by the plaintiff as assignee of the owner of a building which was injured by the defendant's automobile.

The case was heard before the Justice of the Superior Court for Cumberland County without the intervention of a jury and with right of exceptions in matters of law. The Justice rendered a decision in favor of the plaintiff for the sum of $93.61 and the defendant alleged exceptions.

The first point of law raised by the counsel for defendant in their brief is that the court erred in holding that the claim in suit, being a demand to recover for a tort causing injury to property, was assignable, and that the plaintiff as assignee had the legal right to bring the action in his own name.

There are two answers to this proposition. In the first place the point is not open to the defendant at this time. It is too late. He virtually attacks the capacity of the plaintiff to bring and maintain this action and that objection should be raised in limine by proper pleading. By pleading the general issue the defendant waived the point and admitted the plaintiff's capacity to sue. This proposition has been settled so long and so firmly, and in such a wide variety of cases, that citations are needless.

In the second place, as to the assignability of a claim for damages for tort concerning property the great weight of authority sustains the ruling of the court. The distinction between a claim for injuries to the person, such as arises from assault and battery, slander and libel, malicious prosecution or false imprisonment, and a claim for the conversion or destruction of or injury to property is sharply maintained. The former is merely a personal right and until reduced to judgment is not assignable. The latter is held to be a vested interest and as such is assignable. *Rice* v. *Stone,* 1 Allen, 566; *Delval* v. *Gagnon,* 213 Mass., 203; *Jordan* v. *Gillen,* 144 N. H., 424, 5. C J. 887 and 888 and cases cited. In *Rogers* v. *Portland and Brunswick Street*

Railway, 100 Maine, 86, an action for the conversion of earth and gravel, the plaintiff brought suit in his own name as assignee and his right to maintain the action was not questioned either by counsel or the court. See also *Pierce* v. *Stidworthy*, 79 Maine, 234, 239. Our statute provides: "Assignees of choses in action, not negotiable, assigned in writing, may bring and maintain actions in their own names, but the assignee shall hold the assignor harmless of costs, and shall file with his writ, the assignment or a copy thereof, and all rights of set-off are preserved to the defendant." R. S., Chap. 87, Sec. 152. It is to be assumed that all the formalities were complied with here, the case not showing the contrary. The last clause as to set-off fully protects all the rights of the defendant. The ruling of the court as to assignability of the claim and maintenance of the suit by the assignee in his own name was without error.

The second and third questions raised by the defendant in his brief are essentially questions of fact. Upon these the finding of the court, if there was any substantial evidence to support it, is conclusive. The court found as a fact that the defendant was guilty of negligence in leaving his automobile as he did at the side of the street under all the conditions and circumstances. That was the gist of the case and his finding settles it. That he afterwards discussed the evidence to some extent and the weight to be given to certain circumstances connected with the accident, in no way militates against or diminishes the force of his finding. With or without such discussion the decision stands, and judgment must follow.

Exceptions overruled.

FRED BELL *vs.* EDWARD H. DOYLE.

Aroostook. Opinion November 10, 1920.

Accord and satisfaction. Under the statute and at common law there must be an agreement between the parties, either express or implied. It is a question of fact for the jury, unless from the evidence one inference or finding only can be made.

When accord and satisfaction are relied upon as a defense;

Held:

1. Under R. S., Chap. 87, Sec. 63, as well as at common law, accord and satisfaction is based upon an agreement between the parties. No invariable rule can be laid down as to what constitutes such an agreement. Each case must be determined largely on its own particular facts. The agreement need not be express but may be implied from the circumstances and the conduct of the parties. It must be shown that the debtor tendered the amount in satisfaction of the particular demand and that it was accepted by the creditor as such.
2. When the debtor makes tender with condition that if the creditor accepts it he does so in full settlement of the claim, then such tender and acceptance constitute accord and satisfaction, but the proof must be clear and convincing that the creditor understood the condition on which the tender was made, or the circumstances under which it was made were such that he was bound to understand it.
3. Accord and satisfaction is a fact to be submitted to the jury unless the testimony is such that only one inference or finding can be made.

This is an action of assumpsit to recover $192.57, which plaintiff alleges defendant owed him as a balance due on a sale by plaintiff to defendant of two hundred and thirty-seven sacks of potatoes. Defendant filed a plea of the general issue, and a brief statement under which is alleged accord and satisfaction. The jury returned a verdict for plaintiff for $161.90. Defendant excepted to the ruling of the presiding Justice admitting a certain letter offered by plaintiff, and also filed a general motion for a new trial.

Motion and exceptions overruled.

Case is stated in the opinion.

L. V. Thibodeau, and Shaw & Thornton, for plaintiff.

John B. Roberts, and A. S. Crawford, for defendant.

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

PHILBROOK, J. This case arose from a transaction wherein the plaintiff sold and delivered to the defendant a quantity of potatoes. The latter is a dealer in and shipper of that commodity. Part payment was made at the time of delivery, and a memorandum given stipulating that the balance was to be paid when the defendant sold and shipped the potatoes to some one of his customers. In preparation for such shipment it became necessary to rack the potatoes. The defendant claims that this operation disclosed the fact that a portion of the stock was unmerchantable, although, as he further claims, he bought and was to pay for merchantable potatoes only. Thereupon he sent to the defendant a statement of account, based upon his claims, accompanied by his check for the amount due according to those claims. Both were enclosed in a letter, which quite fully and clearly sets forth the defendant's claims, and closed with the words "Herewith check to balance." The plaintiff at once wrote the defendant as follows:

"I received last night $377.68 on account of what you owed me. You remember Mr. Doyle that I sold you 237 bbl. of potatoes at $3.25 a barrel. I have the paper here that you made last fall. Now Mr. Doyle I think I have waited long enough and I would be pleased if you could send me the balance $192.57. Let me hear from you by return mail if possible." The record does not disclose that the defendant made any reply to this letter.

The plaintiff cashed the enclosed check and retained the proceeds. In this suit he seeks to recover the balance referred to in his letter, and has been awarded a favorable jury verdict.

The defendant presents exceptions to a ruling admitting this letter in evidence, and a general motion for a new trial based upon the usual grounds. The contention, both in the exceptions and in the motion, center about the claim of the defendant that there was an accord and satisfaction which constitutes a bar to this suit.

While accord and satisfaction under the provisions of common law have been discussed in many courts of last resort in other States, yet those discussions, in some particulars, are not applicable in our jurisdiction because of statutory provisions and the interpretation thereof by this court. R. S., Chap. 87, Sec. 63, declares that "No action shall be maintained on a demand settled by a creditor . . . . in full discharge thereof, by the receipt of money, or other valuable consideration, however small." This statute applies to demands undisputed as well as to demands disputed, *Knowlton* v. *Black*, 102 Maine, 503; also to demands either liquidated or unliquidated, *Fuller* v. *Smith*, 107 Maine, 161. That accord and satisfaction under this statute is based upon an agreement between the parties, as at common law, is distinctly declared in the latter case, where the Justice delivering the opinion of the court also says, "No invariable rule can be laid down as to what constitutes such an agreement, and each case must be determined largely on its own peculiar facts. The agreement need not be express, but may be implied from the circumstances and the conduct of the parties. It must be shown, however, that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such." In the case from which we have just quoted our court approves the language in *Laroe, et al.* v. *Sugar Loaf Dairy Co.*, 180 N. Y., 367, 73 N. E., 61, where that court, with reference to receipt of checks constituting accord and satisfaction, says "at the most it was a question for the jury to pass upon, whether, under the circumstances and the previous transactions between the parties, the plaintiff knew, or should have known, that the check was sent to them on the sole condition that by its acceptance they should discharge the defendant."

In *Mayo* v. *Stevens*, 61 Maine, 562, this court said, "In order to render payment of part an extinguishment of the whole debt under this statute, both parties must concur in the understanding, that the amount paid is paid and received as and for the whole debt."

Wellington v. *Monroe Trotting Park Company*, 90 Maine, 495, was a case where a plaintiff claimed that his horse won first money in a race. The defendant claimed that the horse won second money, which was a sum less than that claimed by the plaintiff. The defendant sent the plaintiff a check for "second money." The plaintiff cashed the check and notified the defendant that he would not accept

the check as "second money" but would credit it on account. The defendant made no reply and this court held that this was not an accord and satisfaction under our statute.

In a more recent case, *Price* v. *McEachern, et al.*, 111 Maine, 573, after fully discussing the principle now under consideration, and especially as found in *Chapin* v. *Little Blue School*, 110 Maine, 415, Mr. Justice SPEAR said "The receipt of a check purporting to be for the balance of an account, and the use of it, in the absence of an agreement to accept in payment in full is not an accord and satisfaction."

We do not overlook cases relied upon by the defendant. In *Anderson* v. *Standard Granite Company*, 92 Maine, 429, it was held, "If an offer of money is made to one, upon terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied and no words of protest even can affect this result."

But in commenting on *Anderson* v. *Granite Co.*, supra, the court in *Price* v. *McEachern*, supra, noted that the Granite Company case required proof, either express or implied, of both offer and acceptance. Depending upon *Anderson* v. *Granite Co.*, supra, *Price* v. *McEachern*, supra, and *Horigan* v. *Chalmers Motor Co.*, 111 Maine, 111, the defendant claims that the understanding by the creditor of the offer made by the debtor is to be determined by the standard of what a reasonable man would have understood under like circumstances. To a great degree this claim is well founded, but there still remains the duty and obligation to prove, by direct or implied testimony, what the debtor's intention was, and that the creditor, or the ordinarily reasonable man under the circumstances, should have understood that intention. But understanding the intention of the debtor and acceptance by the creditor so as to constitute accord and satisfaction are not necessarily one and the same thing, as we have seen in cases already cited. True, if the debtor adds to his intention a condition that if the creditor accepts he does so in full settlement of the claim, and, fully understanding both the intention and the condition, the creditor does accept, then accord and satisfaction are established as a bar to subsequent suit upon the

claim. But the "proof should be clear and convincing that the creditor did understand the condition on which the tender was made, or the circumstances under which it was made were such that he was bound to understand it." *Horigan* v. *Chalmers Motor Company*, supra.

This brings us back to the proposition that accord and satisfaction is a question of fact to be submitted to the jury, *Laroe* v. *Sugar Company*, supra, unless the testimony is such that only one inference or finding can be made. This case was submitted to the jury and the record abundantly shows that it was done under proper instructions by the presiding Justice. The real issue was tried out by the panel which sat upon the case. As bearing upon that issue the letter, the admission of which is made subject of exception, was properly admitted.

Upon most careful examination of the record and giving full effect to the very able brief of defendant's counsel, we are unable to say that either the ruling or the verdict was wrong.

Motion and exceptions overruled.

ARTHUR H. JACQUES, In Equity *vs.* OTTO NELSON COMPANY, et als.

York. Opinion November 13, 1920.

Bill in equity to enforce lien claim. Counter charges. The decision of an architect vested with power under a building contract between the parties to decide questions that may arise during the progress of the building, is binding if within the limits of the matters committed to him so long as he does not act unreasonably, capriciously, arbitrarily, wilfully, or fraudulently.

Bill in equity to enforce a lien, brought by a subcontractor against the contractor to recover a claimed balance of $494.13. The Otto Nelson Company seeks to charge against this balance the sum of $327.95 expended by it in repainting, and of $280.16 in applying a coat of shellac, both in accordance with the orders of the architect. The case was heard by a single Justice, both items of counter charge were allowed, and therefore the bill was dismissed.

Upon appeal by plaintiff it is,

Held:

1. That the finding of fact by the sitting Justice that the painting by the subcontractor did not meet the contract requirement and therefore the expense of repainting should be allowed, was fully warranted by the evidence.
2. That the contract did not require the plaintiff to apply a coat of shellac to the woodwork. When a build ng contract makes the architect an arbitrator between the parties to decide practical questions that may arise during the progress of the building, his decision within the limits of the matters committed to him is binding, so long as he does not act unreasonably, capriciously, arbitrarily, wilfully or fraudulently. But he cannot require the performance of additional work not within the terms and fair intendment of the contract.
3. The requirement here was not within the terms or intendment of the contract, but involved additional work not contracted for. Therefore the counter charge of $280.16 should not have been allowed. The plaintiff is entitled to recover his lien claim of $494.13 less the cost of repainting $327.95, a balance of $166.18 with interest from date of the bill.

This is a bill in equity brought by the plaintiff, a subcontractor, against defendant, Otto Nelson Company, principal contractor, to enforce a lien on land and buildings in Sanford, Maine, owned by

The Sanford Building Corporation, for a claim for labor performed and materials furnished under a contract for painting Sanford Trust Company Building. Plaintiff claimed a balance of $494.13 was due him. Defendant sought to charge against this balance the sum of $327.95 expended by it in repainting, and the sum of $280.16 in applying a coat of shellac, both in accordance with the orders of the architect. The case was heard by a single Justice, who allowed both items of the counter claims, amounting to $608.11, which exceeded the balance claimed by the plaintiff, and ordered that the bill be dismissed. From which decree plaintiff took an appeal. Appeal sustained. Bill sustained with costs. Decree in accordance with opinion.

Case stated in the opinion.

Willard & Ford, for plaintiff.

Gillin & Gillin, and John V. Tucker, for defendants.

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

CORNISH, C. J. This is a bill in equity brought to enforce a lien for labor performed and materials furnished in connection with the construction of the Sanford Trust Company Building at Sanford, the balance amounting to $494.13. The Otto Nelson Company of Bangor was the general contractor. The plaintiff, under the name of the Arthur H. Jacques Painting Company of Boston, Mass., was the subcontractor for the painting under the Nelson Company. Holmes and Winslow of New York City were the architects.

This subcontract between Jacques and the Nelson Company was made by correspondence and was closed September 19, 1916, for the sum of $1152. The material clauses, as stated in the letter of acceptance, are these:

"To provide all materials and perform all labor required for the painting, according to the plans and specifications prepared by Messrs. Holmes and Winslow, 103 Park Ave., N. Y. and to their satisfaction and acceptance." "Our relations in respect to this subcontract are to be governed by the plans and specifications named above and by the general conditions of the general contracts as far as applicable to the work thus sublet." This was confirmed by the plaintiff under date of September 19, 1916.

The plaintiff entered upon his contract and claims that of the $1152 contract price, and $17.13 extras, making a total of $1169.13, he has received only $675, and this bill is brought to recover the balance, $494.13. The Nelson Company seeks to charge against this balance two amounts, one for $327.95 expended by it for labor and materials in repainting in order to make the work satisfactory and acceptable to the architects; and the other for $280.16, the expense connected with a coat of shellac ordered to be put on by the supervising architect as a part of the contract requirements, and upon plaintiff's refusal, applied by the Nelson Company at its own expense.

The cause was heard by a single Justice who allowed both of the counter claims amounting to $608.11, and as this sum exceeded the balance claimed by the plaintiff, ordered that the bill be dismissed. There are some slight differences in the figures as stated in the answer, decree and briefs of counsel, but they are so trifling as not to affect the result. The case is now before the Law Court on appeal from this decree. The only points of controversy are these two counter claims, and we will consider them separately.

1. Cost of Repainting, $327.95.

The sitting Justice found as a fact that the plaintiff's painting was unsatisfactory to the architects and was not accepted by them. He further found that in so doing they acted reasonably and within their contract rights and duties. He therefore allowed this item as a countercharge. His decision on controverted facts must stand, like the verdict of a jury, unless it is manifestly wrong. A careful study of the evidence as to the character and quality of the work convinces the court that the findings of the sitting Justice on this point were warranted by the facts. Evidently the job did not meet the contract specifications, and it is as much the duty of the architect under a contract like this to reject work which falls below the contract standard as to accept what is up to that standard. The decision allowing this countercharge of $327.95 as an off-set against the plaintiff's balance is sustained.

2. Cost of Shellac Coat, $280.16.

The contention on this point arises over the following paragraph of the specifications: "All wood of basement, of first story, mezzanine and upper floors to be filled, stained and given a waxed finish. Birch, stained 'mahogany', hand rails of stairs treated similarly."

The woodwork was filled and stained by the plaintiff as required by this specification, the particular kind of mahogany stain having been selected by the supervising architect and used at his request. After the filling and staining were completed, the same supervising architect decided that a coat of shellac was required in order to produce a proper foundation for the wax. It needed more body as he testifies. He therefore ordered the plaintiff to put on a coat of shellac before waxing. This the plaintiff refused to do except as an extra, claiming that the specifications did not call for shellac on the interior finish, and that it was not included in his contract. The architect insisted and finally the Nelson Company expended $280.16 in having the shellac coat put on by other parties, and then the plaintiff applied the final coat of wax. The sitting Justice allowed this counterclaim also, but we think the plaintiff's contention on this point is well founded, and that this item should be disallowed. The question is, did the architects under the contract and specifications have the right to call for this coat of shellac. This is a question not of fact but of legal construction of the contract and specifications.

The defendants rely first upon the provision in the subcontract by which the plaintiff bound himself "to provide all materials and perform all labor required for the painting according to the plans and specifications prepared by Messrs. Holmes and Winslow, architects, and to their satisfaction and acceptance," and secondly to "the general conditions of the general contracts" between the owner and the principal contractor, Nelson Company, "so far as applicable to the work thus sublet." A clause in the subcontract, as we have already seen, tied these provisions of the general contract to the subcontract. Article II of the general contract contains this clause: "It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of said architects and that their decision as to the true construction and meaning of the drawings and specifications shall be final." Under the "general conditions" are these: "The plans and specifications intend to include everything requisite to the entire proper finishing of the work, whether every item involved is mentioned or not."

"All right is reserved to the architects to reject any material or workmanship not up to the plans and specifications, whether it be incorporated in the building or not. All such materials and workmanship must be promptly replaced by others in strict accordance with what is called for."

It is familiar law that where a building contract makes the architect an arbitrator between the parties to decide practical questions of performance that may arise during the progress of building, his decision, within the limits of the matters committed to him, is binding, so long as he does not act unreasonably, capriciously, arbitrarily, wilfully or fraudulently. *Norcross* v. *Wyman*, 187 Mass., 25; *Hebert* v. *Dewey*, 191 Mass., 403; *Handy* v. *Bliss*, 204 Mass., 513; *Evans* v. *Middlesex Co.*, 209 Mass., 474. The defendant seeks to apply that rule to the facts of this case, and to make final and conclusive the decision of the architect requiring the plaintiff to put on a coat of shellac at an expense equal to more than one-fifth of the entire contract price.

We do not think the law gives such autocratic power to an architect as that, for the reason that what he was requiring cannot fairly be construed as within the terms of the contract. The detailed specifications covering the painting are precise and clear. This woodwork was to be filled, stained and given a waxed finish, three distinct operations. Before the wax was to be applied two things and only two were to be done, the filling with what is known in the trade as a filler, and the staining. Each was a distinct process. Both these requirements were complied with, and there is no contention that that work was not properly done. At this stage, however, the architect discovered that these two processes had not produced a proper foundation upon which to apply the wax. It needed another coat such as shellac would give. But that was not the fault of the subcontractor. If it was the fault of anyone it was that of the architect himself in drawing the specifications. It may have been an error of judgment in thinking that the filling and staining would give sufficient body. In any event the plaintiff had done all he had agreed to do, and it was not within the legal power of the architect to compel this plaintiff to do this additional work. Nor can any of these general provisions create such a power. An architect may decide as to the performance or non-performance of work within the terms of a contract, but he cannot require the performance of additional work not within its terms. His non-acceptance of the work must be based upon the character and quality of the work specified and on which the contractor based his bids. He cannot rest it upon the non-performance of work not required by the contract, even though the completed job is not satisfactory. The lack of satisfaction in such

a case arises from the failure to insert that additional work in the contract and specifications. If the defendant's contention on this point is sound, then the specifications might call for one coat of paint upon woodwork and if the result prove unsatisfactory the architect could then compel the contractor to add one or two more coats in order to make it an acceptable job. Such a construction is unreasonable and unwarranted. It puts a power in the hands of the architect that was never intended and compels the performance of work that was never contracted for.

Had the architect in the case at bar desired a coat of shellac in addition to the filling and staining he should have so stated in the specifications. It is most significant that such a requirement was inserted in the original specifications for the treatment of the floors, viz: "Wood floors throughout to be stained, filled, then shellacked and then given two good coats of Berry Bros. liquid Granite." There was no necessity of such insertion if the architect had the power to require it without specification. We think it more reasonable to hold that when the use of shellac is contemplated in such a case, it should be specifically called for. Then the contractor can estimate its cost and include it in his bid.

For these reasons our conclusion is that this second claim be disallowed, and that the plaintiff is entitled to recover his lien claim of $494.13 less the cost of repainting, $327.95, a balance of $166.18, with interest from the date of the bill.

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

CARRIE M. STONE, In Equity

vs.

UNITED STATES ENVELOPE COMPANY, et als.

Cumberland. Opinion November 18, 1920.

Preferential rights of holders of preferred stock, and rights of holders of common stock, are fixed by contract which is commonly set forth in the corporate by-laws. Preferred stock prima facie, nothing to the contrary appearing, carries the implication that the preferential rights of the holders thereof are given in lieu of and to the exclusion of the equality in participation which would otherwise exist.

The United States Envelope Co. has forty thousand shares seven per cent cumulative preferred and ten thousand shares common stock. These classes of stock have equal voting power share for share. All of this stock having been issued and sold at par except twenty-five hundred shares of common stock, a vote was passed to issue this twenty-five hundred shares and to give to all stockholders both common and preferred the preemptive right to buy it in proportion to their holdings at one hundred and fifty dollars per share. This price was substantially less than the actual value or market value of the stock.

This suit is brought by a common stockholder to restrain the corporation from giving to the preferred stockholders the right to purchase stock at less than its value. The plaintiff contends that to give preferred stockholders the right to purchase stock at a fixed price which is less than its value is in effect to pay to the preferred stockholders a dividend in addition to the preferential dividend which had been regularly declared and paid. The defendant contends that the preferred stockholders are not limited to their preferential dividends, but are entitled to share the surplus with common stockholders.

Held:

That the respective rights of common and preferred stock are fixed by a contract which is commonly set forth in the corporate by-laws. Within wide limitations any preferential rights provided for in the by-laws will be given effect to by courts.

Where nothing to the contrary appears the creation of preferred stock prima facie implies that the preferential rights of the stockholders are given in lieu of and to the exclusion of the equality in participation which would otherwise exist.

To carry into effect the vote above referred to, and to sell stock to preferred stockholders at less than its value is to violate the rights of the common stockholders.

On report. This is a bill in equity brought by Carrie M. Stone, one of the holders of common shares in the capital stock of the defendant corporation, seeking an injunction to restrain the defendants from issuing to the preferred and common stockholders in proportion to the number of shares of stock, either preferred or common, held by each, 2,500 shares of the common stock of the corporation of the par value of $100 each. The cause was heard upon bill, answers, replications and stipulations as to evidence. By agreement of parties the case was reported to the Law Court for determination upon bill, answers, replications, stipulations, and so much of the evidence as was legally admissible. Bill sustained. Decree to be signed by single Justice in accordance with this opinion.

Case is stated more fully in the opinion.

Verrill, Hale, Booth & Ives, for complainant.

Payson & Virgin, for respondents.

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

DEASY, J. Equity. The part of the by-laws of the United States Envelope Co. material to the present case is as follows:—

"Article XVI. Capital.

The shares of this corporation shall be divided as follows, viz: 10,000 common shares, 40,000 preferred shares.

The preferred shares shall be entitled to cumulative dividends payable semi-annually out of the net earnings of the corporation, at the rate of seven per cent, per annum, before any dividends are declared or paid on the common shares, and in case of non-payment in full of any such semi-annual dividends, the portions unpaid shall be paid out of subsequent net earnings prior to the claims of the common shares, but without interest on deferred payments, and the preferred shares shall have preference over the common shares in any distribution of the assets of the corporation in liquidation."

The by-laws also give to the common and preferred stockholders equal voting power share for share and provide that "any shares of stock not subscribed for at the first meeting may be issued by the Board of Directors."

All the stock has been issued and sold for cash at par except 2500 shares of common stock. A vote has been passed to issue this stock and to offer it to stockholders both common and preferred, in proportion to their holdings, at $150 per share, a price which the case shows to be materially below its value.

The plaintiff holding 1000 shares of the common stock asks that the defendant may be enjoined from carrying this vote into effect on the ground that to give the preferred shareholders a preemptive right to purchase common stock at less than its value is in effect to pay them a dividend in addition to the seven per cent provided for in the by-laws and which they have received. The defendants contend that the preferred stockholders notwithstanding that they have received their preferential dividends are entitled to share in the surplus equally with the holders of the common stock.

The respective rights of holders of common and preferred stock are fixed by contract. *Spear* v. *Lime Co.*, 113 Maine, 285.

The contract is commonly contained in the corporate by-laws. Within wide limitations any preferential rights provided for in the by-laws will be given effect to by courts.

The question at issue in this case relates to the extent and limits of the rights that prima facie belong to preferred stock as such i. e. rights and limitations that, in the absence of express provisions, are implied.

The plaintiff contends that where a say seven per cent preferred stockholding is created with no stipulation in reference to participation in surplus, the preferred stockholder is entitled to seven per cent, and that all the rest of the profits available for distribution belong to the holders of common stock; on the other hand the defendant says that after payment of the seven per cent dividend and perhaps an equal dividend upon the common stock, the balance of profits to be distributed must go to all the stockholders both common and preferred in proportion to their holdings and without discrimination.

Both parties present authorities sustaining their respective contentions. There are two opposing theories each of which has judicial support. One theory is that the preferred stockholder presumptively yields nothing in compensation for the benefits which he receives; that he has and holds all the rights of the common shareholder and in addition has his preferential rights.

Upon this theory the defendant relies and in support of it cites *Jones* v. *Railroad Co.*, 67 N. H., 234 (1893) and a series of cases in Pennsylvania the latest of which, *Englander* v. *Osborne*, 104 Atl., 614, affirms the earlier decisions.

Clark and Marshall on Corporations and also Cook, 6th Ed., are cited by the defendant. These works were written and published before the cases of *Niles* v. *Ludlow Valve Mfg. Co.*, and *Will* v. *U. L. P. Co.*, (infra) were decided. But even the 6th edition of Cook says that "the question is an open one" Section 269, Page 1.

The other theory which we believe to be better and supported by the weight of authority is that in receiving the greater security of his preferential rights, the preferred stockholder impliedly agrees to accept such rights in lieu of equal participation.

The maxim "expressio unius" &c. applies to this case and is decisive.

The parties by a contract embodied in the by-laws have provided for the preferred stockholders a seven per cent preferential dividend and in case of liquidation one hundred per cent. This excludes other participation.

The following cases sustain this view:

In the re-organization of the Baltimore & Ohio Railroad Co. it was provided that "The holders of the preferred stock . . . . are entitled to receive in each year out of the surplus net profits of the company for the current year such yearly dividend (non-cumulative) as the board of directors of said railroad company may declare, up to, but not exceeding four per centum per annum before any dividends shall be set apart or paid upon the common stock." It was held that the preferred stockholders were limited to their four per cent and were not entitled to share in the surplus earnings. The court says: "It is true that some of the text writers do intimate that such may be the law (that preferred shareholders are entitled to share in surplus) but the cases cited are those where there is an express provision for the participation in the surplus and fall far short of sustaining the proposition by which the appellants here seek to impose the additional quality upon the preferred stock." *Scott* v. *B. & O. R. Co.*, (Md.), 49 Atl., 327, (1901).

The Ludlow Valve Mfg. Co. having common and preferred stock voted to its common shareholders a stock dividend. The plaintiff, a holder of preferred stock, brought an action claiming that the stock should be distributed not to common stockholders only, but to preferred shareholders as well.

In the District Court a verdict was directed for the defendant. (196 Fed., 994). The case was carried to the Circuit Court of Appeals which court by a majority opinion sustained the District Court. "These (common) stockholders have the burden of administration upon them; if the corporation is unsuccessful, the loss falls upon them; if successful they receive the benefits. We think that when the preferred stockholders receive the large interest of eight per cent provided for in the certificate they receive all to which they are entitled from the income of the corporation."

Niles v. *Ludlow Valve Mfg. Co.*, 202 Fed., 141. (1912).

The English Court of Appeals in a decision affirmed by the House of Lords holds "that when you find the word 'dividend' used in the way in which the expression is used in the resolution and defined to be a 'cumulative preferential dividend' you have something so definitely pointed to as to suggest that it contains the whole of what the shareholder is to look to from the Company."

Will v. *United Lankat Plantations Co.*, L. R. 2 Ch. Div. (1912), 571; House of Lords, Rep., 1914 A. C., 11.

The New Jersey case of *Bassett* v. *U. S. Foundry Co.*, 73 Atl., 514, inferentially but none the less significantly supports the same view.

Independent reasoning as well as what we deem to be the preponderance of authority sustains the plaintiff's position. Words in contracts, as well as in statutes, should ordinarily be construed "according to the common meaning of the language." Surely the phrase "preferred stock" holds out to the ear of the ordinary investor no promise of participation in earnings beyond his preferential dividend. That this is true has been recognized by authorities.

"It is generally assumed that where preferred shares are given a fixed preferential dividend at a specified rate, that impliedly negatives any right to take any further dividends." Palmer's Company Precedents 11th Ed., 814.

"Preferential shares and stock are ordinarily spoken of and regarded, and I think properly regarded, as shares or stock which carry a fixed preferential dividend and are not entitled to anything more." *Will* v. *United Lankat Plantations Co.*, supra.

Even Cook whose work on Corporations is repeatedly and confidently cited by the defendants says: "Theoretically it is difficult to justify this conclusion, but practically it is true that the investing

public assume and understand that preferred stock is never entitled to more than its specified and fixed dividends." Cook 7th Ed., Section 269 note.

There are disclosed in this case significant circumstances showing that the above opinion harmonizes with the actual intention of the persons interested in the organization of this corporation.

We put the decision however upon the ground that where nothing to the contrary appears the creation of preferred stock prima facie implies that the preferential rights of the stockholder are given in lieu of and to the exclusion of the equality in participation which would otherwise exist.

Some cases indicate a distinction in respect to the relative rights of common and preferred stockholders, between an earned surplus and an "unearned increment" i. e. a surplus arising from an increase in value of corporate property.

It is not necessary to here consider this distinction inasmuch as the surplus in the present case is admittedly an accumulation of corporate earnings.

Bill sustained with costs.
Decree to be signed by single Justice in accordance with this opinion.

GEORGE C. SHEA *vs.* HARRY F. SWEETSER.

Cumberland. Opinion November 18, 1920.

Rights of stockholders to inspect and examine the books of the corporation. Even when the right to inspect is guaranteed by statute, the issuance of a writ of mandamus lies within the discretionary power of the court, and is not a matter of right. It is a prerogative writ issued at the discretion of the court when equity requires it.

The petitioner in 1919, not being then a stockholder in the Ventura Consolidated Oil Fields, wished to obtain a list of the stockholders in that corporation for the purpose of attempting to sell them other stock. For this purpose he purchased five shares of stock through one Prescott, a compiler of and dealer in stockholders' lists. He then demanded the privilege of examining the books. This being denied, he began his petition for writ of mandamus to enable him to examine books and obtain a list of stockholders. It is not contended that he desired the list because of any stock ownership. He acquired a nominal stockholding for the purpose, and only for the purpose of securing the list.

A single Justice before whom the case was heard ordered the peremptory writ to issue. The case is brought up on exceptions.

Held:

That the writ of mandamus is not a writ of right. It is a prerogative writ issued at the discretion of the court when equity requires it.

Held:

Further that the court will protect the interests of the smallest stockholder, but it will not exercise its extraordinary power of compelling by mandamus the production of corporate records for inspection at the mere behest of one who acquires a nominal stock interest for the sole purpose of advertising other goods or stocks.

On exceptions. In this case, the plaintiff petitioned under R. S., Chap. 107, Sec. 17, for a writ of mandamus commanding the defendant to permit the petitioner to inspect the records and stock-book of the corporation. An alternative writ was issued, and a hearing had thereon before a single Justice who decreed that a peremptory writ be issued, to which decree defendant excepted. Exceptions sustained. Peremptory writ denied.

Case is stated in the opinion.

Charles E. Guerney, for petitioner.
C. A. Hight, and H. P. Sweetser, for respondent.

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

DEASY, J. The plaintiff, holder of five shares of stock of the Ventura Consolidated Oil Fields, a Maine corporation of which the defendant is clerk, has petitioned under R. S., Chap. 107, Sec. 17 for a writ of mandamus commanding the defendant to allow the petitioner to inspect the records and stock-book of the corporation and to take copies and minutes therefrom of such parts as concern his interests.

An alternative writ has been issued, a return made and hearing had thereon before a single Justice who decreed that a peremptory writ be issued as prayed for.

The case is brought to this court on exceptions to the issuance of the peremptory writ. To the issuance of the alternative writ exceptions were also taken and a bill of exceptions filed. This however was not certified as provided by statute, and does not appear to have been allowed.

The question raised by the only bill of exceptions before this court is whether the peremptory writ should have been denied because of the purposes for which it was asked.

It appears that the petitioner in 1919, not being then a stockholder in the Ventura Consolidated Oil Fields, wished to obtain a list of the stockholders in that corporation for the purpose of attempting to sell them other stock. For this purpose he purchased five shares of stock through one Prescott, a compiler of and dealer in stockholders' lists. He then demanded the privilege of examining the books. This being denied, he began his petition for writ of mandamus to enable him to examine books and obtain a list of stockholders. It is not contended that he desired the list because of any stock ownership. He acquired a nominal stockholding for the purpose, and only for the purpose of securing the list.

At common law, independently of statute, it has been uniformally held that the right to examine books of a corporation exists only in favor of stockholders who invoke such right for a proper and legitimate purpose. Cook on Corporations, Section 514. *White* v. *Manter*, 109 Maine, 409. *Withington* v. *Bradley*, 111 Maine, 386.

But the Maine Statute, Chap. 51, Sec. 22 provides that "Such records and stock-book (of a corporation) shall be open at all reasonable hours to the inspection of persons interested who may take copies and minutes therefrom of such parts as concern their interests." This makes absolute and unqualified the right which at common law was conditional. "The statute right of inspection of corporate records and of the list of stockholders by a stockholder is absolute and unlimited. The statute does not make the purpose material and we cannot." *White* v. *Manter*, 109 Maine, 410. Substantially similar statutes of other states have been given the same construction.

But all the above relates to the *right* and not to the *remedy*. From the earliest times the writ of mandamus has been held to be a prerogative or discretionary writ and not a writ of right. "The writ of mandamus is not a writ of right. It is issuable at the discretion of the court and when equity requires it." *Belcher* v. *Treat*, 61 Maine, 581. *Davis* v. *Comrs.*, 63 Maine, 397. *Withington* v. *Bradley*, 111 Maine, 384. *Eaton* v. *Manter*, 114 Maine, 261. No statute has ever made this writ a writ of right. The Legislature has never taken away or abrogated the discretionary power of the court.

"Some courts seem to hold that, when the right to inspect is guaranteed by statute mandamus must issue as a matter of course and that nothing is left to the discretion of the court." *White* v. *Manter*, supra.

But other authorities including this court hold the contrary. *Wight* v. *Henblein*, (McL.), 75 Atl., 507; *Board of Directors* v. *Board of Excise*, (Okl.), 122 Pac., 520; *Eaton* v. *Manter*, 114 Maine, 259. "Courts in the exercise of wise judicial discretion may in view of the consequences attendant upon the issuing of a writ of mandamus, refuse the writ though the petitioner has a clear legal right for which mandamus is an appropriate remedy." *Akin* v. *Supervisors*. (Ill.), 56 N. E., 1044.

We adhere to the opinion previously expressed that the discretionary power of the court has not by the statute been taken away or abridged. *Eaton* v. *Manter*, 114 Maine, 259; *Knox* v. *Coburn*, 117 Maine, 409. *Bryer* v. *Wyman*, 118 Maine, 378.

Is the petitioner in this case entitled to the writ? He is not so entitled if the purpose is vexatious, unlawful or the gratification of idle curiosity. *Eaton* v. *Manter*, 114 Maine, 261 and cases cited. He is not so entitled if his purpose is to "abuse the writ rather than use it." *White* v. *Manter*, supra.

While "it is impossible as yet to extract a rule that may be called well settled" (*White* v. *Manter,* supra) we think that the rule when settled will compel a denial of the writ in cases like this.

A stockholder may invoke the aid of the court to enforce his rights under R. S., Chap. 51, Sec. 22 without proof or allegation that his interests as stockholder require an examination of corporate records, and notwithstanding that his interests may be adverse, or his purposes hostile to the corporation. *Kuhbach* v. *Irving Co.,* (Pa.), 69 Atl., 981; *Cobb* v. *Lagarde,* (Ala.), 30 So., 326.

But the writ of mandamus is an "extraordinary remedy" *Edwards* v. *Farrington,* 102 Maine, 140. It would become a very ordinary remedy indeed if a mandamus writ like a trading stamp, should go with the sale of every share of stock.

The court will protect the interests of the smallest stockholder, but it will not exercise its extraordinary power at the mere behest of one who acquires a nominal stock interest for the sole purpose of advertising other goods or stocks. *Eaton* v. *Manter,* supra.

Exceptions sustained.
Peremptory writ denied.

THE MECHANICS SAVINGS BANK *vs.* RICHARD H. BERRY.

Somerset. Opinion November 18, 1920.

Fraud or infirmity in the inception of a promissory note may constitute a defense between the original parties, but as against an indorsee for value before maturity it is not a defense, unless it is shown that plaintiff had actual knowledge of such fraud or infirmity at the time of the purchase of the note, or had knowledge of such facts that his action in taking the note amounts to bad faith. Public Laws, 1917, Chap. 257, Sec. 56.

In an action by the indorsee of two promissory notes against the maker, before the Law Court upon defendant's exceptions to a directed verdict for the plaintiff, it is

Held:

1. That it is not controverted that the plaintiff purchased the notes before maturity.
2. That conceding such fraud existed in the inception of the notes as would constitute a defense between the original parties, the facts disclosed in the evidence do not form a reasonable basis for the inference of "actual knowledge by the plaintiff of the infirmity, ... or of such facts that its action in taking the instruments amounted to bad faith," under the Uniform Negotiable Instrument Act, Public Laws 1917, Chap. 257, Sec. 56, and the previous decisions of this court. The verdict was properly ordered, as a verdict for the defendant would not have been allowed to stand upon the evidence.

On exceptions. This is an action of assumpsit on two promissory notes, each dated July 7, 1917, payable to the order of Partin Manufacturing Company, for two hundred and twenty-five dollars, signed by the defendant, and endorsed by the payee to the plaintiff before maturity. Plea, the general issue, and a brief statement alleging fraud in the inception of the notes, knowledge by plaintiff, failure of consideration, lack of good faith, and that the notes were not taken in the usual course of business. Defendant attempted to introduce testimony showing fraud or irregularities between the original parties, but on objection by counsel for plaintiff, on the ground that it must first be shown that the plaintiff was not a purchaser in good faith, and

that it had knowledge of any irregularities or infirmities resulting from acts between the original parties, the testimony was excluded by the presiding Justice and an exception taken.

After the introduction of testimony was completed, the presiding Justice directed the jury to return a verdict of $450, and interest, for plaintiff, and defendant excepted. Exceptions overruled.

The case is fully stated in the opinion.

Thomas A. Anderson, for plaintiff.

John W. Manson, for defendant.

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

CORNISH, C. J. The plaintiff bank is the indorsee of two promissory notes for $225 each. The defendant is the maker and resists payment on the ground that they were obtained of him by the payee, the Partin Manufacturing Company of Memphis, Tennessee, through fraud. The plaintiff replies that even though fraud existed in the inception of the notes the plaintiff was a bona fide purchaser for value before maturity and without notice of the fraud, and therefore is entitled to recover.

Two exceptions were taken by the defendant. The first is based upon the exclusion of evidence offered by him under his brief statement tending to show fraud on the part of the original payee without first showing knowledge of the fraud on the part of the plaintiff. It is unnecessary to consider this, as the second exception, which was to the direction of a verdict for the plaintiff by the presiding Justice, covers the entire case, and in considering the second, the defendant's rights under the first are preserved by assuming that all the offered testimony relating to the original fraud is in the case. In other words we may assume the existence of such deception and fraud on the part of the Partin Manufacturing Company in obtaining the notes as would afford a valid defense in a suit between the original parties.

It is further admitted that the plaintiff took the notes before maturity. Therefore the only issue left for determination is the plaintiff's actual knowledge of the fraud or its bad faith, and that is a question of fact.

Upon this point the plaintiff introduced the deposition of Mr. MacKinnon, the president of the plaintiff bank, who testified that the bank is located at Des Moines, Iowa, and has been in existence since

1904; that he has been connected with it since its organization, at first as cashier, later as vice president, and for the past nine years as president; that the total resources are over two million dollars; that on June 6, 1917, Mr. G. H. Partin, president of the Partin Manufacturing Company, called at the bank and was introduced to the cashier and himself by one Graham, then a practicing attorney in Des Moines and now a Judge-Advocate in the United States Army. Mr. Partin stated that he desired to negotiate some paper with the bank and produced a statement of a firm of public accountants in Memphis, dated April 2, 1917, and covering the sales, operating costs and net gains of the company for the months of January, February and March, 1917, showing net gains of over forty thousand dollars. He also produced copies of letters of recommendation, either of Mr. Partin or of the company, from the officers of the Germania Savings Bank and Trust Company, the National City Bank and the People's Savings Bank and Trust Company, all of Memphis, and The National Bank of the Republic of Chicago, Illinois, the originals being in the hands of their New Hampshire attorneys. The cashier, at the request of the president, then ascertained the financial rating of the parties whose notes Mr. Partin wished to negotiate, found it to be satisfactory and so reported to the president.

On the following day, June 7, 1917, Mr. Partin returned to the bank and the transaction was completed. The Partin Manufacturing Company indorsed and delivered twenty-four notes against five different parties, aggregating $4500 in amount, the bank paying the face value thereof less ten per cent discount, the notes carrying no interest until maturity and being given on from two to eight months' time. The defendant's notes were not in this group first negotiated.

On July 26, 1917, before any of the notes purchased on June 7 had matured, Mr. Partin came to the bank again and desired to negotiate another lot of twenty-eight notes against six different parties, aggregating $6100 in amount. Among these notes were four of $225 each against the defendant Berry, all dated July 7, 1917, and due in October, November, December and January respectively. After looking up the commercial ratings of the several makers, including that of the defendant, the bank on July 27th purchased this lot on the same basis as the first, that is, face value less ten per cent discount. These notes also carried no interest until maturity. Payment in both cases was made partly by certificates of deposit, partly by cash

and the balance of $1400 in a deposit account not subject to check. This precaution was taken in order to protect the bank against loss on any notes that might be returned unpaid when sent forward for collection at maturity. Several protested notes were subsequently charged off and these exhausted this protecting account. Most of the notes however have been paid, the defendant himself having paid two of his, leaving unpaid the two in suit.

Mr. MacKinnon further testifies that he knew nothing of the nature of the business carried on by the Partin Manufacturing Company, or the consideration they had given for the notes, except that in a general way the notes were given for advertising matter sold the parties; that the purchase, indorsement and transfer were made in good faith on the part of the bank, in the ordinary course of banking business, and that the bank believed them to be free from infirmity. This constitutes a summary of the evidence for the plaintiff.

The defendant offered no testimony whatever in contradiction of this evidence and frankly admitted that he had none to offer on this point. His evidence was confined to the proof of the original fraud.

But he claims that from the evidence of the president and from the circumstances of the case, a jury would be warranted in inferring and therefore in declaring that the bank did have actual knowledge of the initial fraud or knowledge of such facts that its action in taking the notes amounted to bad faith. The fraud which created the infirmity in the Berry notes is alleged to have been perpetrated by an agent of the Partin Company in Pittsfield, the residence of the defendant. That company is a sales promotion business and the consideration of these notes was a contract on its part to increase the business of the defendant who was a retail druggist, and to furnish certain valuable prizes for him to display for six months and then award to the successful competitors. The principal prize was an automobile. The agent further agreed that the company had not inaugurated and would not inaugurate or carry on the same or a similar campaign within twenty miles of Pittsfield. It is the designed breach of all these agreements which the defendant says constituted fraud on the part of the company.

Admitting this to be true, what does the defendant rely upon here to prove actual knowledge of that fraud on the part of the bank or to show bad faith on its part?

As already stated, he relies wholly on inferences to be drawn as he says from the plaintiff's evidence and from the circumstances. These may be summarized as follows: That the purchase by a bank in Iowa from a party in Tennessee of notes against a party in Maine was an unusual transaction; that it would not ordinarily be completed without more investigation of the maker's financial condition than an examination of his rating in a commerical agency; that ten per cent was an excessive discount; that although the Partin Company was afterwards rumored to be in bankruptcy no notice was sent to the bank; that the accountants' statement furnished the bank was valueless; that the letters of recommendation may have been forged, and that the method of payment and the retention of $1400 for protection might indicate fraud.

All these points are strongly urged in argument by the learned counsel for the defendant, but the plaintiff replies that the transaction was not an unusual one in banking circles, that the investigation in a reputable commercial agency is in accord with usual practice, that ten per cent is not an extraordinary rate for discount by western banks, especially as the notes bore no interest until after maturity and the longest ones ran eight months; that the accountants' statement showed a concern doing a prosperous business; that there is no evidence that the letters of recommendation were forged, and that even if forged by the Partin Company, if they were presented to the bank as genuine and acted upon by it, the forgery could in no degree affect its good faith; that the manner of payment was not irregular, full payment in cash not being required, *Hobart* v. *Penney*, 70 Maine, 248, and that the retention of $1400 as a guaranty fund was a safe and conservative move on the part of a prudent investor.

In our opinion the points raised by the defendant do not furnish a reasonable basis for the inference of actual knowledge of fraud or bad faith on the part of the plaintiff. They do not rise above mere surmise or suspicion, even if they amount to that, and suspicion if proved is not sufficient to constitute a defense.

This is the first case to come before this court under the so-called Uniform Negotiable Instrument Act passed by the Legislature in 1917, Public Laws 1917, Chapter 257, that act having taken effect on July 6, 1917, and these notes being dated July 7, 1917. Section 56 of that act defines what constitutes notice of defect, viz: "To constitute notice of an infirmity in the instrument . . . . the

person to whom it is negotiated must have had actual knowledge of the infirmity . . . . or knowledge of such facts that his action in taking the instrument amounted to bad faith." This is in harmony with the previous decisions of this court to this effect, that the mere existence of circumstances calculated to excite suspicion in the mind of a prudent man is not sufficient to prevent recovery. *Farrell* v. *Lovett*, 68 Maine, 326. "Suspicious circumstances attending the transaction of indorsement, especially if aided by auxiliary evidence may have a tendency to show to the minds of a jury that the indorsee knew of the fraud or that he acted in bad faith. But such circumstances do not as a matter of law show such a thing. If an indorsee had reasonable cause to know that fraud had been perpetrated upon the maker by the payee of the note, a jury would generally be justified in finding that he did know it. But it would not necessarily follow. Reasonable cause to know a fact is one thing, and actual knowledge of it is another. What convinces one man may not convince another. The point to be found is not whether the indorsee might have ascertained and could have known that the note he purchases was fraudulently obtained, but whether he in fact knew it, or acted in bad faith." *Kellogg* v. *Curtis*, 69 Maine, 212. See also *Wing* v. *Ford*, 89 Maine, 140. Fraud on the part of the payee and its knowledge by the indorsee are two distinct facts, and proof of the former must not be allowed to color the latter. Nor should natural sympathy for the defendant affect the result.

Our attention has been called by the defendant to two recent cases in New Hampshire where similar notes originally taken by the Partin Manufacturing Company were in litigation and the defendants prevailed.

The first was *Mechanic Bank* v. *Feeney*, 108 Atl., 295, decided June 28, 1919, in which a verdict was directed for the plaintiff and the court sustained exceptions. Two reasons for that conclusion are given in the opinion; first because the transaction as testified to by the cashier, with a discount of ten per cent, and a payment of $1450 in cash and a draft for the balance, $4,040 payable in one year, seemed to the court to be out of the ususal course of banking business and inconsistent with a purchase in good faith; and second because the cashier did not testify that when the discount was made he believed the paper to be free from infirmity.

In the case at bar we do not attach so great importance to the fact proved here that payment was made partly in cash, partly by certificates of deposit, and partly by credit on the bank books to protect against loss, and further in this case the president did testify positively to his belief that the paper was free from infirmity when taken.

The second New Hampshire case is *Security Trust Co.* v. *Porter*, 109 Atl., 46, decided January 6, 1920, in which, as before, a verdict was directed for the plaintiff and exceptions were again sustained.

In that case the court held that a jury might well draw the inference that the notes were held by the bank not as a bona fide owner but for collection only, and relied upon the following facts to substantiate it: First, the plaintiff's request when sending the notes to a local bank for collection to return them without protest if not paid; second, the bringing of a former suit on two of the notes in the name of the Partin Manufacturing Company; third, the amendment of the pending suit in the name of the bank on two of the notes so as to include the two upon which the Partin suit had previously been instituted and presumably abandoned. The case at bar is clearly distinguishable from that case. Not one of the determining factors exists here. These notes were sent to the local bank and were duly protested in the ordinary course of business. Only one suit was brought and that by the indorsee upon the two unpaid notes, the defendant having paid the others.

Each case of this nature must be decided upon its own peculiar facts. Upon the facts proven before us it is our conclusion that the ruling of the presiding Justice directing a verdict for the plaintiff was justified, because a verdict for the defendant although rendered by a jury would have been so lacking in substantial basis, either of fact or of proper inferences from proven facts, that it could not have been allowed to stand.

Exceptions overruled.

BERNIE M. CONANT *vs.* ROBAIN ARSENAULT, et al.

Androscoggin. Opinion November 19, 1920.

Arbitration agreements. The right of free access to courts is inalienable. An agreement containing an arbitration clause respecting preliminary and collateral matters may be enforced, but not when respecting matters which go to the root of the cause of action. Courts cannot be ousted of their jurisdiction.

This is an action on the case to enforce the award of a referee. The plaintiff and defendant entered into a lumber contract, in which was a provision for the settlement of all controversies which might arise in the execution of the terms of the contract. Conceding the conduct of the reference at the hearing to be regular, yet the defendant says the action must fail for want of a binding agreement of reference.

Paragraph 5 of the contract, which embraces the agreement to refer is expressed 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 the 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 defendant contends that the language of the above paragraph contravenes the fundamental doctrine that parties are not bound by contracts that intercept the jurisdiction of the courts. The court below decided the case upon this doctrine and we think his decision must be sustained.

In a case involving an agreement of reference that "the parties or either of them, may submit" the matter of arbitration the "arbiter to be mutually agreed upon", the court in *Dugan* v. *Thomas*, 79 Maine, 221, say:—"Such a clause or arbitration cannot bind the parties. The right of free access to the Courts is alienable." It is further said:—"But men cannot be compelled, even by their own agreements, to mutually agree upon arbiters whose duties would, as in this case, go to the root of the principal claim or cause of action and oust the Courts of their jurisdiction."

The court is of the opinion that the language of paragraph 5 in the present case, goes to the root of the cause of action. It provides as will be seen, by reverting to the first part of the paragraph, that every issue that could be raised by the one side or the other with respect to the subject matter of the contract, "shall be finally determined by two indifferent persons," to be chosen in the manner specified, "whose decision shall be conclusive on both parties."

The distinction between the terms of the reference in the case at bar and that prescribed in the standard insurance policy is, that the latter relates only to the assessment of damages. This distinction is specifically pointed out in *Fisher* v. *Insurance Co.*, 95 Maine, at Page 489.

On exceptions. This is an action to enforce the award of a referee. A lumber contract entered into by plaintiff and defendant contained a provision for a reference for the settlement of all controversies which might arise between them in the execution of the terms of the contract, and that the award should be conclusive on both parties. The defendant contended that the agreement of reference or arbitration contravened the fundamental doctrine that parties are not bound by contracts which, if enforced, would oust the courts of their jurisdiction. The presiding Justice sustained the position of the defendant, and the plaintiff excepted. Exceptions overruled.

Case is stated in the opinion.

George C. Wing, for plaintiff.

McGullicuddy & Morey, for defendants.

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

SPEAR, J. This is an action on the case to enforce the award of a referee. The plaintiff and defendant entered into a lumber contract, in which was a provision for the settlement of all controversies which might arise in the execution of the terms of the contract. If the conduct of the reference at the hearing is conceded to be regular, yet the defendant says the action must fail for want of a binding agreement of reference.

Paragraph 5 of the contract, which embraces the agreement to refer is expressed 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 the 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 defendant contends that the language of the above paragraph contravenes the fundamental doctrine that parties are not bound by contracts that intercept the jurisdiction of the courts. The court below decided the case upon this doctrine and we think his decision must be sustained.

In a case involving an agreement of reference that "the parties or either of them, may submit" the matter of arbitration, the "arbiter to be mutually agreed upon," the court in *Dugan* v. *Thomas*, 79 Maine, 221 say:—"Such a clause of arbitration cannot bind the parties. The right of free access to the courts is inalienable." It is further said:—"But men cannot be compelled, even by their own agreements, to mutually agree upon arbiters whose duties would, as in this case, go to the root of the principal claim or cause of action and oust the courts of their jurisdiction."

The court is of the opinion that the language of paragraph 5, in the present case, goes to the root of the cause of action. It provides as will be seen, by reverting to the first part of the paragraph, that every issue that could be raised by the one side or the other with respect to the subject matter of the contract," shall be finally determined by two indifferent persons," to be chosen in the manner specified, "whose decision shall be conclusive on both parties."

The distinction between the terms of the reference in the case at bar and those prescribed in the standard insurance policy is, that the latter relates only to the assessment of damages. This distinction is specifically pointed out in *Fisher* v. *Insurance Co.*, 95 Maine, at Page 489.

Exceptions overruled.

HORACE WHITE *vs.* GEORGE ANDREWS.

Washington. Opinion November 19, 1920.

Motion for a new trial upon newly discovered evidence. Evidence restricted to the allegations of the motion, to the exclusion of rebutting evidence.

No question of law arises in this case. The action is based upon the alienation of the affections of the plaintiff's wife by the defendant. The declaration contains two counts, the first based upon a charge of criminal conversation; the second upon the allegation of enticement, whereby the plaintiff lost the affection and society of his wife.

The case comes up on a general motion and a motion upon newly discovered evidence. The newly discovered evidence comes within the rule authorizing the taking and use of such evidence. It will serve no useful purpose to analyze either the original or new evidence. The new evidence, however, if found to be true, considered in connection with the old, shows that the original case was saturated with fraud. A son, Delvin White, and a material witness for the plaintiff has made an affidavit that the evidence he gave at the trial was not only false but procured by the fraud of the plaintiff and others. This confession by the affiant is corroborated by several witnesses who say, that prior to his affidavit, he admitted to them he had falsely testified. In other words his affidavit was but a reiteration of what several witnesses testified he had told them.

George White, another son, and material witness, was also contradicted by several witnesses, in the new evidence, who testify that he said he had testified falsely at the trial, and at the behest of his father, the plaintiff, and others.

If the affidavit of Delvin White should be found by a jury to be supported by a preponderance of the evidence, it would result as a corollary that the plaintiff was guilty of both duress and subornation of perjury in the prosecution of his case at nisi. If so, there can be no doubt of the probability that a different verdict might be rendered at a new trial. *Palmer* v. *Railway*, 92 Maine, 399.

In this case the plaintiff and his witnesses whose testimony, in the trial at nisi, had been contradicted by the newly discovered evidence were permitted to testify. Such evidence is inadmissible and cannot be considered. R. S., Chap. 87, Sec. 57, contains the only authority for a motion based on newly discovered evidence. The part pertinent to such a case reads as follows:—

"When the motion is founded on an alleged cause not shown by the evidence reported, the testimony respecting the allegations of the motion, shall be heard

and reported by the Justice, and the case shall be marked 'law'." By this statute the only evidence to be heard and reported is upon "the allegations of the motion."

Accordingly the rebutting evidence in this case has not been considered in the deliberation of the court. That evidence will first be in order at a new trial.

On motion. This is an action to recover damages for alleged alienation of the affections of the plaintiff's wife by the defendant. The declaration contained two counts, the first charging criminal conversation, and the second alleging enticement. The jury returned a verdict for plaintiff. Defendant filed a general motion for a new trial, and also filed a motion for a new trial alleging newly discovered evidence. Motion sustained. New trial granted.

Case stated in the opinion.

H. J. Dudley, for plaintiff.

R. J. McGarrigle, for defendant.

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

SPEAR, J. No question of law arises in this case. The action is based upon the alienation of the affections of the plaintiff's wife by the defendant. The declaration contains two counts, the first based upon a charge of criminal conversation; the second upon the allegation of enticement, whereby the plaintiff lost the affection and society of his wife.

The case comes up on a general motion and a motion upon newly discovered evidence. The newly discovered evidence comes within the rule authorizing the taking and use of such evidence. It will serve no useful purpose to analyze either the original or new evidence. The new evidence, however, if found to be true, considered in connection with the old, shows that the original case was saturated with fraud. A son, Delvin White, and a material witness for the plaintiff has made an affidavit that the evidence he gave at the trial was not only false but procured by the fraud of the plaintiff and others. This confession by the affiant is corroborated by several witnesses who say, that prior to his affidavit, he admitted to them he had falsely testified. In other words his affidavit was but a reiteration of what several witnesses testified he had told them.

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If the affidavit of Delvin White should be found by a jury to be supported by a preponderance of the evidence, it would result as a corollary that the plaintiff was guilty of both duress and subornation of perjury in the prosecution of his case at nisi. If so, there can be no doubt of the probability that a different verdict might be rendered at a new trial. *Palmer* v. *Railway*, 92 Maine, 399.

In this case the plaintiff and his witnesses whose testimony, in the trial at nisi, had been contradicted by the newly discovered evidence were permitted to testify. Such evidence is inadmissible and cannot be considered. R. S., Chap. 87, Sec. 57, contains the only authority for a motion based on newly discovered evidence. The part pertinent to such a case reads as follows:—"When the motion is founded on any alleged cause not shown by the evidence reported, the testimony respecting the allegations of the motion, shall be heard and reported by the Justice, and the case shall be marked 'law'." By this statute the only evidence to be heard and reported is upon "the allegations of the motion."

Accordingly the rebutting evidence in this case has not been considered in the deliberation of the court. That evidence will first be in order at a new trial.

Motion sustained.
New trial granted.

HARRY B. BRADBURY

vs.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA.

Knox. Opinion November 27, 1920.

A clause in a fire insurance policy declaring the policy void, in the event of the existence of other insurance on the property, or the placing of a subsequent policy on the same property, without the assent of the company in writing or in print, is waived, if the agent of the company who placed the insurance, had knowledge that other insurance was on the property, or had knowledge that subsequent insurance was put on the property. The act of the agent is the act of the company, and his waiver is its waiver. R. S., Chap. 53, Sec. 119.

On October 9, 1917, a policy of fire insurance in the defendant company was issued to the plaintiff by one Moran, its agent. The policy provided that it would be void if the insured then had or should thereafter make any other insurance on the same property without the written assent of the company.

On October 11, 1917, a policy in the American Eagle Insurance Company covering the same property was issued to the plaintiff by the same Moran who was agent for both companies and whose indorsement both policies bore. No written assent to the subsequent insurance was given by the defendant.

Held:

1. That under R. S., Chap. 53, Sec. 119, the agent is to be regarded as in the place of the company in all respects regarding any insurance effected by him, and the company is bound by his knowledge of the risk and of all matters connected therewith.
2. That as this agent had actual knowledge of the placing of the subsequent insurance on the property, having issued both policies, his knowledge was the knowledge of the defendant company, his silence was its silence, and his waiver of the policy conditions was its waiver.
3. The ruling of the presiding Justice that judgment should be entered for the plaintiff, subject to a certain stipulation as to abiding the result of another suit, was without error.

On exceptions by defendant. This is an action on a fire insurance policy in the usual Maine standard form. Subsequent to the issuance of defendant's policy, other insurance in another company was put on the same property by the same agent. The policy issued by the defendant did not contain a written or printed permit for other insurance.

The defendant contended that its policy was void by reason of the fact that other insurance was subsequently placed on the property, without its assent thereto in writing or printing, in conformity with a clause in its policy. The agent of the defendant who placed its policy on the property, was also the agent of the other company whose policy he subsequently placed on the same property. The cause was heard by a single Justice without the intervention of a jury, upon an agreed statement as to certain facts with a certain stipulation as to abiding the result of another suit, with the right of exceptions to both parties, who ruled, as a matter of law, that judgment be entered for plaintiff, subject to the stipulation to abide, to which ruling defendant excepted. Exceptions overruled.

The case is fully stated in the opinion.

M. A. Johnson, and A. S. Littlefield, for plaintiff.

W. H. Gulliver, and H. L. Withee, for defendant.

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

CORNISH, C. J. The single point to be decided in this case is whether an existing and valid policy of fire insurance, providing that it shall be void if the assured shall thereafter make any other insurance on the property without the written assent of the company, is avoided by the issue of such subsequent policy, when the same person acts as agent for both companies and issues both policies.

The facts in the case are concisely these. The defendant's policy was issued to the plaintiff on October 9, 1917, by one Moran, its agent. This policy was in the usual Maine standard form and contained this provision: "This policy shall be void if . . . . the insured now has or shall hereafter make any other insurance on the same property without the assent in writing or in print of the company." Two days later, on October 11, 1917, the plaintiff procured from The American Eagle Insurance Company another policy on the same property, through this same Moran who was the agent of both

companies and whose indorsement both policies bear. It is admitted that the plaintiff never procured the defendant's assent in writing or print to such new insurance but that Moran when the defendant's policy was issued had actual knowledge of the existence of other insurance on the property, and that must have included the defendant's policy in question.

This situation calls into action at once the provision of R. S., Chap. 53, Sec. 119, and the determination of the effect of that provision upon the rights of the parties. This section provides among other things as follows:

"Such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known by the company and waived by it as if noted in the policy."

The force and scope of this statute have been declared and applied by this court in various decisions. *Day* v. *Ins. Co.*, 81 Maine, 244; *Hilton* v. *Assur. Co.*, 92 Maine, 272; *Guptill* v. *Ins. Co.*, 109 Maine, 323; *Hughes* v. *Ins. Co.*, 117 Maine, 246. In no case however have its purpose and effect been more clearly and forcibly stated than in *LeBlanc* v. *Standard Ins. Co.*, 114 Maine, 6, where the court say: "The language of this statute is most comprehensive and we think it was intended to be so. The statute itself seems to place no limits. The simple purpose of the statute is that those seeking insurance and those afterwards holding policies may as safely deal with the agents, with whom they ordinarily transact their business, as if they were dealing with the companies themselves. . . . . To the insured the agent is for all practical purposes the company. Good public policy then requires that the companies that appoint these agents and hold them out as their representatives shall be bound by what they do, and that if an agent acts without authority or in excess of authority, his principal should bear the consequences, rather than the insured who trusted him. The statute was enacted to give effect to that policy. Such has been the tenor of the decisions hitherto and such we think was the legislative intent. The statute is best construed by interpreting it just as it reads. The agent stands 'in the place of the company,' is the company, 'in all respects regarding any insurance effected by them'."

The case at bar falls fairly within this broad and just interpretation. Moran, when he issued the policy in the American Eagle Company, the "hereafter" policy, knew that only two days before he had given the plaintiff a policy in the Pennsylvania Company, the already existing policy, and yet he said nothing either to the insurer or the insured in regard to the matter and went forward with the issuance of the second policy. His knowledge was the knowledge of the Pennsylvania Company, his silence was its silence and his waiver was its waiver.

It has been decided in this State that notice of prior existing insurance given to the agent is notice to the company. *Bigelow* v. *Ins. Co.*, 94 Maine, 39. The defendant is obliged to concede this, but contends that notice of subsequent insurance, although the agent be the same in both instances, is not notice to the company. In other words, that on the date of the issuance of the American Eagle policy Moran's knowledge of the existing Pennsylvania Company insurance was the knowledge of the American Eagle Company and waived any defense on its part caused by prior insurance, yet his knowledge of the subsequent American Eagle policy was not the knowledge of the Pennsylvania Company and did not constitute a waiver of the provision as to subsequent insurance. We are unable to discover any substantial reason for this distinction. The statute makes the agent stand in the place of his company regarding "any insurance" effected by him, that is all insurance. If it applies to the knowledge of an existing policy of insurance when placing a subsequent policy, it should with equal force apply to the knowledge of the issuing of a subsequent policy while continuing as the agent of the company which has issued the existing policy. If it were not so, insurers who have confidence in agents, place all their risks in their hands, and commit to them all the details, would suffer from the very wrongs which this statute was designed to prevent.

The Massachusetts cases cited by the defendant have no application because they were not governed by a statute such as controls in the case at bar. The ruling of the presiding Justice that judgment should be entered for the plaintiff subject to a certain stipulation as to abiding the result of another suit, was correct, and the entry must be,

Exceptions overruled.

WILLIS HAY, Adm'r, d. b. n. c. t. a., In Equity

vs.

CHARLES H. DOLE, et als.

Cumberland. Opinion December 8, 1920.

Construction of a will. The share of a predeceased legatee, where the clear, unambiguous, and express language of the will, provides, under such circumstances, that the legacy shall "lapse," remains undisposed of, and passes as intestate property to the heirs at law.

Bill in equity for the construction of a will. Item three reads: "All the rest, residue and remainder of my estate both real and personal wherever situated and however and whenever acquired I give, bequeath and devise to my two brothers, Charles H. Dole of Texas, and Edward E. Dole of Shenandoah, Iowa, and to my two sisters, Sarah C. Dole of Portland, Maine, and Mary E. Fuller of Cumberland, Maine, share and share alike. In the event of any of my brothers or sisters above named not surviving me, the share of the brother or sister not surviving me shall lapse."

The sister Sarah C. Dole predeceased the testatrix.

Held:

That by the express language of the will, clear and unambiguous, Sarah's share remains undisposed of by the will and passed to the heirs at law of the testatrix as intestate property. Such is the universal and accepted meaning of the technical word "lapse" when aptly employed as here.

On report on agreed statement. A bill in equity seeking the interpretation of the residuary clause in the will of Elizabeth H. Avery. One of the residuary legatees predeceased the testatrix. The only question involved is as to whether the share such predeceased legatee would have received, had she survived the testatrix, goes to the surviving residuary legatees, or remains undisposed of and goes to the heirs at law as intestate property.

Case is fully stated in the opinion.

Harry C. Wilbur, for complainant.

Arthur Chapman, for Charles H. Dole, et als.

Verrill, Hale, Booth & Ives, for Howard H. Dole, et als.

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

CORNISH, C. J. Bill in equity asking for the interpretation of the third item in the will of Elizabeth H. Avery. This item reads: "All the rest, residue and remainder of my estate both real and personal, wherever situated and however and whenever acquired, I give, bequeath and devise to my two brothers Chester H. Dole of Texas, and Edward E. Dole of Shenandoah, Iowa, and to my two sisters, Sarah C. Dole of Portland, Maine, and Mary E. Fuller of Cumberland, Maine, share and share alike. In the event of any of my brothers or sisters above named not surviving me, the share of the brother or sister not surviving me shall lapse." The sister Sarah C. Dole predeceased the testatrix and the questions presented to this court are whether the share bequeathed under the will to Sarah shall be divided in equal parts, one-third each, among the surviving brothers and sister, Charles H. Dole, Edward E. Dole and Mary E. Fuller, or whether Sarah's share remains undisposed of by the will and passed to the heirs at law of the testatrix as intestate property.

The will itself answers these questions and requires no aid from the court. It expressly states that in case of the death of any of these devisees mentioned, his or her share shall lapse, that is shall be undisposed of under the will and therefore shall constitute intestate property.

It is doubtless true as a general rule that in cases of doubt the court is not predisposed to a construction which results in partial intestacy, because the mere fact of making a will ordinarily indicates that the owner of the property preferred to die testate rather than intestate, that is preferred to dispose of his estate through channels selected by himself rather than to have it distributed under an impersonal statute. That applies to lapsing implied from the words of the will. And yet a testator has a perfect right to provide for partial intestacy in certain contingencies if he sees fit to do so, and if this purpose is expressed in clear and unambiguous language no rule of law and no canon of construction prevents it. Nor has the court the right to thwart such expressed intent. In reality such a provision is in the nature of a bequest to his heirs at law as completely as if he had designated them in that way.

It is a general rule of testamentary construction that while untechnical words are understood to be used in their usual, ordinary and popular meaning, technical terms are presumed to be employed in their technical sense with the meaning ascribed to them by usage and sanctioned by judicial decision unless something in the context or subject matter clearly indicates that the testator intended a different use. *Jacobs* v. *Prescott*, 102 Maine, 63; *Houghton* v. *Hughes*, 108 Maine, 233; *Morse* v. *Ballou*, 112 Maine, 124. Especially should this rule obtain where, as here, the scrivener was evidently learned in the law, comprehended the exact legal signification of the technical terms employed, and drafted the document with studied care. It is a model of clear and concise legal expression. Two of the witnesses to the will are members of the bar and appear as counsel in this case. It is quite probable that the instrument was drawn by one of them.

Sometimes technical words are inaptly employed by untechnical scriveners, as other parts of the will may disclose, and then the rigor of the rule should be and is relaxed. But here the word "lapse" is aptly used by someone comprehending its exact significance. When therefore the will distinctly declares that in a certain event a certain share of the residuum shall lapse, it is hardly possible for the court to say that the testatrix intended that it should not lapse but should be equally divided among the three survivors. It seems reasonable to conclude that the word "lapse" was intentionally inserted to meet a situation created by statute. At common law the share of one predeceasing the testator, except in case of a joint interest, would lapse without words to that effect. But R. S., Chap. 79, Sec. 10, provides that "when a relative having a devise of real or personal estate, dies before the testator, having lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived." This statute would have applied here in case of the death of any of these four relatives leaving lineal descendants, and the share would not have lapsed but would have passed to such descendants. *Keniston* v. *Adams*, 80 Maine, 290. To obviate that very contigency and to effectuate what the common law in absence of the statute would have effectuated, the testatrix was careful to expressly provide that such portions should lapse, that is they should not come under the terms of the statute. The word was used advisedly.

This view is strengthened by an examination of item two of the will, where precisely the same provision was made, viz:

"Second: I give and bequeath the sum of ten thousand dollars each to my nephews, Donald Fuller, Harold Dole, Howard H. Dole and Stanley F. Dole, the same sum to my niece, Rose H. Dole, and the same sum to each of my three sisters-in-law, Laura Belle Dole, M. Louise Dole and Rose B. Dole. In the event of any of my nephews, or niece or sister-in-law above named not surviving me the share of the nephew, niece or sister-in-law not surviving me, shall lapse." Can there be any doubt as to the meaning of this clause? Certainly not. It distinctly and unqualifiedly provided for lapsing of legacies under a certain condition. The same situation exists under item 3, and the plain and apparent answer to the prayer of the bill is that the share of Sarah C. Dole remains undisposed of by the will and passed to the heirs at law of the testatrix as intestate property.

The learned counsel have discussed at great length the question whether under the first clause of item three, the devisees took as joint tenants or as tenants in common, that is, whether they took as a class with right of survivorship or as individuals without such right. The authorities seem to be uniform in holding that in case of bequests to individuals designated by name, the legatees take as individuals rather than as a class, as tenants in common rather than as joint tenants, unless the language of the will shows a contrary purpose. *Anderson* v. *Parsons*, 4 Maine, 486; *Morse* v. *Hayden*, 82 Maine, 227; *Stetson* v. *Eastman*, 84 Maine, 366; *Robinson App't.*, 88 Maine, 17. This rule is more easily invoked where there are words providing for an equal division among the takers. *Blaine* v. *Dow*, 111 Maine, 480, 483. Such words are present here, "share and share alike."

This point however needs no extended discussion, because the testatrix herself extinguished any possible hope of survivorship by definitely commanding that the share of a deceased legatee should lapse, that is should pass to her legal heirs at law. That command must be followed.

Bill sustained, with plaintiff's taxable costs only to be paid out of the estate.
Decree in accordance with opinion.

MATTHEW FOLEY

vs.

WALKER D. HINES, Director General of Railroads.

Cumberland. Opinion December 8, 1920.

Action for personal injuries. Provisions of the Federal Employers' Liability Act of April 22, 1908, U. S. Comp. St., Vol. 8, Secs. 8657-8665, not applicable. Defendant was engaged in Interstate Commerce, but plaintiff at the time of the injury in doing his particular work was not employed in such commerce. Instrumentalities in order to come within the act, must be impressed with an interstate character. Assumption of risk by plaintiff not a defense. Plaintiff had the right to recover as at common law, aided by the Workmen's Compensation Act of Maine, R. S., Chap. 50. Negligence of defendant the sole question. Verdict large but not grossly excessive.

Action by employe of the Portland Terminal Company to recover damages for injuries sustained while at work "trimming coal" in the hold of a vessel at the company's wharf in Portland. Plaintiff recovered a verdict of $9120.27. On defendant's motion for new trial and exceptions to the refusal of the presiding Justice to direct a verdict for the defendant, it is,

Held:

1. That this action under the evidence does not fall within the provisions of the Federal Liability Act of April 22, 1908, U. S. Comp. St., Vol. 8, Secs. 8657-8665.
2. Two facts must co-exist to bring a case within that statute, first the injury must be sustained while the railroad carrier is engaged in interstate commerce; and second, the employe at the very moment of the accident must be employed in, and the particular service rendered must be a part of, such commerce.
3. The plaintiff concedes that the defendant was engaged in interstate commerce, but the evidence shows that the plaintiff in doing his particular work at that time was not employed in such commerce.
4. The test is whether the employe at the time of the injury was employed in interstate transportation or in work so closely related to it or in an act so directly and immediately connected with it as substantially to form a part or necessary incident thereof.

5. Instrumentalities which have not as yet become impressed with an interstate character are not within the act even though at some future time they may be or are intended to be devoted to such use.
6. The coal upon which the plaintiff was at work had not become so impressed. It was being removed from the hold of a vessel, a portion to a general pile on or near the wharf and a portion to the cars of the Maine Central Railroad Company for transportation to various stations. No part of it had been appropriated or segregated for interstate use. It might later be used for that purpose or for intrastate locomotives or for both. The most that can be said is that the plaintiff was handling coal which at a later date might become part of an instrumentality used in interstate transportation. But that fact could not make him an employe engaged in interstate commerce.
7. The plaintiff therefore had the right to recover as at common law, aided by the Workmen's Compensation Act of Maine, R. S., Chap. 50, so that the sole question is that of defendant's negligence.
8. The jury found negligence on the part of the defendant and the court is of opinion that the verdict is not so manifestly wrong as to be set aside.
9. Nor are the damages so grossly excessive as to indicate prejudice or want of comprehension on the part of the jury. The plaintiff is a common laborer. Lack of education prevents his filling a clerical position and he must still rely for support upon his seriously diminished capacity as such common laborer. He lost a portion of his leg and must wear an artificial limb. The injury is permanent. The suffering was intense. Considering all the evidence we think the damages were large but not grossly excessive.

On exceptions and motion for new trial by defendant. This is an action on the case to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant, as a laborer in assisting in discharging coal from a vessel, at a wharf in Portland owned by defendant. Several counts at common law, and one invoking the provisions of the State Workmen's Compensation Act, R. S., Chap. 50, were embraced in the writ. Defendant filed the general issue, and also a brief statement of special matter of defense, alleging that the case came within the provisions of the Federal Employers' Liability Act of April 22, 1908, and that defendant could avail itself of assumption of risk by plaintiff as a defense. At the conclusion of the evidence the defendant orally submitted a motion for a directed verdict for defendant upon the grounds that plaintiff had failed to show negligence on the part of defendant; and that defendant was engaged in interstate commerce, hence could invoke the rule of assumption of risk by plaintiff as a bar to the action, which motion was overruled by the presiding Justice, and defendant excepted.

A verdict of $9120.75 was returned for plaintiff, and defendant filed a general motion for a new trial. Motion and exceptions overruled.

The case is fully stated in the opinion.

Richard E. Harvey, and William H. Looney, for plaintiff.

Charles B. Carter, of White, Carter & Skelton, for defendant.

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

CORNISH, C. J. On August 14, 1918, the plaintiff, an employe of the Portland Terminal Company, sustained injuries while at work "trimming coal" in the hold of a vessel at the company's wharf in the City of Portland. The jury rendered a verdict in his favor in the sum of $9,120.75 and the case is before the Law Court on defendant's exception to the refusal of the presiding Justice to direct a verdict for the defendant and on a general motion to set aside the verdict. The reasons assigned for asking for a directed verdict are two; first because the plaintiff has failed to show actionable negligence on the part of the defendant, and second because he came within the provisions of the Federal Employers' Liability Act and the defense could therefore avail itself of the plaintiff's assumption of risk, which it claimed had been fully proven.

The writ contains several counts at common law and also one invoking the provisions of the State Workmen's Compensation Act, R. S., Chap. 50. The legal rights of the parties as modified by that act will be considered later.

1. FEDERAL EMPLOYERS' LIABILITY ACT.

The first inquiry that naturally arises is whether this case falls within the provisions of the Federal Employers' Liability Act, of April 22, 1908, U. S., Comp. Statute, Vol. 8, Secs. 8657-8665. If it does, then the plaintiff's assumption of risk, and contributory negligence in reduction of damages, are open to the defendant unless the injury was caused through the violation of some statute enacted to promote the safety of employes. No such statutory violation being claimed here those defenses would be available. *Seaboard Air Line* v. *Horton,* 233 U. S., 492; *Jacobs* v. *Southern Railway Co.,* 241 U. S., 229; *Chicago etc. R. R. Co.* v. *Ward,* U. S. Sup. Court, Advance Op., No. 11, Page 33, decided March 1, 1920.

The essential words of Section 8657 are these: "Every common carrier by railroad while engaged in commerce between any of the

several States . . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. . . . ." Two facts must co-exist in order to bring a case within this provision, first the injury must be sustained while the carrier is engaged in interstate commerce, and second the employe must at the very moment of the accident be employed in and the particular service rendered must be a part of such commerce. Mere employment by an interstate carrier is not sufficient to meet the second requirement, and on the other hand the employe need not be regularly and continuously engaged in interstate work. The same workman on different days or on different hours of the same day may be engaged in interstate and intrastate work and he may pass from one to the other frequently, so that at one period he may be within and at another he may be without the scope of the Act. *N. Y. Central R. R.* v. *Carr*, 238 U. S., 260.

The facts in the case that must furnish the answer to this first inquiry are uncontroverted.

The defendant is a company which owns and operates certain railroad property formerly owned by the Maine Central Railroad Company and Boston & Maine Railroad, situated in Portland, Westbrook, South Portland and that vicinity. It also owns wharf property on the shore front in Portland harbor with all the necessary fixtures and appliances for discharging coal from vessels or barges. On the day of the accident the company's employees, among whom was the plaintiff, were engaged in discharging a cargo that had come by the steamer Louise, from Baltimore, Maryland, the consignor being the Consolidation Coal Company, and the consignee the Maine Central Railroad Company. The steamer docked on Wednesday morning, August 14, and finished discharging on Friday morning, August 16. Foley was injured on Thursday, August 15. The Terminal Company had nothing to do with the coal after it was unloaded. Its connection ceased when the cargo was discharged. Part of the coal was dumped from the buckets carrying the coal from the hold of the steamer into railroad cars on the wharf and part upon a pile located on the wharf. The Maine Central Railroad Company, the consignee, took charge of the cars and distributed them where it wished. This cargo of about 2900 tons was distributed as follows: To Deering Junction, Maine, about 440 tons; Thompson's Point, Maine, about 945 tons; North Conway, N. H. about 86 tons; Ricker

Hotel Company, Rockland, Maine, about 43 tons; Ricker Hotel Company, Kineo, Maine, about 16 tons, while the balance, about 1398 tons, or nearly one-half of the entire cargo, was left in a pile on the wharf. The coal shipped to Deering Junction and North Conway would be stored there and ultimately be used by both interstate and intrastate locomotives; that shipped to Thompson's Point, for use in the locomotive and car repairs belonging to the Terminal Company, where both interstate and intrastate equipment was repaired; what use would be made of that shipped to the Ricker Hotel Company is not shown, but presumably by that company in connection with its hotels at Rockland and Kineo; while the large portion left in the pile on the wharf was ultimately to be used as fuel by both interstate and intrastate locomotives of the Maine Central Railroad, Boston & Maine Railroad and Portland Terminal Company, as they might have occasion to coal there.

The plaintiff was one of the crew in the hold of the steamer employed in discharging this coal at the time of the accident. Did these conditions bring him within the provisions of the act in question? We have no hesitation in answering that question in the negative.

It should be borne in mind that the fact that the plaintiff was engaged in discharging coal from a steamer which had brought it from Baltimore, Maryland, to Portland, Maine, and therefore was in that sense engaged in interstate commerce is entirely immaterial. That steamer was not owned by the defendant and formed no part of its system, and the Federal Act applies only to "a common carrier by railroad." The Pawnee, 205 Fed., 333. The transportation to be considered here therefore is not concerned with the past but with the future, not with the ending of a voyage but the beginning of a shipment. The plaintiff concedes in argument that the defendant at the time of the accident was a common carrier by railroad within the meaning of the Act and was engaged in interstate commerce.

The issue is therefore narrowed to this, was the plaintiff in doing his particular work at that time employed in such commerce? The test laid down by the Supreme Court of the United States on this point is that the employee at the time of the injury must be employed in interstate transportation or in work so closely related to it or in an act so directly and immediately connected with it as substantially to form a part or necessary incident thereof. *N. Y. Cen. R. R. Co.* v. *Carr*, 238 U. S., 260; *Shanks* v. *Delaware &c. R. R. Co.*, 239 U. S., 556.

There is little difficulty in deciding whether the statute applies in a case of direct employment, as for instance to a conductor, engineer, or brakeman while actually employed in running an interstate train. The difficulty arises when we are asked to determine cases where the act or the work is connected with one of the many instrumentalities without which interstate transportation could not be carried on. In deciding cases in this broad domain the courts are governed by the reasonable and firmly established principle, that in order for instrumentalities such as tracks, bridges, engines, or cars to be regarded as engaged in interstate commerce they must already have been devoted to such use and impressed with such interstate character. If so the fact that they are also used for intrastate traffic does not destroy their interstate character. They need not be exclusively used for interstate work but they must have been impressed with the interstate character. A vital distinction exists here, which must not be overlooked. Tracks, road bed, bridges, buildings, are instrumentalities in the nature of fixtures and once having been devoted to interstate commerce they remain so during their use as such although also used in connection with intrastate traffic. But if these instrumentalities have not as yet become impressed with an interstate character then the mere fact that at some future time they may be or are intended to be devoted to such use does not bring them within the Act. To illustrate the foregoing principles: The following cases have been held to be within the Act: An employe engaged in sealing up and labeling both interstate and intrastate cars, *St. Louis &c. R. R. Co.* v. *Seale*, 229 U. S., 158; Yard clerk making record of incoming and outgoing interstate and intrastate cars, *Pittsburg R. R. Co.* v. *Farmers Trust Co.*, 183 Ind., 293; Member of construction crew operating steam shovel in removing earth from interstate tracks, *Tralich* v. *Chicago &c. Ry. Co.*, 217 Fed., 677; Section-hand sweeping snow from tracks used for both interstate and intrastate tracks, *Hordick* v. *Wabash R. R.*, 181 Mo., App., 160; Repairing telegraph lines used in directing interstate trains, *Deal* v. *Coal &c. Ry. Co.*, 215 Fed., 2936; Repairing engine used in interstate commerce, *Law* v. *Illinois Cen. R. R.*, 208 Fed., 871; *So. Pac. Co.* v. *Pillsbury*, 170 Cal., 787; Section-foreman inspecting track used for both; *Louisville R. R. Co.* v. *Kemp.*, 140 Ga., 659; *So. Ry. Co.* v. *Puckett*, 16 Ga. App., 556; *Anest* v. *Columbia &c. R. R.*, 89 Wash., 613; Coaling engine preparing to make interstate trip; *Armbruster* v. *Chicago &c. Ry. Co.*, 166 Iowa, 176;

Mechanic working on turntable while turning interstate engine, *Chesapeake &c. Ry. Co.* v. *Koenhoff*, 67 Ky., 358; Section-foreman repairing switches in yard used for making up trains of both kinds, *Willever* v. *Delaware &c. R. R. Co.*, 87 N. J. L., 350; Signalman operating signals controlling both kinds; *Cincinnati &c. R. R.* v. *Bonham*, 130 Tenn., 446; Employe carrying bolts to be used in repairing a bridge, *Pedersen* v. *Delaware &c. R. R.*, 229 U. S., 146. In the case last cited the court was careful to note the distinction between impressed and non-impressed instrumentalities by adding: "Of course, we are not concerned here with the construction of tracks, bridges, engines or cars which have not yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." See also *Kinzell* v. *Chicago &c. R. R.*, 250 U. S., 130.

Of cases held not to be within the statute the following may be cited: Laborer working on track intended to be used by both interstate and intrastate trains if and when completed; *Chicago &c. R. R.* v. *Steele*. 183 Ind., 446; Conductor operating train loading ties to be taken to a point within the State and subsequently to be used in construction, either within or without the State, *Alexander* v. *Great Northern Ry. Co.*, 51 Mont., 572; Employe in the construction of a tunnel intended to straighten a line but as yet unused, *Raymond* v. *Chicago Ry. Co.*, 243 U. S., 43; Unloading barrels of paint to be used in painting both interstate and intrastate cars, *Salmon* v. *Southern Ry. Co.*, 133 Tenn., 230; Brakeman on a train carrying water to a tank within the State from which both inter and intrastate engines took their supply; *M. K. & T. Ry* v. *Fesmire*, (1912), Tex. Civ., App., 150 S. W., 201.

Applying these principles and noting the clearly settled distinction it is obvious that the coal in question at the time of the plaintiff's injury had not become an instrumentality of interstate commerce, and therefore the plaintiff was not employed in that commerce. He was at work assisting in the removal of coal in bulk from the hold to the cars of the consignee or to the general pile on the wharf. No part of it had been appropriated or segregated for interstate use. It might be used for that purpose or it might be used for intrastate locomotives or for both. At some time in the future some other employe if engaged in coaling an interstate engine from some portion of the stock would be within the Act, as in *Armbruster* v. *Chicago &c. Ry.*

Co., 166 Iowa, 176, before cited, but that time had not arrived and the plaintiff's work was no more directly and immediately connected with and a substantial incident of interstate commerce than that of a workman loading a railroad car at the mines. The cases so hold.

The fireman of a switching-engine handling cars of coal between two intrastate points, their bulk to be broken at the point of destination and some portions afterwards used for fuel on interstate engines, was held not to be engaged in interstate commerce, in *Barker* v. *Kansas R. R.*, 94 Kan., 177. The court used this language: "The most that can be said is that the plaintiff was handling coal which at a later date might become a part of an instrumentality used in the transportation of interstate commerce. But this fact alone could not make him an employe engaged in interstate commerce."

Where an employe in a colliery was mining coal intended to be used in the company's locomotives moving interstate commerce, he was held not to be within the Act, in *Delaware &c. R. R. Co.* v. *Yurkonis*, 238 U. S., 439. So an employe engaged in removing coal from storage tracks to coal chutes destined at some time for use in interstate hauls, was held not to be an interstate employe, in *Chicago &c. R. R.* v. *Harrington*, 241 U. S., 177. In the course of the opinion the court said: "Manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal-chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employe of the carrier while he is moving coal in the carrier's colliery intended to be used by it in interstate locomotives is not engaged in interstate commerce within the meaning of the Federal Act, (*Del. &c. R. R.* v. *Yurkonis*, 238 U. S., 439) and there is no distinction in principle between the two cases."

The cases cited by the defendant are not in conflict with the rule which we apply. We will consider each of the defendant's cited cases.

In *Barker* v. *Kansas &c. R. R.*, 88 Kan., 767, 129 Pac., 1115, a new trial was granted because of error in the admission of evidence. The case was retried and reported again in 94 Kan., 177, 146 Pac., 358, where the court practically reversed its former view stated in the case cited by defendant, and held that the employe was not engaged in interstate commerce. This case has been cited already in this opinion among the illustrations of non-interstate employes.

In *Southern Ry. Co.* v. *Peters*, 194, Ala., 94, 69 So., 611, the plaintiff was working at a coal chute rolling a buggy of coal for an incoming interstate locomotive, a clear case of direct and immediate connection with interstate traffic.

In *Eng* v. *Steam Ry.*, 210 Fed., 92, plaintiff was injured while framing a new office in the defendant's freight shed which had been used for a long time in both interstate and intrastate business. *Held*: That this did not constitute construction of a new instrumentality of interstate commerce but the repair of an instrumentality already impressed with that use, and hence the plaintiff was within the Act, thus sharply marking the distinction we have already referred to.

In *Illinois Cen. R. R.* v. *Porter*, 207 Fed., 311, the plaintiff was injured while wheeling interstate freight from a warehouse into a car to be transported in interstate commerce, another obvious case of direct connection.

In *Central R. R.* v. *Colasurdo*, 192 Fed., 901, the plaintiff was repairing a switch in defendant's terminal yards over which both inter and intrastate commerce was continually transported.

In *Cousins* v. *Ill. Cen. R. R.*, 126 Minn., 174, 148 N. W. 59, the Supreme Court of Minnesota held that a workman wheeling coal to heat a railroad shop in which both interstate and intrastate cars, the most being interstate, were repaired was employed in interstate commerce, but that decision was reversed by the Supreme Court of the United States, on the authority of *Delaware &c. R. R.* v. *Yurkonis*, 238 U. S., 439, and *Shanks* v. *Delaware &c. R. R.*, 239 U. S., 556, both supra. See *Illinois Cen. R. R.* v. *Cousins*, 241 U. S., 641.

In *Montgomery* v. *So. Pacific Ry.*, 64 Or., 597, 131 Pac., 507, the plaintiff was a member of a switching crew engaged in moving an oil tank car to provide fuel for interstate engines, in switching and spotting cars loaded and to be loaded with interstate commerce and in hauling cars to a station from which they could be conveniently taken by a regular interstate train.

Pelton v. *Ill. Cen. Ry. Co.*, 153 N. W., 334 (Iowa), is simply a rescript per curiam, correcting on a rehearing a former opinion in the same case relating to pleading in this class of cases, and does not decide the point raised here.

In *Barlow* v. *Lehigh Valley*, 214 N. Y., 116, 107 N. E. 814, the New York Court held that the engineer of an engine switching coal-cars transported from another State so that they could be placed

on a trestle to be unloaded, and the coal to be taken indiscriminately by interstate and intrastate engines, was employed in interstate commerce. This was contrary to the well established rule and on error to the Supreme Court of the United States this decision was reversed. *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S., 183.

Upon both reason and precedent therefore it is the opinion of the court that the plaintiff was not an interstate employe within the meaning of the Federal Statute at the time of his injury. The growing frequency of cases in this State in which this question arises affords the excuse for the prolonged discussion of the subject.

2. NEGLIGENCE OF DEFENDANT.

As the Federal Employers Liability Act is not involved, the plaintiff has a right of action at common law aided by R. S., Chap. 50, the Workman's Compensation Act so-called. The defendant is not an assenting employer and employs more than five workmen, so that it is deprived of the defenses of contributory negligence of a fellow servant and assumption of risk. This brings us to the consideration of the negligence of the defendant. The facts connected with the happening of the accident are as follows:

The plaintiff had been in the defendant's employ as a section-hand for several years, working more or less about the wharves, but had never taken part in discharging a vessel. After a month's vacation in the Summer of 1918 he applied to one McDonough, the foreman of the defendant's wharves and coal unloading facilities, for a job, and was told to report on August 4, for work "trimming coal," which he did, and he continued to work until August 15, the day of the accident. This was the mode of operation. These coal vessels have bulkheads running transversely, about thirty feet apart, from the deck to the bottom and sides, so that the hold is divided into several compartments with a hatch above each. The usual method of unloading is by means of an iron bucket weighing 3,000 pounds, with opening and closing jaws, which is operated from the wharf by means of an overhead crane or yard-arm. This bucket is extended by the yard-arm over the vessel, is dropped through the hatch way of a compartment, digs into the coal, fills itself, is hoisted up to the yard-arm, then on a trolley attached to the yard-arm is run ashore to a point above waiting railroad cars or above the wharf, then opened, spilling the coal into the cars for shipment or upon the wharf pile.

It is operated by two men located in a tower on the wharf, one an engineer who hoists, lowers, fills and empties the bucket, the other, the trolley-man, who runs the bucket on the trolley out to the proper position over the hatchway and back to the proper position over the cars or wharf. As a vessel lies at the wharf with the hatches open neither the engineer nor the trolley-man can see a man in the hold working on the inshore side. When the unloading begins the coal is nearly level with the deck and the bucket fills itself readily. Gradually it works its way down to the bottom in the center of the hold, with the coal on the four sides at an incline. As the yard-arm runs at right angles with the keel of the vessel it is possible for the engineer and trolley-man to throw the bucket toward the offshore side and the inshore side of the hold, but they cannot thrust it either forward or aft. When the coal has been cleaned by the bucket from the center and also from the offshore and inshore sides, men are sent down into the hold to shovel the coal from the corners and from forward and aft into the center so that the bucket may drop down and seize it. These men are called "trimmers," and it is this kind of work that the plaintiff was performing when injured. He had been working with a crew cleaning out a forward compartment, and when that was finished they were all sent aft to help another crew clean out hatch No. 2. Foley was the last man to leave the forward and to enter the rear compartment, and he took the only place that was left, which was in the wing on the inshore side. He was at work as he says trimming the coal, throwing it into the center, when the bucket came down the hatchway, swung in towards him and grabbed him by the leg. He had heard a shout from some of the crew, had straightned up and tried to step ahead, but the pile of coal in front of him prevented him from saving himself.

The jury found negligence on the part of the defendant, and it is the opinion of the court that their verdict on this point is not so manifestly wrong as to require intervention. The plaintiff was set at work by the foreman McDonough without any instructions or warnings whatever. This is admitted by the foreman, who also testifies that the other workmen had been instructed by his predecessor. And the plaintiff had not worked sufficiently long to gain the necessary knowledge by experience. After the trimmers were sent down into the hold the bucket was not supposed to be swung any more to either side, but to simply take the coal from the bottom directly under the

hatch, to which spot the trimmers were shovelling it. Had this course been followed the plaintiff would not have been injured. The foreman saw him at work on the inshore side and says he thought he was in a perfectly safe position. The bucket had come straight down once and taken the coal from the center in the regular way after the trimmers began work. The second time it was lowered it was made to swing inshore evidently by the men in control. There was no occasion to do this. It was out of the ordinary, and that was the precise act which caused the injury. The jury could well find that it was a negligent act on the part of the operators on the wharf.

3. EXCESSIVE DAMAGES.

The verdict was $9,120.75. The plaintiff is 41 years old. The injury consisted of two broken bones of the ankle, the astragalus and the cuboid, with an apparent crushing just below the ankle. Effort was made to avoid amputation, but gangrene set in and on September 3rd, the leg was amputated above the ankle. The plaintiff now wears an artificial limb and his physician testifies that he is and always will be incapable of hard physical labor. Yet he knows no other kind. Lack of education prevents his filling a clerical position and he must still rely for support upon his seriously diminished capacity as a common laborer. His wages at the time of the accident were fifty-six cents per hour with seventy-five cents for overtime. His physical suffering was at times intense. Upon this question of damages the defendant offered no testimony. From the very nature of the case the injury spoke for itself.

After studying the evidence and the situation carefully, and considering all the elements which enter into it, it is the opinion of the court that the damages although large are not grossly excessive. *Nadeau* v. *Caribou W. L. & P. Co.*, 118 Maine, 325, 329.

Motion and exceptions overruled.

LUCINIA HEATH HOPKINS *vs.* INHABITANTS OF BUCKSPORT.

Hancock. Opinion December 18, 1920.

Dismissal of a school teacher under R. S., Chap. 16, Sec. 36, Par. III. Superintending School Committee, representing one party only, in dismissing a teacher, must strictly pursue the authority given them under the statute. Fitness of the teacher being conceded, opportunity to demonstrate as to whether her services would be unprofitable to the school, must be given to her before she can be dismissed. The action of the committee, to be effective, must, in all cases, be "after due notice and investigation" within the meaning of the statute. "Notice" must impart nature of grounds alleged for dismissal.

The authority given by R. S., Chap. 16, Sec. 36, Par. III, to a Superintending School Committee, to vacate a contract, being an authority given to those who represent one party only, must be strictly pursued according to the provisions of the statute, to have that effect.

The statute in question authorizes the dismissal of a teacher upon two grounds: Unfitness to teach, and failure of practical success in the work of the school rendering the teacher's services unprofitable to the school; the first may be apparent either before or after the work of the school has begun; but failure of practical success in the work of the school can only become apparent after the work has actually begun.

The action of the committee in the instant case cannot be sustained. The fitness of the plaintiff to teach the school is conceded; she should have had the opportunity to show practical success in the school work.

Furthermore, the action of the committee can only be taken "after due notice and investigation." The statement in the record before the court is insufficient as notice to the plaintiff of the object of the meeting at which action was taken dismissing her.

On report. An action of assumpsit to recover of the town of Bucksport the sum of five hundred and fifty dollars, which plaintiff, alleges would have been due her as wages as school teacher under her contract with defendant for the school year beginning September, 1918, had she not been dismissed by the Superintending School Committee of defendant town, prior to the time she was to begin her

services under the contract. The defendant filed the general issue, and a brief statement that the Superintending School Committee of the defendant town had dismissed plaintiff under authority of Chap. 16, Sec. 38 of the Revised Statutes. It was admitted that plaintiff had the necessary certificate for teaching, and that she had been engaged by the defendant town to teach school for the school year beginning in September, 1918, at a salary of $550 a year. During the school year plaintiff received $110 for services as teacher for eleven weeks in her home district. The cause was tried by the presiding Justice without the intervention of a jury, and after the close of the testimony, by agreement of the parties, the case was reported to the Law Court. Judgment for the plaintiff for $440 with interest from the date of the writ.

Case stated in the opinion.

Fellows & Fellows, for plaintiff.

W. C. Conary, for defendant.

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

MORRILL, J. It appears in this case that the plaintiff, a teacher of seventeen years experience, was duly employed to teach the West Side Intermediate school in the defendant town for the year beginning in September, 1918, and that before the school opened in September she was dismissed by the Superintending School Committee; that she had the necessary certificate for teaching and was qualified to teach is admitted. In justification of the action of the committee, the defendant relies upon R. S., Chap. 16, Sec. 38, Par. III which reads as follows:

"Sec. 38. Superintending school committees shall perform the following duties: . . . .

III. After due notice and investigation, they shall dismiss any teacher, although having the requisite certificate, who proves unfit to teach, or whose services they deem unprofitable to the school; and give to said teacher a certificate of dismissal and of the reasons therefor, a copy of which they shall retain, and such dismissal shall not deprive the teacher of compensation for previous services."

The certificate given by the committee to the plaintiff, a copy of which they retained, is as follows:

"Whereas on the 16th day of September A. D. 1918, at a meeting of the Superintending School Committee of the Town of Bucksport, Maine, duly called and held at the office of W. C. Conary in said Bucksport, at 7.30 P. M., and after due notice to Lucinia E. Hopkins, teacher of the West Side Intermediate School, so called, in said Bucksport, that said Committee would meet at above time and place to act upon the advisability of Lucinia E. Hopkins teaching said school, and at which time and place said Lucinia E. Hopkins might present herself and be heard in the matter, if she desired.

Now, therefore, we the undersigned Superintending School Committee having met as above set forth, the said Lucinia E. Hopkins being present at said meeting; and after due investigation and deliberation on the above matter it was, voted:

That the teacher for the West Side Intermediate School, so called, in said Bucksport, Lucinia E. Hopkins, be and hereby is dismissed, as her services in the judgment of said Committee would be unprofitable to said school on account of her admitted associations with a German Alien Enemy of the United States of America, under suspicion and under investigation at this time by the Government.

Dated at an adjourned meeting of said Superintending School Committee, at Bucksport, Maine, this twenty-third day of September A. D. 1918.

W. C. CONARY,
ARCHIE L. WHITE,
Superintending School Committee
Bucksport, Maine,"

Counsel for the defendant contends that the "committee had judicial authority given them by the legislature" and that their proceedings constituted "a judicial deliberation and decision of that committee" which is binding upon the plaintiff.

We think that the defense cannot be sustained. We have not been furnished with the record of the proceedings before the committee, except the certificate above copied. It appears from the testimony of the plaintiff, who was the only witness at the trial below, that in the summer of 1918 she purchased an automobile to enable her to teach in Bucksport, and to return to her home in Verona each night on account of her mother's illness; her husband secured the

services of one Margraf to teach her to run the automobile, and in company with him she drove to Bucksport several times and about Verona; Margraf was a German alien, a near neighbor of the plaintiff and her husband, whom they had known for several years during which he had been coming to Verona in the summer season. The plaintiff testifies that she did not know that Margraf was under suspicion until so informed by a Mr. Wilson, at the hearing, and that she then told him that she did not know it; Mr. Wilson's connection with the affair does not appear. As to admissions by the plaintiff referred to in the certificate, she testifies: "That is all they asked me, if they had seen Mr. Margraf with me in the automobile, and I told them yes, he had taught me to run the automobile." It does not appear that any complaint against, or criticism of, the plaintiff had been lodged with the committee, or that any dissatisfaction with her existed in the community; nor does it appear that Margraf was in fact "a German Alien Enemy of the United States of America, under suspicion and under investigation at this time by the Government," or that the committee had before them any evidence to that effect.

This proceeding is very far from the investigation contemplated by the statute, which constitutes the Superintending School Committee, in the proper exercise of its powers, a tribunal with visitatorial powers. The authority given to the committee, to vacate a contract, being an authority given to those who represent one party only, must be strictly pursued according to the provisions of the statute, to have that effect. *Searsmont* v. *Farwell*, 3 Maine, 450, 453.

The statute in question authorizes the dismissal of a teacher upon two grounds: Unfitness to teach and failure of practical success in the work of the school, rendering the teacher's services unprofitable to the school. It is evident that these causes may run into each other; yet they are substantially distinct. Unfitness to teach, including in that term moral and temperamental unfitness as well as lack of educational training and ability, may be apparent either before or after the actual work of the school has begun; but failure of practical success in the work of the school can only become apparent after the work has begun. The clause, "or whose services they deem unprofitable to the school," is first found in the R. S. of 1841, Chap. 17, Sec. 41, Par. V, in the form, "or whose services are believed by

them to be unprofitable to the school." This cause of dismissal was evidently introduced into the statute, to cover cases frequently arising where from some cause it is apparent, after the school has begun, that the teacher's usefulness has become impaired, and that the good of the school requires the dismissal. Such action in vacating a contract can only be justified as for the good of the school, and should only be taken after notice and "candid" investigation. R. S., 1841, Chap. 17, Sec. 41, Par. V.

It is apparent that the action of the committee cannot be sustained. The fitness of the plaintiff to teach the school is conceded; she should have had the opportunity to show practical success in the school work. The committee acted, in good faith no doubt, not upon actual conditions and results, but in anticipation of what they believed or feared would be future results.

We might well close this opinion here; but another phase of the case is worthy of consideration. The action of the committee can only be taken "after due notice and investigation;" "candid investigation" is the language of the early statute. The only record of the action of the committee, which is before us, shows that the committee met "to act upon the advisability of Lucinia E. Hopkins teaching said school, at which time and place said Lucinia E.Hopkins might present herself and be heard in the matter, if she desired." As notice to the plaintiff of the object of the meeting, such a statement is wholly insufficient; from it she could not know for what reason her dismissal was sought, whether upon the ground of moral unfitness, temperamental unfitness, or lack of educational qualifications; much less whether it was sought on the ground that her services were deemed to be unprofitable to the school. She testifies that she attended the meeting and brought some parties with her; but she was entitled to know in advance on what ground her dismissal was sought. This, so far as the record before us shows, she did not have.

Judgment for the plaintiff for $440 with interest from the date of the writ.

WILLIAM J. SMITH

vs.

WALKER D. HINES, Director General of Railroads.

Washington. Opinion December 18, 1920.

Actions under Federal Employers' Liability Act. Defendant's negligence. Assumption of risk by plaintiff. The servant assumes the ordinary risks of his employment, but only such extraordinary and unusual risks as are obvious, and to him known and appreciated.

This action is brought under the Federal Employers' Liability Act of April 22, 1908, 35 U. S. St. 65, C. 149, U. S. Comp. St. Secs. 8657-8665, to recover for injuries while employed by defendant as a freight conductor. The jury returned a verdict for the plaintiff for $8,454.66, and the case is before the court on the defendant's general motion for a new trial.

Held:

1. The record shows, and the jury was fully justified in finding, that the speed attained by the engine and sustained until the instant of impact was at least ten miles an hour; that no effort was made by the engineer to apply the brakes until the moving car was within from six to ten feet of the standing cars. That the impact was violent, every witness, including the engineer, say the cars came together with a crash. And as to the action of the brakes, a finding that the brakes did respond and act would be justified, for the "shaking and slatting" of the car can be explained upon no other theory.
2. A careful review of the evidence fails to satisfy us that the plaintiff was negligent in placing himself where he was, and doing what he did when injured. And as to defendant's contention that the plaintiff assumed all the risk of the particular danger which caused the damage to him, it is the opinion of the court that the plaintiff did not assume the risk. That he did assume the ordinary risks of his employment, and too that he assumed the extraordinary and unusual risks which are obvious, and risks of which he knew and which he appreciated, is well settled. But the circumstances of this case place it in a class far removed from the ordinary happening, and one in which, if cases do occur, they seldom reach courts of last resort.
3. The settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that

the employee may assume that the employer, or his agents, have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.

An action under the Federal Employers' Liability Act to recover for personal injuries received while in the employment of defendant as freight conductor. Plea, the general issue, and a brief statement, alleging assumption of risk by plaintiff. A verdict of $8,454.66 for plaintiff was returned, and defendant filed a general motion for a new trial. Motion overruled.

Case fully stated in the opinion.

Hinckley & Hinckley, for plaintiff.

Charles B. Carter, of White, Carter & Skelton, for defendant.

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

WILSON, J. does not concur.

HANSON, J. This action is brought under the Federal Employers' Liability Act of April 22, 1908, 35 U. S. St. 65, C. 149, U. S. Comp. St. Secs. 8657-8665, to recover for injuries while employed by defendant as a freight conductor. The jury returned a verdict for the plaintiff for $8,544.66, and the case is before the court on the defendant's general motion for a new trial.

At the time of the injury complained of the plaintiff was in charge of a freight train of ten or twelve cars, which left Washington Junction on the defendant's railroad on the night of December 4, 1918, its destination being Ayers Junction on the same railroad. The record shows that shortly after leaving Washington Junction, a severe snowstorm was encountered, impeding the progress of the train, and that at many of the stations along the road cars were left on account of the intensity of the storm. This condition lasted until the train reached Harrington, when the storm abated. The train proceeded without further changes until reaching Robinson's Siding, a few miles west of Ayers Junction, at which siding a car was to be set off for use there. The train then consisted of the engine, four cars and a caboose car. Under the plaintiff's

orders an attempt was made to leave a car at the siding; the engine and one car, the car to the left as above, were separated, leaving three cars and the caboose on the main line. The engine with the car to be side-tracked proceeded to the switch, where it was discovered that on account of snow and ice the switch could not be opened. The latter fact was made known to the plaintiff, who ordered the brakeman to restore the car to the train. Having given that order, the plaintiff returned to the caboose, entered, and immediately went to the monitor, sat down in the swivel-chair with one foot on the iron rail and his train book on his knee, and attempted to change the entry relating to the car above mentioned. The caboose was constructed substantially the same as all such cars used by railroads, with the elevated swivel-chair, iron rails for foot-rests, and hand-rails, and the part above the car roof inclosed on the four sides by glass windows. While so engaged, and sitting as described, the plaintiff was injured by the impact caused by the attempt to recouple the cars uncoupled for the above named purpose. The plaintiff says the impact broke the glass in front of him, and that he was thrown violently forward and onto the glass, cutting his wrist and head and otherwise injured him.

The further facts necessary to be recited may be found in the evidence here given. The plaintiff's version of the accident:—

"Q. You went into the caboose and went up to the monitor, and sat down,—what were you doing?

A. When I got up there and sat down, I took my small car book which is what we have to keep our records of the car movements on, to make up for the auditor. I took out my book and started to rub out the marking, to change the station symbol which we have to show that a car was to be left at Ayer Junction instead of Robinson's.

Q. While you had your book out writing or preparing to write this over, what was the next thing that happened that you know?

A. I had taken my book out of my pocket and had started to change the numbers. I had just got the number slightly erased, when the engine and car crashed into the train.

Q. Did you hear the crash?

A. I heard nothing but glass.

Q. What happened so far as you could see?

A. I went ahead in this manner (illustrating), right down on the glass, striking my cheek on the back of the center support which goes down on the left side.

Q. Cut your cheek?

A. Yes, sir.

Q. Any other injury?

A. Yes, cut my arm."

The engineer testified as follows:

"Q. You couldn't get the switch into a proper position to run in on the siding and leave that car?

A. No, sir.

Q. What was the next thing that happened?

A. The brakeman motioned for me to pull up; and we started back onto the train. I gave the engine a little steam, and shut her off and drifted down onto the cars. The first I noticed was Kallenburg running off to one side of the track and giving me a motion to stop. I put the brakes on; and on account of the ice and stuff, why she kept on going right along. We went down and made the hitch."

Walter C. Pettee, rear brakeman, testified:

"Mr. Kallenburg tried to throw the switch, but owing to the snow and ice around the point it was impossible to do so. He called to me; and I hollered to Smith, and Smith gave me directions to tell him to couple onto the train and we would set the car out at Ayer Junction and leave it there."

Q. What did you observe?

A. When they struck, the cars slatted back and forth so I naturally waited before I attempted to get on the minute they stopped; and just about as they stopped slatting, Mr. Smith opened the door and came out of the caboose. . . . ."

"Q. Describe to the jury the condition you found the caboose in inside when you went in?

A. I found the cushions knocked off onto the floor, and the water-pail upset, some water slopped onto the floor from the tank in where the wash water is kept, and the cover of that on the floor.

Q. Was there anything else movable in the caboose?

A. I should say everything in the caboose that was not securely fastened down was moved."

Carl H. Kallenburg, trainman, testified:

"I received orders to take the car and put it back on the train and proceed to Ayer Junction and leave it there. After I got the order to take the car back to the train, I signalled the engineman to back up."

"Q. What position did you get on the car?

A. I stood on the rear end of the car, that would be the end next to the cars that were left on the main line. . . .

Q. You gave the signal and then got on the rear of this car?

A. Yes, sir.

Q. What was the next thing that you noticed?

A. I noticed we were coming back pretty fast

Q. What did you do?

A. I thought we were coming more rapid than I thought we should be, and I gave a stop motion to the engineman.

Q. What motion did you give?

A. The stop motion in swinging the arm.

Q. Did that have any effect?

A. Not that I could see.

Q. Then what did you do?

A. I gave another stop motion.

Q. Did that have any effect?

A. Not that I could see.

Q. Then what did you do?

A. I gave another stop motion, and I jumped off.

Q. When you gave the third one, how near was the rear of your car to the car on which the caboose was attached, on that part of the train?

A. Well, I should think, I can't just exactly say how many feet, but somewhere between 5 or 6 or 10 feet.

Q. What did you jump off for?

A. Well, at the speed they were coming back, I thought it would be practically impossible, in the space that remained, to prevent their hitting hard, and I thought of the position I was in and I jumped.

Q. You attempted to save yourself?

A. Yes, sir."

The foregoing evidence presents the important facts clearly before the court, and was the subject substantially of the argument of counsel on both sides.

The defendant's counsel in their brief urged,—

"1. That there is no negligence on the part of the defendant railroad corporation.

2. That the case being admittedly one which falls under the Federal Employers' Liability Act, the plaintiff assumed all risk of the particular danger which caused the damage to him.

3. That the damages are excessive."

Upon the first contention they say: "We do not dispute but what the impact of the two sections of this train in making the hitch was the force which caused the plaintiff to loose his balance while sitting in a careless manner in the seat on the monitor in the cupola of the caboose car,—but we do say this impact or force exerted when the hitch was made was in no way a negligent act on the part of the defendant railroad corporation. This is the only thing which the plaintiff complains of in the way of negligence, which narrows this case down to one particular issue."

We cannot concur in this view of the evidence. The record shows, and the jury was fully justified in finding, that the speed attained by the engine and sustained until the instant of impact was at least ten miles an hour; that no effort was made by the engineer to apply the brakes until the moving car was within from six to ten feet of the standing cars. That the impact was violent; every witness, including the engineer, said that the cars came together with a crash. And as to the action of the brakes, a finding that the brakes did respond and act would be justified, for the "shaking and slatting" of the car can be explained upon no other theory. The testimony of Mr. Pettee and the condition of the caboose after the accident sustain such conclusion. Mr. Kallenburg, the trainman who gave the motion to back, and from his position on the car attached to the engine gave three signals to the engineer to stop, and then jumped to save himself from injury, said that the cars to be coupled were then at most but ten feet apart. The engineer said he saw but one signal to stop, and that was when Kallenburg was on the ground beside the track, and the jury believed Mr. Kallenburg who was corroborated by the engineer's own statement as to conditions at the moment of impact.

The negligence of defendant's engineer was very apparent. Was the plaintiff negligent? We find nothing in the record to support a finding that he was not in the exercise of due care. The cir-

cumstances surrounding the case, with his simple recital of the known duties of a conductor, and the manner of their performance, and his action at the time of injury, negative the claim of negligence, and the admittedly ordinary process of coupling cars, which is usually accompanied by some force and some disturbance, has not been shown to require a conductor to stand or sit in any special place, or observe any special rule during the process other than that required by law that he shall exercise due and proper care and not be negligent. The jury had the right to consider and necessarily did consider the question so carefully covered by defendant's cross-examination, as to the conduct and acts of the plaintiff, and having before them the testimony as to the appearance of the movable articles in the car after the accident, to discuss the question where in the car, under the circumstances, the plaintiff would have been safe from injury, and what might have been the result if he had been in any other part of the car. A careful review of the evidence fails to satisfy us that the plaintiff was negligent in placing himself where he was, and doing what he did when injured.

As to defendant's second contention that the plaintiff assumed all the risk of the particular danger which caused the damage to him, for the reasons set forth above it is the opinion of the court that the plaintiff did not assume the risk. That he did assume the ordinary risks of his employment, and too, that he assumed the extraordinary and unusual risks which were obvious, and risks of which he knew and which he appreciated, is well settled. But the circumstances of this case place it in a class far removed from the ordinary happening, and one in which, if cases do occur, they seldom reach courts of last resort.

It is undisputed that the brakes were in perfect order, that the tracks were clear, that before the accident the caboose was in the usual orderly condition, and although the train had passed through several hours of storm, no other untoward event had occurred. Frequent stops had been made for the same purpose on the way, and aside from hardship due to severe weather, nothing unusual happened until the train arrived at Robinson's Siding. At this point the accident occurred, induced as we must hold by the fault of the engineer in attaining such great and unusual speed, and failing to check the same by the timely use of the air-brake, that the jury could not find otherwise than that the defendant's

engineer and servant was negligent, and that the plaintiff did not assume the risk. And so we must hold. The engineer's testimony, together with the history of the broken glass, the crash of the impact to which all witnesses testify, the disorder in the caboose, the testimony of Pettee that the car was still "slatting" when the plaintiff came out of the caboose door, presents a condition seldom observed and surely most extraordinary. That the plaintiff did not assume the risk of injury in such circumstances is well settled also.

The sections of the Federal Employers' Liability Law referred to read as follows;

"Section 8657. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 8659. "In all actions hereafter brought against any such common carrier by the railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence 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."

By the Employers' Liability Act the defense of assumption of risk remains as at common law, save in those cases mentioned in Section 4, where the violation by the carrier of any statute enacted for the safety of employees contributed to the accident. *Southern Railway Company* v. *Crockett*, 234 U. S., 725. *Seaboard Air Line* v. *Horton*, 233 U. S., 492, 502.

At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. *Boldt* v. *Pennsylvania R. R. Co.*, 245 U. S. 441, and cases cited. *Monk* v. *Power Co.* 112 Maine, 492. In *Chesapeake and Ohio Railway Co.* v. *De Atley*, 241 U. S. 311-315, where a brakeman was injured while attempting to board an engine moving at an unusual rate of speed, the court say: "According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer, or his agents, have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them;" citing *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 101, *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 494. See *Jacobs* v. *Southern Ry. Co.*, 241, U. S. 229; *Dutrey* v. *Philadelphia & R. Ry. Co., Penn. Sup. Court*, 108 *Atlantic Rep.* 620, and cases cited; *Reed* v. *Director General of Railroads, Penn. Sup. Court*, 110 Atl. 254. In the last cited case it was held that "a member of a crew of a train in interstate commerce assumed the risk of injury or death while engaged in well-known dangerous yard movement, that of riding on front of a caboose pushed by an engine with duty to signal the engineer in time to stop, if a derailing device was set against further passage, so that his widow could not recover under the Federal Employers' Liability Act." In its finding the court upon the question of assumption of risk say: "Under the Federal Employers' Liability Act (U. S. Comp. St. 8657-8665), one engaged in interstate commerce is not absolutely deprived of recovery because of his contributory negligence; but neither he nor those claiming under him can recover, if an acci-

dent results from a risk assumed by him in the performance of his duties. The only exceptions to this are where the accident is the result of a breach of some statutory duty, in which event the employe is protected by Section 4 of the Act (*Seaboard Air Line Railway Co.* v. *Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915 C, 1 Ann. Cas. 1915 B, 475; *Southern Railway Co.* v. *Crockett*, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. Ed. 1564), or where the risk is so unusual or extraordinary as to be outside of those normally and necessarily incident to the employment (*Dutrey* v. *Phila. & Reading Railway Co.* 265 Pa. 215, 108 Atl. 620). Neither of these exceptions have any application here." See *Anderson* v. *Director General of Railroads*, Court of Appeals, New Jersey, June 14, 1920, 110 Atl., 829, and *Chicago, R. I. & P. R. Co.* v. *Ward*, U. S. Sup. Court, March 1, 1920, Co.-Op. Adv. Sheets 1919-20 - April, 1920.

As to the third contention, that the damages are excessive, we are not persuaded that the jury erred in assessing damages. The injury incurred was very serious, causing substantially the loss of use of hand and arm, and the accompanying pain and suffering very great. So much appears from the evidence. The jury had the matter under consideration, with proper instruction from the presiding Justice, and no doubt had in view the purchasing power of money at the present time, as well as the testimony bearing upon the plaintiff's earning capacity past and present, and we are unable to say that they have erred in their judgment, and that the damages are excessive.

The entry will be,

Motion overruled.

CONSTANTINE GAROUFALIS

vs.

ELENIKE ORTHODOX CENOTIS AGIA TRIAS.

Androscoggin. Opinion December 18, 1920.

Breach of contract. Covenant broken. Assumpsit. Plea in abatement. Demurrer. Two actions brought for the same cause, on the same day, and served at the same time should be abated.

Where two actions for the same cause are brought and served at the same time, though differing in form, the plaintiff may not discontinue one and proceed with the other, but upon the defendant seasonably filing a plea in abatement to each writ, both actions must be abated.

On defendant's exceptions. Two actions, one in assumpsit, and one in covenant, to recover a balance alleged to be due plaintiff from the defendant, for personal services as parish priest in charge of its church in Lewiston, under a written agreement therefor, were brought for the same cause, on the same day, and served at the same time. The defendant filed a plea in abatement in each case, alleging the pendency of another action for the same cause. The plaintiff thereupon filed a motion to discontinue the action in assumpsit, which was sustained by the presiding Justice against defendant's objection. The plaintiff then filed a replication to defendant's plea in abatement in the other action, to which defendant demurred. The presiding Justice overruled the demurrer and defendant excepted. A verdict of $845 was returned for plaintiff. Exceptions sustained. Demurrer sustained. Writ abated.

Case stated in opinion.

William H. Newell, for plaintiff.

Ralph W. Crockett, for defendant.

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

WILSON, J. The plaintiff entered into a written contract with the defendant church on the twenty-fifth day of November, 1915, to officiate as priest in accordance with the established canons of the Eastern Orthodox Church of Greece for a period of one year. In June, 1916, the plaintiff was discharged by the defendant on the ground that one of the inducements for entering into the contract was that the plaintiff was a regular priest of that faith in good standing, which the defendant claimed it had discovered was not true.

On the twenty-eighth day of October, 1919, the plaintiff sued out two writs against the defendant which were served on the defendant on the same day and at the same time and were both returnable and entered at the January term of the Supreme Judicial Court next following.

Both actions were brought to recover damages for the alleged breach of the contract above set forth, one being an action of covenant broken alleging the contract to be under seal, the other an action of assumpsit as for a breach of a simple contract.

The defendant seasonably filed a plea in abatement to each action on the ground of the pendency of another action for the same cause, brought on the same day and served at the same time. Whereupon the plaintiff filed a motion to discontinue the action of assumpsit which the presiding Justice allowed against the defendant's objection. The plaintiff then filed a replication to the defendant's plea in abatement to the action of covenant broken, to which the defendant demurred. The court overruled the demurrer to which ruling the defendant excepted.

The case then proceeded to trial and chiefly upon the issue of whether the plaintiff was a regular priest in good standing at the time of entering into the contract. Evidence on both sides of this issue was introduced, and also disclosed that a priest in the Eastern Orthodox Church of Greece must receive a certificate of appointment from the Holy Synod at Athens in Greece, presided over by the Archbishop of Athens, and that no person is permitted to officiate as a priest in that church without such a certificate.

In proof of his appointment the plaintiff offered a certificate issued by a bishop of that church stationed in the United States, under date of September 16, 1919, to the effect that he was a duly ordained priest and was appointed minister in the Hellenic Ortho-

dox Community of Holyoke, Massachusetts. The court received the certificate in evidence subject to the defendant's exception.

The case is now before the court on the defendant's exceptions. We think they must both be sustained. While it is not quite clear from the pleadings just what questions are raised by the defendant's demurrer to the plaintiff's replication, all the authorities appear to be in accord that where two actions are brought for the same cause, on the same day and are served at the same time, both should be abated. *Walsh* v. *Jones*, 1 Mich,. 254, *Beach* v. *Norton*, 8 Conn., 71; *Doris* v. *Dunkiee*, 9 N. H., 545; *Haight* v. *Holly*, 3 Wendell, 258; *Dengler* v. *Hayes*, 63 N. J. L., 14, Ency. of Pleading and Practice, Vol. 1, Page 753.

Where one is brought after the other for good and sufficient reason, the first may be discontinued or the second abated. *Brown* v. *Brown*, 110 Maine, 280. But where both are brought and served at the same time, the court cannot and is not obliged to determine which is first and which is second. Both are deemed vexatious and both should be abated. The practice of bringing two suits for the same cause though in different form and serving them at the same time has nothing to commend it and should be discouraged. They do not stand on the same footing as two suits, one of which is brought after the other because of some defect in the first or where for some other good reason it is desired to discontinue the first, or the second is afterwards brought in good faith and for purposes which are not vexatious, which is the basis of the decision in the case of *Brown* v. *Brown*, supra, and the cases therein cited.

That both these actions were for the same cause there can be no question. Though different in form, a judgment in either would have been a good bar to the other, *Newell* v. *Newton*, 10 Pick., 470. Both should have been abated.

The certificate of the official standing of the plaintiff in September, 1919, had no probative force on the issues in the case which was the standing of the plaintiff in the church in November, 1915, and should not have been received. Neither does it appear from the case that it was issued by anyone with authority in the premises.

Exception sustained.
Demurrer sustained. Writ abated.

STATE *vs.* LEO BROWN.

Penobscot. Opinion December 19, 1920.

Construction of an ordinance of the City of Bangor. Presumption that the enacting body did not intend to exceed its authority. The ordinance as whole, in the light of its purposes, should be considered in construing it.

An ordinance of the City of Bangor provides that no person shall keep or occupy a shop, storehouse, building or place of business for the purchase, possession, storage, sale, barter of or trade in any junk, old metal, old rags, or second-hand articles of personal property or articles of any kind usually handled or dealt in by junk dealers, nor shall any person keep or store such articles in any building for any purpose or permit the same to remain in any building after notice to remove them. . . . .

Held:

That the ordinance should be viewed as a whole and in the light of the purpose for which it was enacted, and with the presumption that it was not the intent of the enacting body to exceed its authority;

That the last clause as set forth above should be construed under the rules of *ejusdem generis* and *a sociis noscitur* to mean that no person shall keep or store such articles in any building for any of the aforementioned purposes, viz: Storage, sale, barter or trade, and when so construed the ordinance as a whole becomes harmonious and the provision in question a valid one.

On report on agreed statement. The respondent was found guilty in the Bangor Municipal Court of a violation of a certain ordinance of the City of Bangor relative to junk business, and appealed to the Supreme Judicial Court. The case was taken to the Law Court on an agreed statement of facts and a certain stipulation. Respondent to be adjudged guilty and sentenced to be imposed by the court below.

The case is fully stated in the opinion.

A. L. Blanchard, County Attorney, for the State.

T. B. Towle, for respondent.

James B. Mountaine, City Solicitor, for Bangor.

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

WILSON, J. Among the ordinances adopted by the City Council of Bangor regulating the purchase and sale of junk and second-hand articles, is the following:

Section 1. No person shall within the limits of this city keep or occupy any shop, storehouse, building or place of business for the purchase, possession, storage, sale or barter of or trade in any junk, old metal, old rags, or second-hand articles of personal property or articles of any kind usually handled or dealt in by junk dealers, *nor shall any person keep or store such articles in any building for any purpose or permit the same to remain in any building after notice to remove them,* or be a dealer in such articles unless duly licensed to be a dealer therein or purchaser of junk and second-hand articles as hereinafter provided.

Section 2, provides for the licensing of keepers of such places of business and also of suitable persons to buy by the ordinary methods of collecting such articles from house to house.

The respondent was brought before the Bangor Municipal Court on a complaint charging him with the violation of this ordinance. He was found guilty and appealed to the Supreme Judicial Court from which court the case comes before this court on an agreed statement of facts and with the following stipulation: That if the Law Court is of the opinion that the above mentioned part of said ordinance (which is the part in italics, the italics being ours for convenience of reference) is valid, the respondent is to be adjudged guilty and the case remanded for sentence, otherwise the complaint is to be quashed.

The contention of the respondent is that the part of the ordinance in italics is too general, and literally construed would be an unreasonable interference with the rights of the individual, and is therefore void.

The ordinance, however, should be viewed as a whole, in the light of the purpose for which it was enacted and with the presumption that it was not the intent of the enacting body to exceed its authority.

We think the provision in question must be construed to mean under familiar and well established rules of interpretation that no

person shall keep or store any such articles in any building for any of the aforementioned purposes, viz: Of storage, sale, barter or trade. Black on Interpretation of Laws, Page 141, Section 63, *Emerson* v. *E. & N. A. Railway*, 67 Maine, 387, 393; *Water Co.* v. *Water Co.*, 80 Maine, 544, 566; Trafton, Applt., 94 Maine, 579, 580; and when so construed the ordinance as a whole becomes harmonious and within the authority delegated to the City of Bangor under Par. XIII., Sec. 98, Chap. 4, R. S.

Under the stipulation the respondent will be adjudged guilty and sentence imposed by the court below.

MRS. N. W. LADD *vs.* EARL R. WHITE, Admr.

Hancock. Opinion December 19, 1920.

Verdict for plaintiff. Motion by defendant for new trial. Questions of fact only involved. Verdict not disturbed.

This is an act of assumpsit brought to recover for meals furnished to George E. Patterson, and to his wife, Fannie B. Patterson. There is no question of law involved or presented to the court for its consideration. The defendant seeks a new trial upon the customary grounds, relying upon questions of fact.

The familiar and well established rule must be observed, that this court will not set aside a jury verdict upon questions of fact unless it is shown that there was manifest error in the verdict or that it was the result of bias or prejudice. In the case at bar the defendant has failed to sustain the burden laid upon him by this rule.

On motion. This is an action to recover for meals furnished by plaintiff to defendant's intestate, and his wife, Fannie B. Patterson. Plea, the general issue. The jury returned a verdict of $1,205.24, for plaintiff. Defendant filed a motion for a new trial. Motion overruled.

The case is very fully stated in the opinion.

W. C. Conary, for plaintiff.

H. H. Patten, and Hale & Hamlin, for defendant.

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

PHILBROOK, J. This is an action of assumpsit brought against the administrator of the estate of George E. Patterson to recover for meals furnished to the deceased and to his wife, Fannie B. Patterson, the amount claimed being $1,680.00. The plaintiff recovered a verdict of $1,205.24 and the defendant seeks, by motion, based on the customary grounds, to have that verdict set aside and a new trial granted. No exceptions to any ruling or instruction appear. The case was apparently tried with great care, so far as the introduction of evidence was concerned, and we are now called upon to say, after critical examination of that evidence, whether the jury so plainly erred, either as to liability or amount of damages, that the motion should be sustained. We are to deal only with questions of fact, to invade a province in which, by long practice, and statutory provisions, the jury control, and then only for the purpose of determining whether manifest error is shown, or it appears that the verdict was the result of bias or prejudice. *Hatch* v. *Dutch*, 113 Maine, 405.

Mr. Patterson died August 18, 1917. The items in the plaintiff's writ are two in number. The first charges for the meals furnished to the deceased from January, 1911, to August 18, 1917, the date of his death, a period of six years, seven and one-half months, or three hundred forty-two weeks at $2.50 per week, amounting to $855.00; the second charges for meals furnished to his wife from January, 1911, to July 31, 1916, five years and seven months, and from November, 1916, to August 18, 1917, nine and one-half months, making a total period, during which meals were furnished the wife, of six years, four and one-half months, or three hundred thirty weeks at $2.50 per week, amounting to $825.00, the two sums making a total of $1,680.00 which, as we have seen, was the plaintiff's claim.

The plaintiff presented no book charges, under the rules of evidence in cases of this character she could not testify, and her proof consisted only of such testimony as could be given by other witnesses. She conducted a small restaurant and lunch counter in the town of Bucksport where, as it is claimed, the deceased and his wife obtained the meals, payment for which the plaintiff seeks

recovery. To cover the period of time for which the charges are made, and to prove the first branch of her case, namely, that the Pattersons had the meals, she calls three of her employees and one boarder. The time covered by the employees may be thus stated:

Fall of 1908 to Spring of 1912, by Grace Blaisdell; May, 1912, to October, 1912, by Florence Gross; October and November, 1912, by Laura Snowman; Fall of 1912 to Spring 1914, by Grace Blaisdell; June, 1913, to December, 1913, by Laura Snowman; June, 1914, to December, 1914, by Laura Snowman; June, 1915, to December, 1915, by Laura Snowman; December, 1915, to October, 1916, by Florence Gross.

Thus it will be seen that from December, 1914, to June, 1915, a period of about six months, and from October, 1916, to August 18, 1917, the date of Mr. Patterson's death, a period of about eight months, a total of about fourteen months, no employee testified that the Patterson's took meals from the plaintiff. The attempt to fill this gap is made by calling Mabel Robbins, who took dinners with the plaintiff from 1910 to the close of the period for which the Pattersons are charged. It would be unprofitable to quote from and completely analyze the testimony of each of these witnesses, but it may be fairly said that their testimony has some probative force in establishing the proposition that the Pattersons at least had dinners during much of the time for which the charges are made, and possibly suppers, except that period of fourteen months above referred to. The lack of evidence regarding this period may account for the amount which the jury deducted from the plaintiff's bill.

That meals were furnished to any considerable extent is denied by the defendant and it is also strenuously urged in defense that the friendly and social relations between the plaintiff and the deceased and the whole conduct between the parties was such, that whatever bounties were furnished to and partaken of by the deceased and his wife were gratuitous on the part of the plaintiff and so understood by all concerned. It appears from the testimony that the Pattersons were people in humble circumstances and received neighborly courtesies from their friends, especially during the last months of Mr. Patterson's life, when he was very ill, and the defendant not only says that all these meals, if any were furnished, were

in the nature of such courtesies, for which in part the Pattersons returned courtesies to the plaintiff, but that the plaintiff had distinctly said to Mrs. Sarah E. White, a sister of Mrs. Patterson, after the death of Mr. Patterson, that neither Mr. nor Mrs. Patterson owed her anything. In rebuttal the plaintiff denied emphatically that she ever made such a statement. The jury passed upon the credibility of the two women and their verdict sustained the plaintiff. It was also claimed that the plaintiff's suit resulted from a failure of any provision in her behalf by will, but the testimony of Mrs. Leach plainly discloses that what the plaintiff expected was that she should "get something from the estate for the board of Mr. and Mrs. Patterson." It also appears from the testimony of Laura Snowman that Mr. Patterson had offered to pay for meals but that Mrs. Patterson would usually say, "not now George, but some other time I will pay on the bill." In cross-examination the same witness testified as to an offer by Mr. Patterson to pay on Sunday, or some other day when an especially good dinner was served, and that Mrs. Patterson said, "not now George, I will settle with Aunt Belle," meaning the plaintiff. Mrs. Robbins also testified that Mr. Patterson told her that he intended to pay Mrs. Ladd for meals. The same witness stated that Mr. Patterson said a number of times, "she is going to get her pay; we will pay her well." Mr. Eldridge also testified that at one time, not long before his death, Mr. Patterson was worrying about certain bills and said, "I am owing Mrs. Ladd."

Without prolonging this discussion to any unnecessary length, it is the opinion of the court that there was sufficient testimony, notwithstanding that offered in defense, upon which a jury might find a verdict for the plaintiff upon both propositions, first that meals were furnished to the Pattersons, and second, that they expected to pay, and the plaintiff had the right to expect and did expect pay for the same.

The jury may have been somewhat liberal in the amount allowed, but they were practical men of affairs, saw the witnesses, heard them testify and rendered their honest opinion. The testimony does not disclose a basis of computation by which we can intelligently reduce the damages and the mandate will be,

Motion overruled.

PERCY H. WILLIAMS *vs.* PERCY J. LANCASTER.

Somerset. Opinion December 19, 1920.

Replevin. Sale of personal property. Bona fide purchaser. Adequate consideration. Notice of previous sale. Delivery.

This is an action of replevin brought by the plaintiff to recover a certain lot of pressed hay alleged to be taken and detained by the defendant.

The plaintiff claims that he purchased the hay of the defendant and took delivery of it in the barn, although he had paid no part of the consideration.

Later the defendant sold the same hay to Merton L. Chase in the barn and received payment in full therefor. The latter purchaser had no knowledge of the previous sale, and was, accordingly, an innocent purchaser for value.

Arrangements were made by Chase and cars obtained for delivery of the hay at Thompson's Crossing and shipment therefrom; and the hay was delivered at the Crossing, and there deposited when it was replevined.

Held:

1. That at the time of the replevin the hay had been sold to Chase.
2. That Chase was a bona fide purchaser for value, without notice of the previous sale.
3. That the hay was delivered to Chase at Thompson's Crossing, and in his possession when taken by the plaintiff.

On report. This is an action of replevin brought to recover certain pressed hay alleged to be taken and detained by the defendant. Plea, the general issue of non cepit, with a brief statement alleging title to, and possession of the hay, to be in defendant. After completing the evidence, by agreement of the parties, the case was reported to the Law Court, with a stipulation that the Law Court should determine, in the event judgment be for the defendant, whether a return of the property replevied should be ordered. Judgment for defendant.

Case stated in the opinion.

Merrill & Merrill, for plaintiff.

Butler & Butler, for defendant.

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

SPEAR, J. This is an action of replevin brought by the plaintiff to recover a certain lot of pressed hay alleged to be taken and detained by the defendant.

The plaintiff claims that he purchased the hay of the defendant and took delivery of it in the barn, although he had paid no part of the consideration.

Later the defendant sold the same hay to Merton L. Chase in the barn and received payment in full therefor. The latter purchaser had no knowledge of the previous sale, and was, accordingly, an innocent purchaser for value. Arrangements were made by Chase, and cars obtained for delivery of the hay at Thompson's Crossing and shipment therefrom; and the hay was delivered at the Crossing, and there deposited when it was replevined. The real question before the court is whether the hay when it was replevined at Thompson's Crossing was in the possession of Lancaster, the defendant, or Merton Chase, the second purchaser.

Assuming, without deciding, that the plaintiff purchased the hay as he claims, then the case may be resolved into three propositions: 1. At the time of the replevin had the hay been sold to Chase? 2. Was Chase a bona fide purchaser for an adequate consideration, without notice of the previous sale? 3. Was the hay delivered to Chase at Thompson's Crossing, and in his possession?

If the defendant sustains the burden upon these propositions the plaintiff cannot sustain his action. We think he does. There can be no controversy upon proof of the first two. The third involves a proposition of law: Was there a delivery of the hay to Chase at Thompson's Crossing? The evidence shows that he ordered cars, employed men to haul the hay, and that the hay was actually deposited at the Crossing when taken. We think this proposition, as a matter of law, is fully sustained by *Mercier* v. *Murchie's Sons Company*, 112 Maine, 72, where it is said: "Whenever personal property is sold deliverable to a particular person or at a particular place for the buyer, a delivery to such person or at such place is a completed delivery to the vendee. The principle is so well settled as to hardly require citation." Under the above

rule of law the undisputed evidence shows a delivery of this hay to Chase at Thompson's Crossing and, as a corollary to delivery, the hay was in his possession and not in that of the defendant.

Judgment for defendant.

NORTH NATIONAL BANK.

vs.

H. G. HALL, and NANCY I. HALL, Admx.

Knox. Opinion December 19, 1920.

Promissory note. Maker deceased. Indorser. Demand necessary on the personal representative of a deceased maker of a promissory note, no place of payment being specified, if with reasonable diligence he can be found.

This is an action upon a promissory note, dated November 9th, 1908, payable on or before six years from said date by G. L. Farrand to H. G. Hall, and by H. G. Hall before maturity endorsed in blank, and negotiated to the plaintiff bank.

At the time the note became due the maker, Farrand, had died, and Helen Farrand had been appointed administratrix of his estate. At the date of the maturity of the note, a notary public and cashier of the plaintiff bank made protest thereof, but did not make nor attempt to make any demand upon the administratrix of Farrand, the maker, the protest showing that he demanded said note at the said North National Bank, which was the endorsee. No place of payment was stated in the note.

The justice, without the intervention of a jury, found for the plaintiff, to which the defendant filed exceptions.

The only question was whether a demand was necessary upon the administratrix.

Held:

That such demand was necessary.

On exceptions by defendant. This is an action on a promissory note, the maker having died before maturity of the note, and an administratrix had been appointed of his estate, it having been

endorsed by payee before maturity to plaintiff, no place of payment being specified in the note. It was protested at maturity by a notary public, cashier of plaintiff bank, but no demand was made upon the administratrix of the estate of the maker. The presiding Justice, without the intervention of a jury, held that a demand on the administratrix was not necessary, and found for the plaintiff, and defendant excepted.

Exceptions sustained.

Case stated in the opinion.

Alan L. Bird, for plaintiff.

A. S. Littlefield, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, MORRILL, WILSON, JJ.

SPEAR, J. This is an action upon a promissory note, dated November 9th, 1908, payable on or before six years from said date by G. L. Farrand to H. G. Hall, and by H. G. Hall before maturity endorsed in blank, and negotiated to the plaintiff bank.

At the time the note become due the maker, Farrand, had died, and Helen Farrand had been appointed administratrix of his estate. At the time of maturity of said note, no appraisal had been filed, but later an inventory was returned showing some thousands of dollars of real estate, and several thousands of personal property, all of which except $75.00 was said to be in the hands of the trustee in bankruptcy of said Farrand. The estate was never represented insolvent.

On November 9th, 1914, the date of the maturity of the note, E. F. Berry, a notary public, and cashier of the plaintiff bank, made protest thereof, but never did make or attempt to make any demand upon the administratrix of said Farrand, the protest showing that he demanded said note at the said North National Bank, which was the endorsee. No place of payment was stated in the note. No demand was made upon the administratrix of the deceased maker. The question raised by the exception is: Was such demand necessary in order to charge the endorser?

The justice, without the intervention of a jury, found for the plaintiff, to which the defendant filed exceptions. There is no dispute upon the facts. The justice based his decision upon *Hale* v. *Burr,* 12 Mass. 85, a case which was precisely in point, and held

that a demand upon the administrator was not necessary. His attention was not called by either side to *Gower* v. *Moore*, 25 Maine, 16, which upon the same state of facts decided directly the other way. Accordingly the only question is, whether we shall follow the Maine decision, which was affirmed in *Hunt* v. *Wadleigh*, 26 Maine, 273, or overrule these decisions and follow the Massachusetts case, which was expressly considered by our court but not followed. We find no ground, either in reason or law, for pursuing the latter course.

It may not be improper to observe, as bearing upon the reason for the Maine decision, that our negotiable instrument act follows our court.

As that act will apply to cases arising after its going into effect, it will be of no consequence to make further citations.

Exceptions sustained.

ELLIOTT W. HOWE *vs.* ABBIE M. GRAY, Admx.

Oxford. Opinion December 22, 1920.

Actions against executors and administrators. R. S., Chap. 92, Sec. 14, as amended by Public Laws of 1917, Chap. 16, Sec. 7. The phrase "supported by an affidavit of the claimant" is restricted to claims filed in the Registry of Probate, and does not apply to claims presented in writing to the administrator or executor.

This case comes up on demurrer. The declaration is founded upon two promissory notes against the administratrix of an estate. As to each note the plaintiff alleges as follows: "That on the first day of May, 1919, being within eighteen months after the qualification of the said Abbie M. Gray in her capacity as administratrix of the estate of the said George C. Gray and at least thirty days before the commencement of this suit, the claim herein declared on was presented in writing to the said administratrix and payment thereof demanded, yet the said defendant has never paid the same, etc."

To this declaration a special demurrer was seasonably filed. The demurrer was joined, and overruled by the presiding Justice, to whose ruling exceptions were taken.

The real question is, does the phraseology of the statute, "supported by an affidavit by the claimant," apply to the claim presented to the administrator or executor, as well as to the claim filed in the Registry of Probate?

Held:

That it does not.

On exceptions by defendant. This is an action of assumpsit by Elliott W. Howe against Abbie M. Gray, administratrix of the estate of George C. Gray, on two promissory notes of $1,000 each. The defendant filed a demurrer to the declaration alleging that the claim in writing which it is alleged in the declaration was presented to the defendant in her capacity as administratrix, was not supported by the affidavit of the claimant or some other person cognizant thereof. The demurrer was joined and overruled by the presiding Justice, and the defendant excepted.

Exceptions overruled.

Case stated in the opinion.

Ralph T. Parker, for plaintiff.

Chapman & Brewster, for defendant.

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

SPEAR, J. This case comes up on demurrer. The declaration is founded upon two promissory notes against the administratrix of an estate. As to each note the plaintiff alleges as follows: "That on the first day of May, 1919, being within eighteen months after the qualification of the said Abbie M. Gray in her capacity as administratrix of the estate of the said George C. Gray and at least thirty days before the commencement of this suit, the claim herein declared on was presented in writing to the said administratrix and payment thereof demanded, yet the said defendant has never paid the same etc."

To this declaration a special demurrer was seasonably filed as follows:

"1. That it does not appear therein that the plaintiff has ever presented to the defendant in writing or filed at the Registry of Probate supported by an affidavit of the claimant or some other person cognizant thereof the claim declared upon in said declaration as required by the Statutes of the State of Maine made and provided.

"2. That no notice of the claim herein declared upon was given to the defendant thirty days at least before the commencement of this action in the manner and form required and provided for by the Statutes of the State of Maine."

The demurrer was joined, and overruled by the presiding Justice, to whose ruling exceptions were taken.

R. S., Chap. 92, Sec. 14, as amended by Public Laws of 1917, Chap. 16, Sec. 7, under which the action is brought, reads as follows: All claims against the estate of deceased persons. . . . . shall be presented to the executor or administrator in writing, or filed in the Registry of Probate, supported by an affidavit of the claimant or of some other person cognizant thereof either before or within eighteen months after the qualification etc."

The real question is, does the phrase "supported by an affidavit by the claimant" apply to the claim presented to the administrator or executor, as well as to the claim filed in the Registry of Probate? We are of the opinion that it does not.

The interpretation of this statute depends upon discovering the intention of the Legislature, and must be considered in pari materia with all other provisions of the statute relating to the same subject matter. It will serve no useful purpose to consume the time and space in an opinion to correlate the different statutes bearing upon the interpretation to be given the statute in question. Upon a careful examination of the history of the statute in question and kindred statutes, so ably discussed in both the argument of the plaintiff and the defendant, we are of the opinion that the weight of authority and reason supports the plaintiff's contention.

In the first place the statute clearly states and was intended to give an alternative in the choice and manner of presenting a claim against an estate.

The first and usual way, and a method that has been generally followed so far as we are aware, is to present the bill against the estate to the administrator or executor. The second and less usual way is to file the claim in the Registry of Probate supported by affidavit. This latter course was undoubtedly intended as much of a protection to the claimant as to the estate, as in this manner positive record evidence of filing his claim would be preserved.

That the first method was intended to be sufficient without affidavit is fully corroborated by the provisions of R. S., Chap. 68, Sec. 65, which reads as follows: "Executors or administrators *may* require any person making a claim against the estate of their testator or intestate, to present said claim in writing, supported by the affidavit of the claimant, or of some other person cognizant thereof stating what security the claimant has, if any, and the amount of credit to be given, according to the best of his knowledge and belief."

This latter statute is a complement of R. S., Chap. 92, Sec. 14, with respect to the requirement of an affidavit and clearly implies that no affidavit is required in the first instance, but says, in effect, if occasion arises in which the administrator may deem it advisable to obtain a more detailed and accurate statement of the debt and credit side of the claim, that he can avail himself of Chap. 68, Sec. 65, and demand an affidavit.

We think when these two statutes are read together, it is very apparent that the latter was intended to enlarge the power of the administrator or executor whenever in his judgment he might deem it advisable for the protection of the estate. It gives him power to accomplish all the defendant claims is required by his interpretation of the first statute, and therefore obviates any necessity for invoking such interpretation. Accordingly the reason for the interpretation having failed the interpretation itself fails.

Exceptions overruled.

FRED A. SHEAF *vs.* GEORGE HUFF.

Kennebec. Opinion December 22, 1920.

Personal injury case. Negligence of defendant. It is not the duty of an employer to furnish a reasonably safe place for his employees to work, but he is bound to exercise reasonable care to do so.

This case comes up on motion and exceptions. One of the exceptions must be sustained. The justice, in his charge, with respect to the duty resting upon the employer to furnish a place for the employee to work in, stated the measure of duty as follows: "It is necessary for the defendant to furnish a safe, a reasonably safe place for his employees to work; he is bound to furnish a reasonably safe place." The whole charge is printed and made a part of the case, but a careful examination discloses no modification of the language or meaning of the rule as above given. Nor are we able to say from the record which is also made a part of the exceptions, that the evidence so strongly predominates in favor of the plaintiff as to make the inadvertence a case of harmless error.

Held:

1. There may be a marked distinction in the duty of being bound to furnish a reasonably safe place, and exercising reasonable care to do so.
2. A place may not be reasonably safe, and on account of not being so, may be the proximate cause of an injury, and yet if the employer has exercised reasonable care to make it reasonably safe he is not liable.
3. If the place is, as a matter of fact, reasonably safe, it is immaterial whether the employer exercises any care in selecting it.
4. It is only when the place is not reasonably safe, that the test of any care is invoked.
5. When the test of any care is invoked, it is not that the master is bound to furnish a reasonably safe place, but to exercise due care to do so.

On motion and exceptions by defendant. Plaintiff seeks in this action to recover damages for personal injuries sustained while in the employ of defendant as a sawyer in his portable sawmill. The case was tried in the Superior Court for Kennebec County, and the jury returned a verdict of fourteen hundred dollars for plaintiff. Defendant filed a motion for a new trial, and also a bill of exceptions. Exceptions sustained.

Case is stated in the opinion.

Andrews & Nelson, for plaintiff.

A. S. Littlefield, and C. R. Tupper, for defendant.

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

SPEAR, J. This case comes up on motion and exceptions. One of the exceptions must be sustained. The justice, in his charge, with respect to the duty resting upon the employer to furnish a place for the employee to work in, stated the measure of duty as follows: "It is necessary for the defendant to furnish a safe, a reasonably safe place, for his employees to work; he is bound to furnish a reasonably safe place." The whole charge is printed and made a part of the case, but a careful examination discloses no modification of the language or meaning of the rule as above given. Nor are we able to say from the record which is also made a part of the exceptions that the evidence so strongly predominates in favor of the plaintiff as to make the inadvertence a case of harmless error.

There may be a marked distinction in the duty of being bound to furnish a reasonably safe place, and exercising reasonable care to do so. A place may not be reasonably safe, and on account of not being so, may be the proximate cause of an injury, and yet if the employer has exercised reasonable care to make it reasonably safe he is not liable.

If the place is, as a matter of fact, reasonably safe, it is immaterial whether the employer exercises any care.

It is only when the place is not reasonably safe, that the test of due care is invoked.

The question then at once arises: The place not being reason ably safe, has the employer exercised due care to make it reasonably safe? Has he done what a reasonably prudent and careful man would have done, in the particular instance? In *Hull* v. *Hall,* 78 Maine, 117, it is said:

"The implied duty of the master being measured by the legal standard of ordinary care, his knowledge or want of knowledge of the actual condition of the machinery when it falls below the legal standard of being reasonably safe and causes the injury, becomes a material element. . . . When the master, there-

fore, does not know of the dangerous condition of the machinery and has exercised that standard of care in relation thereto, he has discharged his duty and there is nothing of which negligence can be predicated. And such is the result of all the cases."

But if an employer is bound to furnish a reasonably safe place then the test of due care is entirely eliminated. It matters not how much care the employer has exercised if, as a matter of fact, the place is not reasonably safe, he is liable, so far as the element of place is concerned.

It accordingly appears that the definition of the duty of an employer in furnishing a place for his workmen is in no sense technical, but one which carefully differentiates between making the employer an insurer of the reasonable safety of the place, and an observer of the universal rule of reasonable care to furnish such a place. It is unnecessary to cite cases, as the definition of the duty is usually found to be as stated in *Elliott* v. *Sawyer*, 107 Maine, 201: "It is admittedly the duty of a master to use reasonable care to furnish for his servant a reasonably safe place for him to do his work."

Exceptions sustained.

STATE *vs.* FRANK ALBANO.

Cumberland. Opinion December 23, 1920.

Challenge for cause. Overruled. Exception. Remaining peremptory challenges. Waiver of rights under exception to overruling challenge for cause. Rights of respondent not prejudiced if a peremptory challenge remain, or he has not availed himself of his right under R. S., Chap. 78, Sec. 100, to challenge one from the completed panel.

Even where the court erroneously overrules a respondent's challenge for cause to the competency of a juror and the respondent excepts, he will be held to have waived such exception, if having peremptory challenges unused, he fails to remove such incompetent juror by the exercise of one of his peremptory challenges, unless it shall be made to appear that he was thereby prejudiced by being finally obliged to accept an objectionable juror against his wishes.

On exception by respondent. The respondent was indicted at the January Term of the Superior Court for the County of Cumberland, 1920, for keeping and maintaining a gambling nuisance in violation of Section 1, Chapter 23, of the Revised Statutes. Respondent requested a drawn jury and the eleventh juryman was challenged for cause by respondent which was overruled by the presiding Justice, and the respondent took exception.

Exception overruled.

Case is stated in the opinion.

Carroll L. Beedy, and Clement F. Robinson, for the state.

W. H. Murray, for respondent.

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

WILSON, J. The respondent was being tried on an indictment charging him with keeping and maintaining a gambling nuisance. A drawn jury was requested by the respondent. The eleventh

juryman upon being sworn on his *voir dire* in reply to a question by respondent's counsel as to his views on card and pool playing said: "I feel that a community would be better off without either pleasure, as a whole."

And in response to an inquiry by the court as to whether he thought his views would prevent him from rendering a true verdict upon the evidence presented in court said: "No, sir, I think I should not be prejudiced, if the evidence indicated there was nothing wrong." Whereupon the respondent challenged for cause on the ground that such a bias or prejudice was disclosed by the juror's answer to the court's inquiry that it would require evidence to remove it. His challenge for cause was overruled by the presiding Justice, and the case is now before this court on the respondent's exception to this ruling.

It appears from the bill of exceptions that the respondent still had three peremptory challenges left when the eleventh juror was chosen and the case does not show that he later exercised any of them or his statutory right under Sec. 100, Chap. 87, R. S., to challenge one from the panel after it was complete.

While the answer of the juror to the inquiry of the court may have indicated a state of mind that was not open and impartial such as should be required of a juryman in a criminal case, still we think by permitting the juror to serve, knowing his views, when he could have removed him by the exercise of one of his peremptory challenges, the respondent must be held to have waived his rights under his exceptions, unless it is made to appear that he would have been prejudiced by the use of one of his peremptory challenges for this purpose, which the case does not disclose.

It is held by the overwhelming weight of authority that where a juror was incompetent, though the trial court erred in overruling a challenge for cause, if the juror is then removed by a peremptory challenge, the respondent cannot maintain an exception to the erroneous ruling of the court, unless it appears by reason of thus exercising one of his peremptory challenges he is finally compelled to accept an objectionable juror against his wishes. Bishop Crim. Procedure, Vol. 1, Sec. 943 a; *Stuart* v. *Hoyt*, 47 Conn., 518, 529; *State* v. *Gaffney*, 56 Vt., 451; 24 Cyc., 323, XIII, E, 8.

Since the rights of a respondent can be fully preserved in case he is finally compelled to accept an objectionable juror through

having used a peremptory challenge to remove an incompetent juror by reason of his challenge for cause being erroneously overruled, we think the interests of justice require that he should first use all the means the law has provided him to obtain an impartial jury and if it then appears that he has been prejudiced by na erroneous ruling of the trial court, this court will grant him proper relief.

While New York and a few other States hold to the contrary, *People* v. *McQuade*, 110 N. Y., 248; *Brown* v. *State*, 57 Miss., 424; *Birdsong* v. *State*, 47 Ala., 68; *Dowdy* v. *Com.*, 9 Gratt, (Va.) 727, the great weight of authority supports the rule above laid down, that a party still having peremptory challenges unused, who permits an incompetent juror to take his seat or remain on the panel with full knowledge of his prejudicial views, must be held to have waived his exceptions to an erroneous ruling of the trial court denying his challenge for cause, unless it appears that by using one of his peremptory challenges to remove such incompetent juror, he would later have been compelled to accept an objectionable juror, even though not incompetent, through the exhaustion of his peremptory challenges. *State* v, *Smith*, 47 Conn., 377; *Presswood* v. *State*, 50 Tenn., 468; *People* v. *Aplin*, 86 Mich., 393; *People* v. *Durant*, 116 Cal., 179, 196; *Davidson* v. *Bordeaux*, 15 Mont., 245; *State* v. *Elliott*, 45 Iowa, 486; *Palmer* v. *People*, 4 Neb., 68, 75; *Mabry* v. *State*, 50 Ark., 492, 498; *State* v. *Pritchett*, 106 N. C., 667; *State* v. *Stockman*, 9 Kan., App., 422. Also see Ency. of Pleading and Practice, Vol. 12, Pages 505-509, where the cases on this point are collated.

We feel that the practice in so many jurisdictions having been so uniformly contrary to the New York rule, and for so long a time, it is fair to presume that no prejudice to the rights of respondents in criminal cases or litigants in civil actions has been found to result. It seems no more than a requirement that all parties shall exercise good faith in the use of the powers the law has entrusted to them for securing an impartial jury.

Exception overruled.

CONTINENTAL JEWELRY COMPANY *vs.* SAM MINSKY.

Somerset. Opinion December 24, 1920.

Motion to dismiss. Directed verdict. Exceptions. A motion to dismiss does not lie where to support or resist it proof is necessary dehors the writ. Exceptions to a directed verdict must be overruled unless the jury might find a sustainable verdict upon at least one of the issues of fact raised by the pleadings upon the entire evidence.

This case comes to us upon defendant's exceptions which are two in number. The first is based upon the refusal of the presiding Justice to grant a motion to dismiss, the motion being upon the ground that the plaintiff is not a corporation but an individual. The second exception is to a directed verdict in favor of the plaintiff.

Held:

1. Upon a motion to dismiss the court has no jurisdiction to determine any issue arising from a matter that is not apparent by an inspection of the writ. If no defects nor defenses appear on the face of the writ the motion to dismiss must be denied, regardless of the merits of the case. Such motion does not lie where to support or resist it proof is necessary dehors the writ.
2. Where a verdict is directed, and exceptions are taken, such ruling is based upon the entire evidence and will stand unless it is shown to be erroneous. The test of such error is whether a jury would have been warranted by the evidence in finding a verdict contrary to the one ordered. If such jury verdict would be sustainable then the issues of fact should be submitted to that tribunal, otherwise the directed verdict must stand.

The issues of fact raised by the defendant in his plea and brief statement are six in number. If any one or more of these issues are so supported by the evidence that, under correct rules of law, the jury could have properly found for the defendant, then the second exception must be sustained, otherwise it must be overruled.

After a careful examination of the evidence, in the light of the law applicable to the same, the court is of opinion that a jury verdict for the defendant could not have been sustained upon any of the issues relied upon by the defendant.

On exceptions by defendant. Assumpsit on promissory notes given for jewelry sold by plaintiff to defendant. Plea the general issue with brief statement. Defendant filed a motion to dismiss,

which was overruled by the presiding Justice, and defendant excepted. At the conclusion of the evidence the presiding Justice directed a verdict for the plaintiff for the amount sued for and accrued interest, and the defendant took exceptions. A verdict for plaintiff for $204.08 was returned. Exceptions overruled.

The case is fully stated in the opinion.

Fred F. Lawrence, for plaintiff.

James H. Thorne, for defendant.

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

PHILBROOK, J. This case comes to us upon defendant's exceptions, two in number, the first based upon refusal to grant a motion to dismiss, the second upon a directed verdict in favor of plaintiff.

First Exception. The docket entries, made part of the case, show that the action was entered at the January term, 1920; that there was a general appearance by defendant through counsel; that on the second day of the following April term pleadings, with brief statement, were filed and trial begun before a jury. The record, of the evidence shows that the plaintiff introduced the notes which were the basis of the action, and rested its case. At this point the defendant presented a motion to dismiss on the ground that the plaintiff is not a corporation, as alleged in the writ, but is an individual, one Bixler by name, and that the Continental Jewelry Company does not exist as a corporation, as alleged in the writ. This motion was overruled and exceptions allowed. It is quite plain that the ruling is correct, for upon a motion to dismiss the court has no jurisdiction to determine any issue upon any matter that is not apparent by an inspection of the writ. If no defects nor defenses appear on the face of the writ, the motion to dismiss must be denied regardless of the merits of the case. Such motion does not lie where to support or resist it proof is necessary dehors the writ. *Hunter* v. *Heath,* 76 Maine, 219; *Shurtleff* v. *Redlon,* 109 Maine, 62; *Hubbard* v. *Limerick Water and Electric Co.,* 109 Maine, 248.

Second Exception. Where a verdict is directed, and exceptions are taken, such ruling is based upon the entire evidence and will stand unless it is shown to be erroneous. *Bouchles* v. *Tibbetts,*

117 Maine, 192; *Peoples National Bank* v. *Nickerson,* 108 Maine, 341. The test of such error is whether a jury would have been warranted by the evidence in finding a verdict contrary to the one ordered. If such jury verdict would be sustainable, then the issues of fact should be submitted to that tribunal. *Royal* v. *Bar Harbor and Union River Power Co.,* 114 Maine, 220.

The issues of fact raised by the defendant in his plea and brief statement are six in number. Although this is not the order in which those issues are stated by the defendant, yet for convenience of discussion they may appear as follows: 1, that because he was examined and accepted for service in the United States army, and was obliged to hold himself in readiness for a call to the colors, he should be excused from performance of the civil contract involved in this controversy, even though he was not actually so called; 2, that his signature to the contract was obtained by fraudulent representations, or by misrepresentations, made by the plaintiff's agent who was authorized to make the contract; 3, that the contract, consideration for which are the notes in suit, was a conditional sale agreement, in which certain warranties were made, and that those warranties failed; 4, that by reason of such failure he seasonably and properly rescinded the contract, which rescission was accepted by the plaintiff; 5, that although he took all precautions, in the rescission of the contract, to place the plaintiff in as good a position as it occupied before the contract was made, yet the plaintiff has taken no steps to minimize the damages alleged to have grown out of said rescission; 6, that the plaintiff has suffered no damages.

Our attention has not been called to any state or federal statute, or rule at common law, nor do we know of such, which releases a person from the obligations arising from a civil contract, like the one at bar, because he has been accepted for military service to be rendered to his country. The act "to extend protection to the civil rights of members of the military and naval establishments of the United States engaged in the present war," approved by the President March 8, 1918, cited as the Soldiers' and Sailors' Civil Relief Act, while being in the nature of a moratorium for the benefit of those who were at the time engaged in actual service, obviously affords the defendant no immunity in the case at bar, and the first issue raised by his brief statement, therefore, avails him nothing.

Are any one or more of the other issues so supported by the evidence that under correct rules of law the jury could have properly found for the defendant. *Johnson* v. *N. Y., N. H., and Hartford Railroad*; 111 Maine, 263. *Bixler* v. *Wright*, 116 Maine, 133.

The plaintiff is a wholesale dealer in jewelry, with its principal office in Cleveland, Ohio. It reaches the retail trade, in part at least, through travelling agents. One of those agents called on the defendant at his store in Madison, Maine, and obtained his signature to a printed paper, which he says he did not read, giving lists of jewelry, partial description of the same, prices, terms of payment, warranty, exchange privilege, and other information concerning and governing the transactions between the parties, concluding with an order, signed by defendant, for goods which he might "purchase on the above terms and conditions." This paper is referred to by the parties as the contract. The defendant ordered certain goods described and priced in the contract to the amount of one hundred ninety-two dollars. In due course of time the goods were shipped to and received by the defendant. A show-case, for which no charge was made, followed the goods. The latter were not unpacked until the show-case came, but between the time of receiving the goods and that of receiving the show-case and unpacking the goods, the defendant had received and signed what the parties call credit cards, and are declared upon in the plaintiff's writ as promissory notes. The defendant, after unpacking the goods, claimed that the prices were too high for the quality of the merchandise bought, and wrote the plaintiff, which writing was twelve days after he signed the credit cards, stating that the jewelry was "not satisfactory regarding prices and quality," and further stating that he could not handle the jewelry at the prices for which he had been charged. He claimed that he had handled goods of similar quality, evidently the cheaper kinds of such merchandise, and was well acquainted with the quality and price which should obtain in the line under consideration. In that letter he made no complaint concerning the agent's conduct or representations. The plaintiff's reply denied that the prices were too high, when the comparative quality of the goods was considered and suggested co-operation for the success of the defendant's business. Again the latter wrote, this time making no complaint, but saying he would so co-operate were it not for the fact that he expected a call to the

army the following month, asking instructions for returning the goods, and expressing regret with respect to the turn affairs had taken. Through the next two months the correspondence consisted only of demands made by the plaintiff for payment of notes coming due, to which the defendant made no reply, and after the two months the correspondence on the defendant's side was carried on entirely by his attorneys. It is needless to say that the correspondence became acrimonious and provocative of litigation. It is proper to again call attention to the fact that up to the time of bringing suit the defendant had made no complaint personally, except as already stated. When he took the stand to give testimony at the trial his grievance as to fraudulent representations of the agent, stated in its strongest form, was that the salesman told him "you wouldn't take any chances whatever; in case you wouldn't sell it you can return it back, and you have a right to keep it fifteen months time, and we will also send you a showcase;" also, that if the jewelry was not satisfactory it could be returned; that the contract was not on a commission basis but "whatever you sell you will have to pay for it and according to the prices under the contract." He testified that these statements induced him to sign the contract and without this inducement he would not have signed. Still discussing the defense of fraud, do these statements, even though uncontradicted, the agent not being called as a witness, to affirm or deny them, constitute fraud sufficient to raise a successful defense. The defendant relies with much confidence upon a recent case, *Bixler* v. *Wright*, supra, decided by this court in the year nineteen hundred seventeen. But that case is distinguishable from the case at bar. Wright was the proprietor of a small country store and there was no testimony to show that he ever dealt in jewelry. This defendant, upon the witness stand, said he had been handling jewelry long enough to know the value of merchandise of that kind, and in his correspondence gave the names of several wholesale jewelry dealers with whom he had done business. Representations made to a man having the experience that this defendant had, according to his own statements, and representations made to a man of little or no such experience, may be quite different in their effect, and consequently are to be examined carefully when presented as a basis for fraud. For, to constitute fraud, it is elementary law, needing no citation of authorities, that the person, to whom the

representations were made, must prove that he was deceived and thereby acted to his own injury; and this court in *Hotchkiss* v. *Coal & Iron Company,* 108 Maine, 34, has approved an instruction that the representations must be considered, examined and determined with reference "to the knowledge which the parties had of the matter at the time . . . . . as interpreted by the subject matter and all of the circumstances surrounding the parties at the time." Moreover, in the case against Wright the agent falsely represented himself as a brother member of a fraternal order, and that he had been sent to Wright by a near-by neighbor, thus disarming Wright of suspicion and perhaps of caution. No such falsity exists in the case at bar. In the Wright case the agent's talk was all about the details of a consignment, when, in fact, the contract which Wright was induced to sign, without reading, was an unconditional order for the purchase of merchandise. In the case at bar the alleged representations are notably different. Here the salesman is represented as saying "you wouldn't take any chances whatever; in case you wouldn't sell it you can return it back, and you have a right to keep it fifteen months time, and will also send you a showcase." Turning to the contract, under which the defendant had rights, we find that there is a provision by which he may keep goods fifteen months and if not then sold return them and receive in exchange other jewelry in plaintiff's stock, dollar for dollar. There is no provision for defendant to receive his money back, nor did the agent so state. As for the alleged representation that if the jewelry was not satisfactory it could be returned, we find that the contract again provides for this contingency by agreement on the part of the plaintiff that unsatisfactory goods might be promptly returned and that a new duplicate article furnished without expense to the defendant. And even according to the latter's own testimony it was plainly stated by the plaintiff's agent that the contract was not on a commission basis but that whatever the defendant sold he must pay for according to the prices under the contract. Instead of acting within the protective terms of his contract the defendant refused to pay his credit cards and attempted to return all goods which he had not sold without waiting for the expiration of the fifteen months' period. But another important difference between the Wright case and the case at bar appears when we observe that this case is a suit upon

credit cards in the nature of promissory notes which was not the fact in *Bixler* v. *Wright.* In the case at bar the goods were received and there was ample opportunity to examine them before signing the credit cards. This was not done. In effect the defendant ratified his act of signing the contract when he signed the cards on which he is now sued, having been given full opportunity to examine the goods and to carefully read the contract under which he made the purchase. These conditions did not obtain in the Wright case. We are of opinion that the defense of fraud arose in defendant's mind after he was called upon to pay his obligations and that this defense is not well founded.

The third issue of fact raised by defendant is that the contract contained certain warranties which failed. He says that he sold only one tie pin and the complaint of his customer was that the pin was a cheap one. Well it might be for the cost price was only $2.20. He gave a brooch to his fiancee which he claimed to be unsatisfactory but the cost was only $3.10 according to his testimony. He took for his own wear a society emblem which he also says was unsatisfactory. He does not state the price of this emblem but the order shows a cost of such articles running from seventy-five cents to $2.40. None of these were returned, nor was there any attempt to return them. His claim of breach of warranty seems to be that these articles, or part of them, were described in the contract as "solid gold." With his knowledge of such merchandise and with prices carried out against each article we cannot persuade ourselves that there were any warranties upon which the defendant relied, but that this defense arose in his mind simultaneously with the attempted defense of fraud.

It is the opinion of the court that a jury verdict for the defendant could not have been sustained upon any of the defenses which we have discussed. It must follow that consideration of claims of rescission is unnecessary, since defendant has not established a right to rescind. The directed verdict was correct.

Exceptions overruled.

STATE *vs.* EDGAR M. WARD.

Androscoggin. Opinion January 5, 1921.

Murder. Guilty. Motion to set aside the verdict. Denial. Appeal. Sufficiency of evidence to warrant the verdict the only question raised on the appeal. Verdict sustained.

In this case Edgar M. Ward was indicted at the October term of the Superior Court in Androscoggin for the murder of Marie Bernier of Lewiston.

From the evidence in the case, we are of the opinion that the jury was warranted in finding beyond a reasonable doubt the following facts:

(1) The corpus delicti.

(2) That Marie Bernier was poisoned by taking internally sulphate of strychnia.

(3) That the medium through which it was conveyed to her stomach was whiskey.

(4) That the whiskey was furnished by the respondent and contained in two 14-ounce bottles called small pints.

(5) That neither bottle when purchased by him contained any strychnine.

(6) That one bottle was drunk by several people, one-half by himself and Mrs. Bernier, without any evidence or effect whatever of strychnia or other drug.

(7) That one-half of the other bottle was drunk by the respondent and decedent between six-forty and a little after eight o'clock in the evening without any poisonous or unusual effect.

(8) That he alone took another drink—offered to Miss Giroux—a little after eight o'clock.

(9) That there was then left in the bottle only two drinks of whiskey.

(10) That about half past nine he and Mrs. Bernier drank the two drinks remaining in the bottle.

(11) That in the bottle that contained these two drinks was deposited a quantity of strychnine that killed Mrs. Bernier in the course of half an hour and brought the respondent to the point of death.

None of the above facts is in dispute except the kind of poison which caused the death, and the wood alcohol theory was abandoned. A long controversy arose in the trial as to how long a time it would require to complete the solution of sulphate of strychnine in whiskey. There was no question, however, that if sulphate of strychnine was actually mingled with whiskey that its presence there would be manifest in the form of either solution or

suspension. It would therefore seem entirely immaterial in what form she took the poison. It was enough. It killed her.

We therefore reiterate that the evidence warranted the jury in finding that strychnine was the drug. Accordingly the only question for consideration is, was the jury warranted in finding beyond a reasonable doubt that the respondent through the medium of the whiskey contained in that bottle intentionally administered the fatal drug?

Upon this question the testimony of the respondent can be regarded as of very little value except as it is corroborated by circumstances, probabilities and other evidence, which tend to give it probative force. When any respondent takes the stand in his own behalf, however guilty he may be, he always denies the truth of the offense with which he is charged and asserts his innocence. Otherwise there would be no trial.

In view of the above proven facts, the first important inquiry is: When was the poison deposited in that bottle of whiskey? There can be no reasonable doubt that it was not put in by the seller who took it all from one large bottle. Hence it was not in the bottle when it came into the possession of the respondent. This conclusion seems to be made impregnable from the fact that the whiskey was originally taken from one large bottle, was all drunk by several persons, including about a pint and a half by the respondent and Mrs. Bernier, to within two drinks left in the bottle, without deleterious effect or even suspicion of the presence of any drug of any kind. It therefore follows that the poison was deposited after the contents of the last bottle were reduced to two drinks. If so, either Ward or Mrs. Bernier inserted it. If the above conclusions are correct he and Mrs. Bernier had the exclusive opportunity. He says, however, that he did not see Mrs. Bernier do it, and her exclamation when in convulsions "he has drugged me" corroborates him. If she did not, it follows that he must have done it.

Not only the logic of the case but the evidence points directly to him.

By the process of elimination an analysis of the testimony warranted the jury in finding beyond a reasonable doubt that:

(1) Mrs. Bernier died from internally taking strychnine that was in the last drink of whiskey she took.

(2) That the poison was put into the whiskey after it had been reduced to the last two drinks.

(3) That Mrs. Bernier did not put it in.

(4) That Ward had the exclusive opportunity to put it in.

(5) That Ward was guilty of doing it.

(6) That he did it intentionally.

(7) That nothing appearing that he did not intend the natural and necessary consequences of his act, namely, the death of Mrs. Bernier, he was guilty of murder.

On appeal by respondent. Edgar M. Ward, the respondent, was tried at the October term, 1919, of the Superior Court for

Androscoggin County upon an indictment charging him with the murder of one Marie Bernier, and the jury returned a verdict of guilty. After verdict and before sentence, the respondent moved that the verdict be set aside. The presiding Justice denied the motion, and the respondent appealed. Motion overruled.

Case is stated in the opinion.

Guy M. Sturgis, Attorney General, *and Albert E. Verrill*, County Attorney, for the State.

Frank A. Morey, for respondent.

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

SPEAR, J. In this case Edgar M. Ward was indicted at the October term of the Superior Court in Androscoggin for the murder of Marie Bernier of Lewiston. From the evidence in the case, we are of the opinion that the jury was warranted in finding beyond a reasonable doubt the following facts:

(1) The corpus delicti.

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(3) That the medium through which it was conveyed to her stomach was whiskey.

(4) That the whiskey was furnished by the respondent and contained in two 14-ounce bottles called small pints.

(5) That neither bottle when purchased by him contained any strychnine.

(6) That one bottle was drunk by several people, one-half by himself and Mrs. Bernier, without any evidence or effect whatever of strychnine or other drug.

(7) That one-half of the other bottle was drunk by the respondent and decedent between six-forty and a little after eight o'clock in the evening without any poisonous or unusual effect.

(8) That he alone took another drink—offered to Miss Giroux—a little after eight o'clock.

(9) That there was then left in the bottle only two drinks of whiskey.

(10) That about half past nine he and Mrs. Bernier drank the two drinks remaining in the bottle.

(11) That in the bottle that contained these two drinks was deposited a quantity of strychnine that killed Mrs. Bernier in the course of half an hour and brought the respondent to the point of death.

None of the above facts is in dispute except the kind of poison which caused the death. A long controversy arose in the trial as to how long a time it would require to complete the solution of sulphate of strychnine in the whiskey. There was no question, however, that if sulphate of strychnine was actually mingled with whiskey that its presence there would be manifest in the form of either solution or suspension. It would therefore seem entirely immaterial in what form she took the poison. It was enough. It killed her. The wood alcohol theory was abandoned.

We therefore reiterate that the evidence warranted the jury in finding that strychnine was the drug. Accordingly the only question for consideration is, was the jury warranted in finding beyond a reasonable doubt that the respondent through the medium of the whiskey contained in that bottle intentionally administered the fatal drug?

Upon this question the testimony of the respondent can be regarded as of very little value except as it is corroborated by circumstances, probabilities and other evidence, which tend to give it probative force. When the respondent takes the stand in his own behalf, however guilty he may be, he always denies the truth of the offense with which he is charged and asserts his innocence. Otherwise there would be no trial.

In view of the above proven facts, the first important inquiry is: When was the poison deposited in that bottle of whiskey? There can be no reasonable doubt that it was not put in by the seller who took it all from one large bottle. Hence it was not in the bottle when it came into the possession of the respondent. This conclusion seems to be made impregnable from the fact that the whiskey was originally taken from one large bottle, was all drunk by several persons, including about a pint and a half by respondent and Mrs. Bernier, to within two drinks left in the bottle, without the slightest deleterious effect or even suspicion of the presence of any drug of any kind. It therefore follows that the poison was deposited after the contents of the last bottle were reduced to two drinks. If so, either Ward or Mrs. Bernier inserted it. If the above conclusions are correct he and Mrs. Bernier had

the exclusive opportunity. He says, however, that he did not see Mrs. Bernier do it, and her exclamation when in convulsions "he has doped me" corroborates him. If she did not, it follows that he must have done it.

Not only the logic of the case but the evidence points directly to him.

There was present with him and Mrs. Bernier that evening from a little after eight until this tragedy happened, a young woman and friend of Mrs. Bernier, by the name of Delia Giroux. Nothing appears from the evidence which indicates that Miss Giroux was biased or prejudiced in her testimony or had any reason to be. The jury had the advantage which we have not of seeing her on the stand, and of observing under a severe cross-examination her character, mentality, tendency to exaggerate or minimize, her prejudice or bias, her disposition to tell the truth or prevaricate, her opportunity to know the facts in respect to which she testified, her appearance and manner of giving her testimony, and from these tests of arriving at an intelligent conclusion as to value and weight of her testimony.

If the jury had the right to test the value of her testimony, and we think it had, it will appear from the evidence not only that Ward had an opportunity to put the poison into the whiskey but that he has prevaricated upon the most vital piece of evidence in the case, the note.

It should be here noted that in all of the details of what occurred on that fatal evening, the respondent in a general way corroborates Miss Giroux as to all that was said and done except as to her testimony which tends to show his guilty acts.

Her evidence shows that Ward had exclusive opportunity to place the poison in the bottle. She says that about nine o'clock Ward and Mrs. Bernier went into the kitchen and he said: "You send her away and I will go." Then she, Mrs. Bernier, came back into the sitting room and he came back, not in the sitting room but to the shelf there and got the satchel and the bottle and the glass, and he went out my sight into the kitchen." Mrs. Bernier was then "on the chair at the foot of the couch." She says he was gone about five minutes. All this time he was by himself in the kitchen or elsewhere out of sight of both the women, having with him his satchel, the bottle containing the whiskey and a glass. This tes-

timony shows ample opportunity, and it goes much further. The inference in view of the proven fact that there was strychnine in the whiskey, is entirely consistent with the conclusion that he took the satchel containing the strychnine, the bottle containing the whiskey and the glass in which to mix the poison and from which to pour it into the bottle containing the whiskey.

This inference is strongly corroborated by the admitted fact that the whiskey in the two bottles, which originally came from the same source was all drunk, except the two drinks left in the bottle which Ward took with him into the kitchen, without producing the slightest unusual effect, and that the next drink proved fatal.

Thus Miss Giroux's testimony on this vital point was overwhelming, if true. We think the jury had a right to determine whether it was true or false, and found it true. The respondent denies that he was in the kitchen or elsewhere alone as above described by Miss Giroux. Otherwise her testimony is undisputed but corroborated as above.

But the most vital piece of testimony in the case is found in a note, written on a single sheet of paper by the respondent and discovered upon his person after he was taken to the hospital on the night of the tragedy. The note reads as follows: "Am deadly sick—think whiskey we have been drinking is made of wood alcohol—Marie I think is dead and I am failing fast—cannot move my legs now —never stole any autos in my life. P. S. Mother if I die I am sorry for all that I have done—father have my watch."

The vital issue upon this point is whether the evidence shows, beyond a reasonable doubt, that this note was written before Ward and Mrs. Bernier took their last drink.

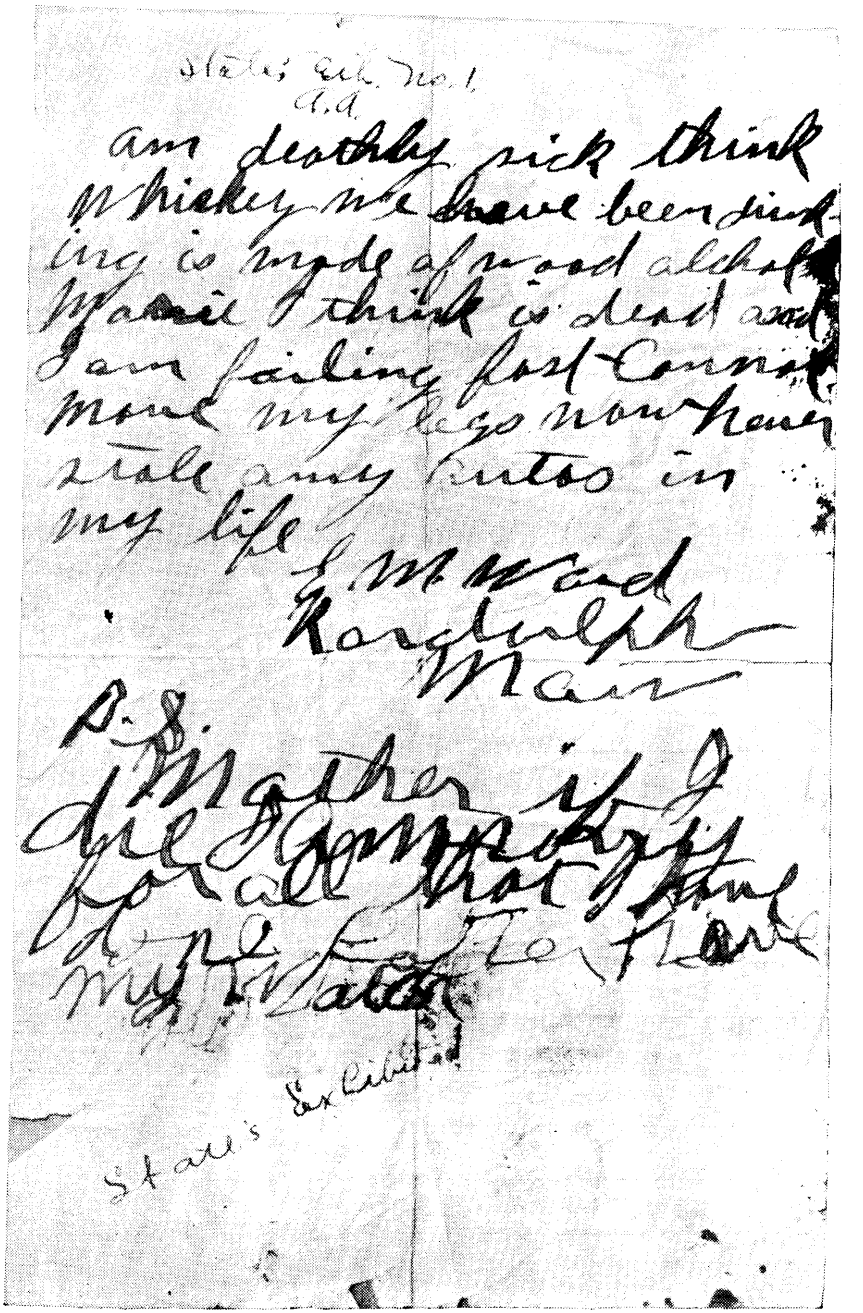
The State claims that the evidence proves that it was. The evidence upon this point comes solely from Miss Giroux, and is of course, denied by Ward.

She says that at about nine o'clock he asked Marie if she had some ink, and filled up his fountain pen, from ink he found in the desk, and then sat down and wrote a note. The conversation that ensued between Miss Giroux and Mrs. Bernier while Ward was writing is significant, if true, in its tendency to conclusively prove the time with respect to whether it was before or after the last drink, that he wrote. Miss Giroux says: "I said to Marie, I says, I think he is writing a letter. I told that in French—I think he is writing so as to give it to you to tell me to go. She

said no." Either this conversation took place or it is a fabrication. It is, however, perfectly natural. If this detail is true, there can be no question as to the time of writing. But there is something further that is significant. She further says, "After he wrote the note he went back to the couch and a few minutes later took out the sheet of paper, placed it upon his knee and wrote some more upon it. A reference to the note proves this to be true. But the respondent claims that all this was done after the fatal dose and after he saw Mrs. Bernier on the floor apparently dead, and felt himself to be in a critical condition.

All the medical men, expert or otherwise, agreed that the distinguishing features of strychnine poison were tonic, meaning continuous convulsions and that these convulsions are produced by touching the patient or by the patient's coming in contact with something himself. Ward says he went to the desk and wrote the note—and does not deny that he filled his fountain pen—after he was numb in his legs but before he had a convulsion and came back to the couch where he had a convulsion and that after that convulsion he wrote the postscript on the note upon his knee. Dr. Haskell, the county medical examiner, and Dr. Scannell, a physician and surgeon of long practice, both declare that after Ward had a convulsion it would have been impossible for him to write; that any movement or anything or even a draught of air would set him into convulsions. On cross-examination by the defense this question and answer appear: "Assuming that he came from the table, writing table, back upon lounge and when he got back there or before leaving, he put the pen in his pocket, he then felt a twitching, he went back to the couch and then wrote upon his knee a note, whether that was possible before the severe convulsion came on?" Answer by Dr. Scannell: "I should think it would be absolutely impossible." No medical witness is called by the defense to contradict this positive testimony. It would therefore seem conclusive that the time of writing the note was correctly stated by Miss Giroux.

She is attempted to be contradicted however by Mr. and Mrs. Bragdon who live in the tenement above Mrs. Bernier to whom Miss Giroux went for assistance when she fully appreciated the serious condition of Mrs. Bernier. They say she placed the time of writing the note after the taking of the final drink.



But the jury also saw these two witnesses and had an opportunity to compare them with Miss Giroux and from their verdict must have felt compelled to place full confidence in her story; for upon the awful charge of murder, juries certainly are not prone to conviction except upon ample evidence.

But the note itself which is before the court, a copy of which is here inserted, is very strongly corroborative of Miss Giroux's version of the time of writing.

Upon Ward's own testimony of when and how the note was written, both the physicians above named, Haskell and Scannell, say that his version is impossible. He admits he wrote the postscript after having had a convulsion. After having written the first part of the note he said in answer to the question: "Q. Can you tell us whether on the way back you had any convulsion? A. I think not. I did have a convulsion when I sat down on the couch." Then in respect to writing the postscript he says, "Q. You wrote that on your knee? A. I rather think so; yes." This corroborates Miss Giroux.

It is quite evident from the testimony that not only Drs. Haskell and Scannell were of the opinion that Ward's version of writing the note was impossible, but that a similiar opinion would have been expressed by every other physician who testified in the case. Their descriptions of the symptoms of strychnine poison and the effect of contact in causing immediate convulsions justify this conclusion and were ground for a reasonable and perhaps a wise exercise of discretion on the part of defense in omitting to call any rebuttal to the testimony of Drs. Haskell and Scannell.

Another most significant piece of corroborative testimony is the statement of Mrs. Bernier after she had fallen from her chair and Miss Giroux stood over her offering her help. The testimony is in perfect harmony with what is conceded to have occurred and is shown by the following question and answer: "Q. How? What did she do? A. She threw her arm out and her body was shaking all over. She slid from her chair and I asked her if I could do anything for her, if she wanted me to get some help. She says, No. Be careful. He doped me. Stay with me. It is all I have to say." Ward denies that Mrs. Bernier said anything "about being doped."

Had not the jury a right to pass upon this question? Is not the alleged statement of Mrs. Bernier who had just taken a drink from a bottle from which she had been drinking all the evening and who had been suddenly seized with convulsions, after taking the last drink, in perfect accord with what she or any other sane person would think, and consequently say? This testimony also corroborates Ward's statement that he did not see her put anything into the whiskey and points directly to him as the only one who could have done it, and, as before seen, who had exclusive opportunity.

Another piece of testimony which fits into the structure of proof of Ward's intent is the persistency in which he importuned Mrs. Bernier to drink after he had been in the kitchen alone with the satchel, the bottle and the glass in his possession. Miss Giroux testified that after he came back: He says, "have a drink and I will go. Have a drink and I will go. Kept asking her she should take a drink to make him go." "Q. Did she get up and go out? Yes, because he called her back again."

She and Ward then disappeared from her view in the kitchen and the next she saw of them Mrs. Bernier was rinsing the bottle. As she said, "Then I saw her rinse out the bottle, wash out the bottle."

The rinsing of the bottle is another significant act. Ward told the officers, at first, that he rinsed the bottle, himself, because it was a habit he had acquired from previous experience in tending bar.

We think the jury was warranted in inferring from this testimony that the conception of washing the bottle originated in Ward's mind, and, while weak and sick, and before his mind was able to co-ordinate, he stated what was in his mind to have done, to the bottle, after they had drunk, rather than the fact of who did it; for he did not follow his habit, as Mrs. Bernier washed out the bottle, and there is no pretense that she had acquired any such habit. What plausible reason can be suggested under the circumstances of this case, if normal, that Mrs. Bernier should stop to wash out a whiskey bottle or that Ward should direct her to do so, as the plain inference is he did? There is no claim that the other bottle was rinsed, according to any habit, when it was drained.

It is another significant circumstance that is perfectly consistent with the hypothesis that Ward put the poison in the bottle and directed it to be washed out to remove the evidence of what it had contained; and inconsistent with what would be expected to be done, under usual and innocent conditions.

Ward corroborates all this testimony, except his being in the kitchen alone. He says, "If I'm not going to miss my car, I have got to be going. I says the last car goes at 10.15. I asked Mrs. Bernier if she would have another drink with me before I left. She says, I don't know whether to take it or not. I am sick. I says, you might as well, only enough left there. We will finish it."

Miss Giroux says she heard him say in the kitchen "You send her and I will go. She says, no, I am sick, and then came back into the sitting room." He undoubtedly had this conversation as he says when they first went into the kitchen and before he had drugged the whiskey and then after she came back into the sitting room insisted upon her taking the last drink, and he would go. The only practical difference between her testimony and his is as to where this conversation occurred. The jury believed Miss Giroux, and this evidence of his persisting that she take a last drink was entirely consistent with the hypothesis of guilt.

Another circumstance which has an important bearing and points to the guilt of Ward, was his conduct after the fatal drink. After they came back from the kitchen, "she started to laugh and he laughed." The laugh of these people was of such a character as to startle Miss Giroux, for she said, "don't laugh Marie. Don't make him laugh. That scares me." Then he asked Mrs. Bernier, "You happy, Marie?" A mysterious inquiry. Her unusual appearance excited no apparent surprise or interest in his mind. Was it what he expected and was prepared for?

When she fell to the floor he made no effort whatever to help her. He admits this but excuses himself on the ground that he was sick. Yet he says he went to the table, filled his pen, wrote the note, went back to the couch, took out his fountain pen, adjusted it, and wrote a postscript upon his knee. Did his conduct in a total failure to make any effort or attempt to assist her comport with any standard of innocent human action? If he had no previous knowledge of what was in that whiskey and no previous expectation of her sudden collapse, would not he have rushed to her

assistance if he had strength enough to get there? Or was his conduct entirely consistent with the fact, not only that she was poisoned, but that he knew she was poisoned, and saw before him just what he expected to see, and hence stood aloof from the victim of his guilt?

His conduct again was perfectly consistent with guilt and inconsistent with innocence.

But it is claimed by the defense that the State has not proved where Ward had procurred any strychnine. But this claim has little weight in the face of overwhelming evidence that he administered it. Besides it would be a practical impossibility for the State to furnish such proof under the law regulating the sale of strychnine. Our statute provides that the only restraint upon a druggist in selling strychnine is that he shall make a record of the sale and the person to whom it is made. It appears from the testimony that strychnine in different forms is a common drug. It is sold in tablet form for medicine and in powdered form for the extermination of vermin. One-half a grain may produce death. This is a small quantity. It might be obtained by combining the strychnine from several tablets. It might be purchased in powdered form. But to ascertain a sale of this kind might necessitate an inquiry of every drug store in Maine, or it might have been obtained in another State. This defense, however is evidential only.

Proof that Ward purchased the drug, with the other facts, might be evidence of his guilt beyond any question of doubt. The other facts, wanting this one, might be evidence of his guilt beyond any reasonable doubt. The fact of its presence in the whiskey proves *a* purchaser. The fact of Mrs. Bernier's death by strychnine, under the circumstances, we think proves *the* purchaser. It was not necessary for the State to go further.

It is also claimed that no adequate motive was shown. But motive is only one element in the chain of evidence offered for the purpose of proving the commission of a crime. It is not an essential element. A powerful motive may be found upon all the evidence to be inconsistent with guilt. On the other hand there may be ample proof of guilt without any evidence of motive. It is often impossible to prove motive. If the other evidence is sufficient, motive becomes immaterial.

It will be further observed from the testimony, in corroboration of the truth of Miss Giroux's statements, that Ward agrees with her in all the essential details of what was done and said that evening except upon the vital things which point to his guilt as nearly as two persons would be likely to agree who were trying to tell the same story.

It appears with respect to his presence in the kitchen, alone, just before the fatal drink, and the time of writing the note, that Ward was guilty of prevarication. When a person is in custodia legis charged with the commission of a criminal offense, a false statement by him as to a material circumstance, is taken heavily against him. Our court have stated the effect of such testimony in *State* v. *Benner*, 64 Maine, at Page 289, as follows:

"The remark that if the prisoner falsified as to time, it was a circumstance strongly evidentiary of guilt, was not merely unobjectionable, but strictly and accurately correct. Crime is ordinarily proved by circumstantial evidence. Truth is the reliance of innocence. Falsehood is the resort of crime. All true facts are consistent with each other. If the prisoner was innocent, there was no reason for the withholding a true fact. Still less was there for uttering a falsehood. Falsehood is evidence of crime. Every falsehood uttered by way of exculpation becomes an article of circumstantial evidence of greater or less inculpatory force."

By the process of elimination the above analysis of the testimony warranted the jury in finding beyond a reasonable doubt that:

(1) Mrs. Bernier died from internally taking strychnine that was in the last drink of whiskey she took.

(2) That the poison was put into the whiskey after it had been reduced to the last two drinks.

(3) That Mrs. Bernier did not put it in.

(4) That Ward had the exclusive opportunity to put it in.

(5) That Ward was guilty of doing it.

(6) That he did it intentionally.

(7) That nothing appearing that he did not intend the natural and necessary consequences of his act, namely, the death of Mrs. Bernier, he was guilty of murder.

Motion overrruled.

MELVILLE H. REED *vs.* J. BURTON REED.

Lincoln. Opinion January 5, 1921.

Jurisdiction of Law Court. Certification by the justice or stenographer of the report of the evidence in a case before the Law Court though required by the statute, may be waived by the parties to the action. The printing of the report is a matter of convenience only, and the certification by the clerk of courts, where the case is tried, is an attestation only that the report is a true copy, and such act of attestation by the clerk of courts is not a jurisdictional fact. A party or counsel receiving a printed uncertified copy of the report, and fails to inform the court that correction may be made, waives the informality.

This was an action of forcible entry and detainer. The plea, not guilty, upon trial a verdict was rendered for the plaintiff. Upon general motion and motion based upon newly discovered evidence, a new trial was granted under mandate of August 21, 1915.

At the October term, 1915, upon another trial a verdict was rendered for the plaintiff. Exceptions were filed and allowed in this trial, which were sustained by mandate of December 4, 1916.

At the April term, 1917, upon a third trial, a verdict was rendered for the defendant. A motion for a new trial was filed and granted by mandate filed June 27, 1918. At the October term, 1918, upon a fourth trial, a verdict was rendered for the plaintiff. Exceptions were filed and allowed. By agreement the evidence taken at the April term, 1917, was to be used by the defendant before the Law Court. December 20, 1918, a mandate came down, "Exceptions overruled."

Upon a hearing on costs the defendant took exceptions and an appeal. The exceptions were sustained and the bill of costs ordered to be corrected in accordance with the opinion.

In the meantime on July 19, 1919, the defendant filed a motion for judgment on the verdict rendered at the April term, 1917. The ground upon which the last motion was based was that the report of evidence of the trial of April, 1917, was not certified by any member of the court nor by any officer of the court authorized thereto; that the defendant, nor his counsel had any knowledge of such defect; that the court had no jurisdiction to set aside the verdict of the April term of 1917; that said verdict cannot now be disturbed. With the exception of one element, this question was passed upon by the court in

Reed v. *Reed*, 118 Maine, 321. Every phase of the case was before the court at that time except the claim that neither the defendant nor his counsel had any knowledge of the defective certification of the report of the evidence of the trial at the April term, 1917.

Held:

1. That as a matter of law the defendant was charged with such knowledge.
2. That the report of the evidence certified by the justice or stenographer is the official and original evidence before the Law Court.
3. That the report is printed for convenience only; it is not required by law.
4. That the effect of certification by the clerk of courts in the county where the case is tried is that the case is accurately printed.
5. That the clerk's act is not a jurisdictional fact.
6. That it is a true copy is all that the attestation of the clerk imports.
7. That if a party or counsel receive a printed copy of a report of the evidence he is charged with knowledge of whether it is certified or not.
8. That if he receives a copy not certified he is in duty bound to inform the court that correction may be made.
9. That if he fails to so notify he must be deemed to have waived the informality.

On exceptions by defendant. This is an action of forcible entry and detainer. Plea, not guilty. This cause was tried to a jury at nisi prius four times, and a verdict for plaintiff was returned at three of such trials, and a verdict for defendant returned at one of such trials, it being the third trial, the court at the first and fourth trials having directed a verdict. The question involved in the case and which was the sole issue at each of the four trials, was as to whether or not there was delivery of a certain deed from the father of these parties to the plaintiff's wife. After the exceptions taken at the fourth trial had been overruled, upon a hearing on costs the defendant took exceptions and an appeal which were sustained and bill of costs corrected. In the meantime defendant filed a motion for judgment on the verdict rendered at the third trial for defendant, at the April term, 1917. This motion was overruled and exceptions taken. The defendant in support of his exceptions contends that the acts of the Law Court since the rendering of the verdict at the April term, 1917, are void by reason of the fact that the report of the evidence was not certified or attested as required by the statute, thus raising the question of jurisdiction of the Law Court. Exceptions overruled.

The case is fully stated in the opinion.

C. M. P. Larrabee, and D. J. McGillicuddy, for plaintiff.

A. S. Littlefield, for defendant.

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

WILSON, J. concurs in result.

SPEAR, J. This was an action of forcible entry and detainer. The plea, not guilty. Upon trial a verdict was rendered for the plaintiff. Upon general motion and motion based upon newly discovered evidence, a new trial was granted under mandate of August 21, 1915.

At the October term, 1915, upon another trial a verdict was rendered for the plaintiff. Exceptions were filed and allowed in this trial, which were sustained by mandate of December 4, 1916.

At the April term, 1917, upon a third trial, a verdict was rendered for the defendant. A motion for a new trial was filed and granted by mandate filed June 27, 1918. At the October term, 1918, upon a fourth trial a verdict was rendered for the plaintiff. Exceptions were filed and allowed. By agreement the evidence taken at the April term, 1917, was to be used by the defendant before the Law Court. December 20, 1918, a mandate came down, "Exceptions overruled."

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defendant nor his counsel had any knowledge of the defective certification of the report of the evidence of the trial at the April term, 1917.

As a matter of law we think he was charged with such knowledge. The law requires that upon motion for a new trial a report of the evidence shall be signed by the presiding Justice or certified by the stenographer. Such a report is official and the original evidence before the Law Court. The report is printed for convenience only. It is not required by law. Therefore the only purpose and effect of a certification of the county clerk is that the report is accurately printed. His act is not a jurisdictional fact at all. If the parties to a case not certified by the clerk should agree that the original report of the evidence might be taken from the archives and used, it would undoubtedly be a legal course, although a bungling one and not to be encouraged in practice.

It is apparent that the regular course by which parties or their attorneys receive copies of printed reports is through the clerk of the Law Court, in whose custody such reports belong. If a party or attorney receive a report through this channel he is charged by law with knowledge that it should be attested by the county clerk as a true copy. That it is a true copy is all the attestation imports. Accordingly, if an attorney receives a printed copy of a report of the evidence in a case, he is charged with knowledge of whether such copy is attested or not. If he receives a copy that is not attested it is his duty to so inform the court that a correction may be made, and if he fails to so notify, he must be deemed to have waived the informality.

But in the case at bar the statement of the defendant, as the basis upon which he seeks to annul the action of the court since the verdict for the defendant, in April, 1917, conclusively shows that the report that came to his counsel was so irregular on its face as to at once give warning of its imperfection. The defendant's motion sets forth that the official stenographer, John A. Hayden, furnished to counsel for the plaintiff a copy of the oral evidence . . . . and that plaintiff's counsel caused it to be printed, and was by him taken to said Law Court without ever being reported, certified or authorized in any manner or form by the Justice presiding at said term or by any other justice of said court, and without ever being certified, attested or in any way authenticated by the clerk of said court, and that a copy of so much of said case as was printed was furnished

defendant's counsel through the mail. When this printed copy came into the hands of the defendant or his counsel the omission of attestation by the clerk of courts for Lincoln County was perfectly obvious on inspection. In fact, that the printed report was certified by Llewellyn Barton, Clerk of Courts of Cumberland County, presented an obvious error, as the case was tried in Lincoln County, and should have been certified by the Lincoln County clerk.

As before seen counsel on both sides were charged, in law, with knowledge of such error. Consequently if one or both counsel proceeded without calling the attention of the court to the mistake they must be deemed to have waived the irregularity.

That various documents were used before the Law Court without being printed as a part of the case, is a common practice, and when used as they were in the trial of April, 1917, without objection, such use must be predicated upon consent of counsel, and any irregularity in this respect will be deemed to have been cured by such implied consent.

It further appears, however, in the present case that the identical printed report of whose irregularity the defendant now complains, was used by him as the evidence upon which he sought to have the verdict against him, at the fourth trial, set aside. This phase of the case is fully discussed in *Reed* v. *Reed*, 118 Maine, 317, where this precise issue was involved, and the foregoing conclusions fully affirmed. The court there say:

"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."

We are of the same opinion now.

Exceptions overruled.

BERNARD ANDREWS *vs.* LEON NALLEY.

Oxford. Opinion January 5, 1921.

Report of master in chancery, on damages and costs, on dissolution of a temporary injunction. R. S., Chap. 82, Sec. 35, embraces all damages passed upon by the master. Motion for the assessment of damages and costs may be either in writing or oral. Estoppel by conduct. All irregularities in proceedings, which do not go to the jurisdiction of the court may be waived.

This case arises upon a motion and hearing to dissolve a temporary injunction obtained upon bond by the plaintiff against the defendant.

The injunction was dissolved and the sitting Justice appointed Donald B. Partridge as special master to hear the parties and assess the damages and costs sustained by the defendant by reason of the injunction. The master gave notice and heard the parties and found that the defendant was entitled to recover the sum of $269.52.

To the finding of the master, the plaintiff filed exceptions. At the February term of court, 1920, upon motion of the defendant for an acceptance of the report, the sitting Justice, after hearing, both parties being represented by counsel, ordered and decreed that the exceptions to the master's report be overruled, and the report affirmed, and further decreed that the damages and costs suffered and incurred by the defendant by reason of the temporary injunction be assessed and awarded to the defendant in the sum of $269.52, and in default of payment execution to issue.

The exceptions are based upon two theories: One, that the elements of damages considered by the master are not included in those contemplated by the statute; two, that no motion was made in accordance with the requirements of the statute for the assessment of damages.

Held:

1. That R. S., Chap. 82, Sec. 35, which provides in case a temporary injunction is dissolved upon the motion of the defendant that the plaintiff shall pay all damages and costs caused thereby, is broad enough to include every element of damage upon which the master passed.
2. That upon the second theory, the plaintiff could not stand by and take the changes of a favorable report of the master, and accept the advantage thereof, and decline to abide by the report if it was deemed by him to his advantage to do so.

On exceptions by plaintiff. This case arises from the dissolution of a temporary injunction. A master in chancery was appointed to assess damages and costs, and after a hearing filed in court his report, to which plaintiff filed exceptions. The plaintiff's exception's were overruled, the report affirmed, damages and costs assessed to defendant in the sum of $269.52, and in default of payment execution to issue. To these decrees plaintiff excepted. Exceptions overruled.

Case stated in the opinion.

Albert Beliveau, for plaintiff.

John P. Swasey, for defendant.

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

SPEAR, J. This case arises upon a motion and hearing to dissolve a temporary injunction obtained upon bond, by the plaintiff against the defendant.

The injunction was dissolved and the sitting Justice appointed Donald B. Partridge as special master to hear the parties and assess the damages and costs sustained by the defendant by reason of the injunction. The master gave notice and heard the parties and found that the defendant was entitled to recover the sum of $269.52.

To the finding of the master, the plaintiff filed exceptions. At the February term of court, 1920, upon motion of the defendant for an acceptance of the report, the sitting Justice, after hearing, both parties being represented by counsel, ordered and decreed that the exceptions to the master's report be overruled, and the report affirmed, and further decreed that the damages and costs suffered and incurred by the defendant by reason of the temporary injunction be assessed and awarded to the defendant in the sum of $269.52, and in default of payment execution to issue. To this decree plaintiff excepted.

The exceptions are based upon two theories: One, that the elements of damages considered by the master are not included in those contemplated by the statute; two, that no motion was made in accordance with the requirements of the statute for the assessment of damages.

Under the first theory, the elements of damages considered by the master to which objection was made by the plaintiff, embraced, (1) "The assessment of alleged damages sustained by the defendant on account of laying off of men and teams." (2) The allowance for the item of laying off men and teams "because it was the duty of defendant to procure other work and to discourage the men . . . held up by the injunction." This was a question of fact upon which the master's finding, with no evidence to the contrary, must be regarded as final. (3) To the allowance of damages "in not getting logs out of the snow." (4) To the allowance of getting logs out of the snow. (5) To the allowance of expenses and counsel fees. (6) To the allowance of expenses incurred by the defendant in procurring a dissolution of the injunction. (7) To the allowance of the total of the above named elements. Items 3, 4, 5, 6, and 7 all embrace elements of facts upon the finding of which the master's report cannot be disturbed.

We think the statute, R. S., Chap. 82, Sec. 35, which provides in case a temporary injunction is dissolved upon the motion of the defendant that "plaintiff shall pay all the damages, and costs caused thereby" is broad enough to include every element of damage upon which the master passed. The exception to the items considered must be overruled.

Under the second theory, the exception alleges the failure of proper procedure to enable the master to consider the question of damages at all, namely, that no motion was made for the assessment of the damages. The defendant filed his answer to the plaintiff's bill for an injunction praying "that the plaintiff's bill may be dismissed and for his costs."

The presiding Justice upon this answer and prayer to dismiss the bill filed the following decree: "This cause came on for hearing this day and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz: That it be referred to Donald B. Partridge, Special Master in Chancery, hereby appointed for the purpose, to take into account the damages, by the defendant sustained by reason of the interruption of his business in the issuance of the temporary injunction, ordered by the court and subsequently dissolved as appears by the record in the above entitled case, and report the amount found to be due the defendant from

said plaintiff. Said report to be made to said court after notice and hearing by said master."

This decree is clearly based upon the implication that upon dissolution of the injunction the statutory remedy was invoked to compensate the defendant in damages "caused thereby."

The statute does not require a written motion for the assessment of damages and costs. It may be oral or in writing. The decree of the presiding Justice, in form and substance, clearly implies a motion, and the conduct of the plaintiff, upon the filing of the decree confirms that implication, to the extent of now being estopped to deny that such motion was made. Had he, before the case was submitted to the master, made known his objection, the error, if there was one, could then and there have been corrected.

The record shows that the plaintiff was present with counsel and was fully heard upon every step of the proceedings until the filing of the master's report, without a word of objection to the method of procedure.

But he could not stand by and take the chances of a favorable report of the master, and accept the advantage thereof, and decline to abide by the report if it was deemed by him to his disadvantage to do so. Under the well-settled rules of law he must be deemed to have waived any irregularity in the proceedings that did not go to the jurisdiction of the court. The second exception must therefore be overruled.

Exceptions overruled.

HARLAND C. MAXWELL'S CASE.

Kennebec. Opinion January 13, 1921.

Workmen's Compensation Act. What must be set out in the petition. Plain requirements of the statutes must be observed. Agreement between the employer or the insurance carrier and the employee, is binding, except in cases of fraud, and can not be modified, or reviewed, except under Section 36 of said Act. The loss of the whole phalange of a finger, rather than a part, is equivalent to the loss of half the finger. Approval of agreements by the labor commissioner.

Held:

That in petitions to the Industrial Accident Commission the nature of the petitioner's claim and the matter in dispute should be set out in the petition; that while the Industrial Accident Commission is authorized to provide printed blanks for such petitions it may not dispense with a plain requirement of the statutes.

When an employee has entered into an agreement with his employer or the insurance carrier and it has been duly approved by the labor commissioner, such agreement within the limits of its terms has the binding effect of a judgment between the parties and may not be modified, or reviewed or additional compensation given except under Section 36 of the Compensation Act, except, of course, in cases of fraud.

The loss of a "trifle" more than two-thirds of the distal phalange of a finger is not the same as the loss of the whole phalange under the Compensation Act of Maine, especially when some of the function of that phalange is still preserved. It is the loss of the whole phalange, rather than of a part, that under the statute is equivalent to the loss of half the finger.

In this case it not appearing whether the agreement referred to was approved by the labor commissioner, or that provisions of the Act it covered, the case should be recommitted to the Industrial Accident Commission, where the petition may be amended, and if not barred by the terms of the agreement, or if the agreement was not duly approved, the petitioner may recover such compensation as the facts warrant.

On appeal from a decision of the chairman of the Industrial Accident Commission. The respondents in their answer to the petition alleged that the matter at issue was not sufficiently set out in the

petition, and asked to have the petition amended, which was refused, and further alleged that claimant entered into an agreement with respondents for compensation, as provided by law, which compensation had been paid, when due, and that claimant was not entitled to further compensation than that provided under said agreement.

Appeal sustained.

Case is fully stated in the opinion.

Claimant not being represented by counsel, his examination was conducted by Arthur L. Thayer, Chairman of Industrial Accident Commission.

Andrews & Nelson, and W. T. Gardiner, for respondents.

SITTING: SPEAR, HANSON, PHILBROOK, MORRILL, WILSON, JJ.

WILSON, J. An appeal from a decree of a sitting Justice under Section 34 of the Workmen's Compensation Act, now found in Chap. 238, P. L., 1919, confirming the findings of the chairman of the Industrial Accident Commission. The petitioner was injured in the mill of the Winthrop Mills Company on the sixth day of December, 1919. From the report of the evidence, it appears that the petitioner and his employer entered into an agreement as to the compensation he was entitled to receive under the Compensation Act, which was paid to him under and in accordance with the agreement for seven and a fraction weeks or until February 7th, 1920.

More than a month after the payments under this agreement ceased, on March 20, 1920, the petition on which these proceedings are based was filed with the Commission as though no agreement had been entered into. The petition evidently was made on a printed form furnished by the Commission, and in substance sets forth as the basis of his claim: First, that he was injured on the sixth day of December, 1919, by an accident arising out of and in course of his employment with the Winthrop Mills Co.; second, that the accident occurred through his finger being caught in the gears of the machinery in the mill where he was employed; third, that it resulted in a "laceration of the end of the finger middle of left hand requiring amputation of the end."

The remainder of the petition follows in full:

"Did employer have notice in writing of the accident? Yes.

Did employer have knowledge of the injury? Yes.

Have you entered into an agreement on a form furnished by the Commission?

Has said agreement been approved by the Commissioner of Labor? No.

Whereupon your petitioner prays that after due notice a hearing may be had thereon and that he may be awarded such compensation as he may be entitled to in the premises."

A hearing was held by the chairman of the Commission. It appears from the printed case that the accident resulted in a "trifle" more than two-thirds of the distal phalange of the middle finger of the left hand being amputated. There was left, however, sufficient of the phalange so that the finger could be bent at the first joint and the roots of the nail were still left.

According to the testimony of the petitioner it was his intention under these proceedings to claim compensation for the permanent impairment of the usefulness of the finger, presumably under the last paragraph of Section 16 of the Act. The chairman of the Commission, however, heard the case alone and awarded him compensation under Section 16 as though for the loss of the entire phalange and upon the consideration as he put it, that "for all practical and useful purposes the phalange is gone."

The respondents filed a formal answer and contend; first, that the petition is deficient in that it does not set forth the "matter in dispute and the petitioner's claim in reference thereto" as required by Section 30 of the Act, and that the commissioner who heard the case should have ordered it amended to comply with the statute which, though requested, he refused to do, and held the petition sufficient and proceeded with the hearing; second, that having already entered into an agreement and received compensation under it he cannot obtain additional compensation except by proceeding under Section 36 of the Act; third, that since the petitioner based his claim on the permanent impairment of the usefulness of the finger, the amount of the compensation to which he was entitled could not be determined until the full Commission had determined the extent to which the usefulness was impaired; fourth, that the finding of the chairman that the petitioner suffered the loss of the entire distal phalange was not warranted from the evidence inasmuch as it appeared that nearly a third of the bone of

the phalange remained, and as a matter of law it was error to hold that the loss "for all practical or useful purposes" should enter into the determination of whether the loss of even a major part of a phalange entitled the petitioner to compensation under the specific provisions of Section 16 of the Act as for the loss of the entire phalange.

We think the contentions of the respondents, in part at least, must be sustained. Even though the Commission may under Section 37 of the Act provide blank forms for petitioners, it cannot dispense with the plain requirements of the statute. Section 30 of the Act requires that the petition shall set forth "the matter in dispute and the claim of the petitioner in reference thereto." The respondent is entitled to have this provision complied with in order that he may be prepared to meet the claim. Especially is this so since the addition of the last paragraph to Section 16, in order that it may appear at the outset whether the chairman or the full Commission must hear. The petition printed as a part of this case contains nothing that would apprise anyone of the matter in dispute or the petitioner's claim relating thereto. Technical or formal language should not be required, but in substance the nature of the petitioner's claim should be set out in his petition—whether for partial or total incapacity, for specific compensation or permanent impairment of the usefulness of the member. We think as a matter of procedure the chairman should have ordered the petition amended as requested by the respondents, but whether a failure to do so alone constitutes a ground of appeal, unless it clearly appears that the rights of the respondent were thereby prejudiced, it is not necessary to decide in this case.

As to the respondent's contention that since an agreement was entered into between the petitioner and the respondent under which the petitioner has already received compensation and which under Section 35 of the Act has the binding force of a judgment, he is thereby precluded from receiving any additional compensation unless such agreement is first modified in accordance with the provisions of Section 36. Such, we think, would be the result if the agreement has been approved by the labor commissioner and is broad enough to cover all the compensation to which he is entitled under the Act. Such agreements, however, do not bind the employee except as to the conditions covered by them as a basis for the

compensation agreed upon. Hunnewell's Case, 220 Mass., 351; Lemieux Case, 223 Mass., 346. It does not appear from the printed case whether the agreement referred to in the evidence was ever approved by the commissioner of labor, or what its terms were. Its approval is expressly denied in the petition. Upon the evidence before us we are therefore unable to pass upon the respondent's contention on this point.

In answer to a question by the chairman, the petitioner stated that he asked the compensation in these proceedings upon the ground that there had been a permanent impairment of his finger—meaning in usefulness—by reason of the injury he suffered. Whereupon the respondents objected to further hearing by the chairman alone, as such claims under the last paragraph of Section 16 of the Act must be determined by the full Commission.

The chairman, however, heard the case, but based his decision on an entirely different ground, viz: That the loss, as he puts it, of "nearly three-fourths of the distal phalange, constitutes the loss of the entire phalange for all practical or useful purposes," and held that the petitioner had lost the phalange of his finger within the meaning of Section 16 of the Act and was entitled to specific compensation therein provided, less the sums he had already received.

The decision just handed down by this court in the case of *McLean* v. *American Express Company*, 119 Maine, 322, is decisive on this point especially in view of the addition to Section 16 in the re-enactment of the law in 1919, whereby compensation may be granted in cases of impairments of the usefulness or physical function of a member even though it is not entirely lost. This court in the above case said, in speaking of the loss of two-thirds of the foot: "We think it is more consonant with judicial interpretation to hold that according to the common meaning of the language the statutory words, 'the loss of the foot' means the loss of the entire foot and not a fractional part thereof."

The New York courts have adopted the construction of a provision corresponding to the one under consideration that where "substantially" all of the phalange is gone, the Accident Commission is justified in holding that there has been a loss of the phalange. In the case of Matter of Petrie, 215 N. Y., 335, though it is not entirely clear just how much of the phalange was gone, it upheld

the finding of the Commission that there was a loss of the phalange upon the application of this rule. In *Tetro* v. *Superior Printing & Box Co.*, 172 N. Y. S., 722, however, where only one-fourth of the bone was lost the court said: "It is a loss of the first phalange, not a part thereof which is equivalent to the loss of half the finger," but it still adhered to its ruling in the Matter of Petrie, *supra*, that where "substantially" all of the portion of the finger specified in the Act is lost it may be regarded as a loss of that portion. Under the Compensation Act of this State as now amended we see no occasion for adopting this rule.

In the case at bar, however, since the injured employee still retains some of the functions of the designated member,—i. e., enough of the phalange remaining so that it may be fairly said, we think, that he is still able to bend the injured finger at the distal joint, and had practically one-third of the bone of the phalange left, and some part at least of the nail,—he cannot be said to have lost even substantially all of the phalange, and the ruling of the chairman of the Commission that since it was lost for all practical and useful purposes, it was lost within the meaning of the statute, was error.

A liberal construction of the Act does not require the court to strain plain and unequivocal language to this point.

However, since it does not appear whether the agreement alleged to have been made was signed by the labor commissioner or what its terms were, the case should be recommitted to the Industrial Accident Commission, where, if not barred by the alleged agreement, the petitioner may amend his petition and obtain compensation, if the facts warrant, for permanent impairment of use of the injured member. McKenna's Case, 117 Maine, 179.

Appeal sustained. Findings of sitting Justice reversed. Case recommitted to Industrial Accident Commission for further hearing.

ELIZABETH PATRICK, In Equity,

vs.

J. B. HAM COMPANY, and ROYAL INDEMNITY COMPANY.

Androscoggin. Opinion January 19, 1921.

Workmen's Compensation Act. The finding by the chairman of the Industrial Accident Commission, that the injury complained of was caused by accident arising out of and in the course of the employment of the injured party, if founded on facts proved and supported by rational and natural inferences from facts proved or admitted, is final. Injury caused by exertion incident to one's employment, under the ordinary and usual circumstances and conditions of such employment, which accelerates or aggravates a pre-existing disease and results in injury, is an accident arising out of and in the course of such employment within the meaning of the Act. It is contended in the dissenting opinion, that a fatal malady, progressive in its nature and character, and destined at some time, to result in injury without any external, foreign, or adventitious influences, precludes, as accidental within the meaning of the Act, an injury resulting from a condition produced by such pre-existing disease, even though such injury happens to occur at a time when the injured party is engaged in his usual employment under ordinary conditions and circumstances, nothing unexpected or unforeseen, except the injury itself, occurring.

This is an appeal by J. B. Ham Company, an employer, and Royal Indemnity Company, its insurance carrier, from a decision of the chairman of the Industrial Accident Commission ordering them to pay to Elizabeth Patrick, dependent widow of Joseph Patrick, a deceased employee of said J. B. Ham Company, weekly compensation of $11.80 to the maximum of $3,500 provided for by the Workmen's Compensation Act.

Held:

1. That the burden of proof was amply sustained within the rule laid down in Mailman's Case, 118 Maine, 172, is clearly shown in the record. And Mail-

man's Case is decisive of this case, and is authority for a change of burden of proof or proceeding had the same been required. There, as here, there was dispute as to the circumstances, and much was left for the Commission to settle from inferences to be drawn from the facts proved or admitted.

2. The chairman found from facts proved and inferences from facts proved, that the decedent's death was due to personal injury by accident arising out of and in the course of his employment.

3. It is the settled law that even where a workman dies from pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident. Acceleration or aggravation of a pre-existing disease is an injury caused by accident.

4. That Patrick was suffering from diseased arteries pre-disposing him to cerebral hemorrhage is of no consequence in the case. That he might have died, or would have died, in his bed of cerebral hemorrhage, in a year or a week is immaterial.

The question before the Commission was whether the work that he was doing on the afternoon of October 13th, 1919, caused the cerebral hemorrhage to then occur. If so we think it was an accident arising out of and in the course of his employment.

This was a question of fact. The Industrial Accident Commission through its chairman has decided this question of fact in favor of the claimant. The finding is, we believe, supported by rational and natural inferences from proved facts, and we do not feel authorized to disturb the finding.

On appeal by defendant. This case came to the Law Court on appeal by J. B. Ham Company, the employer, and Royal Indemnity Company, its insurance carrier, from the decree of a single Justice sustaining the findings of the chairman of the Industrial Accident Commission, ordering them to pay to Elizabeth Patrick, dependent widow of Joseph Patrick, a deceased employee of said J. B. Ham Company, weekly compensation of $11.80 to the maximum sum of $3,500, under the provisions of the Workmen's Compensation Act. The questions involved embrace the question as to whether the finding of the chairman of the Industrial Commission is founded on facts proved and natural inferences from facts proved or admitted, and thus final, and the question as to whether the injury complained of was the result of an accident within the meaning of the Act. Appeal dismissed. Decree affirmed.

The case is fully stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Leon V. Walker, for defendants.

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

PHILBROOK, J., dissenting. CORNISH, C. J., SPEAR, J. Concur in dissenting opinion.

HANSON, J. This is an appeal by J. B. Ham Company, an employer, and Royal Indemnity Company, its insurance carrier, from a decision of the chairman of the Industrial Accident Commission ordering them to pay to Elizabeth Patrick, dependent widow of Joseph Patrick, a deceased employee of said J. B. Ham Company, weekly compensation of $11.80 to the maximum sum of $3,500 provided for by the Workmen's Compensation Act.

The facts found by the Industrial Commission were as follows:

On October 13, 1919, Joseph Patrick was an employee of the J. B. Ham Company, grain dealers of Lewiston, Maine. The J. B. Ham Company were assenting employers under the terms of the Workmen's Compensation Act.

On the date of the alleged injury Mr. Patrick was engaged in loading a car of grain at the place of business of the J. B. Ham Company. The grain was in bags containing 100 lbs. each and consisted of corn and mixed grain. The grain was being wheeled into a car on small trucks, two bags at a time. Mr. Patrick had charge of loading the car, and remained in the car. Other employees were trucking the bags into the car. As the bags were trucked into the car they would be wheeled to the front of the pile in such a manner as to place the bags to be unloaded from the truck parallel with those already placed in the car, the man who had wheeled the bags in would set the truck down and take one end of the bag while Mr. Patrick standing at the front end of the truck would take the other end of the bag, and the two would swing the bag onto the pile. As the bags were piled up the height would vary according to the number placed in the car.

Mr. Patrick was engaged in this kind of work all the morning of October 13th. He went home to his dinner as usual at noon and returned as usual at one o'clock ready to continue his work. As the work commenced in the afternoon, a Mr. Bailey, who was one of those wheeling the grain into the car, asked Mr. Patrick if he was ready for some corn and Mr. Patrick said "Bring it in." Mr.

Bailey brought in a load of two bags and together with the help of Mr. Patrick started to place the bags on the pile, one at a time, in the usual way. Mr. Bailey testified that the pile, at that time, was about three feet high where the bags were to be placed.

Mr. Patrick stooped to pick up his end of the bag and as he threw it onto the pile Mr. Bailey said he noticed Mr. Patrick lurched a little. However, they put the bag in place and both stooped and picked up the second bag and placed it on the pile. Again Mr. Bailey says he noticed that Mr. Patrick lurched a little as he swung the bag up.

Mr. Bailey then went after another load of grain and returned with it. Again Mr. Patrick stooped to pick up his end of a bag but this time he fell across the bag and could not lift it. Mr. Bailey then saw there was something wrong with Mr. Patrick and he called some other men who, together with Mr. Bailey, assisted Mr. Patrick to walk out of the car into the store-room. Mr. Patrick soon became unconscious, he was sent at once to a hospital where he died about ten o'clock that night without regaining consciousness. The cause of the death, as testified by two physicians, was cerebral hemorrhage.

No question is raised as to dependency, and the chairman found that Elizabeth Patrick was a dependent as defined by sub-division (a) Paragraph VIII, Section 1 of the Workmen's Compensation Act, upon Joseph Patrick at the date of his death. And basing his decision upon the foregoing facts, and upon the testimony of the two physicians testifying in the case, the chairman further found that "in view of these two opinions, expressed by the two physicians who saw and attended Mr. Patrick, and the further evidence that Mr. Patrick had resumed his work for the afternoon in apparently his usual health and was actually engaged in that work at the time the fatal hemorrhage first appeared, and in view of the entire lack of evidence of any other possible cause of the hemorrhage, the chairman finds that Mr. Patrick's death was due to a personal injury by accident arising out of and in the course of his employment."

The decree followed, and it is the opinion of the court that there was evidence upon which the decision of the Commission can rest.

Counsel for appellant contends that the chairman not only misapprehended the evidence on various vital points, but that he in effect placed the burden of proof not upon the claimant, but upon the respondents.

As to the first contention, the appellant's counsel strenuously urges that the testimony of Mr. Bailey is inconsistent with an affidavit previously made, which affidavit was written by counsel himself, and after cross-examining Mr. Bailey in detail as to his statements, introduced the affidavit.

The chief contention was over the circumstances attending the piling of the first and second bags. There is variation between the affidavit and the testimony before the Commission, as there always is when months intervene, but the variation is not such as to discredit the testimony of Mr. Bailey, and it can be reconciled easily with the petitioner's theory when the whole record is taken into consideration. It may be said that appellant does not challenge the integrity of the witness, nor do we find that his close cross-examination destroys the value of his testimony because of its inconsistency. Counsel's theory is that Patrick was stricken before he lifted at all, on either of the bags, and he claims that Bailey's testimony supports his theory, but it is found that after confronting him with his former statement as to Patrick's position on the arrival of the first two bags, Bailey does not support his claim. The record has it:—

"Q. Now Mr. Bailey don't you recall that at that time you stated that 'when he stooped for the first bag, I noticed him lurch forward against the bag before he lifted it?'

A. I do, yes, sir.

Q. And then that you said,—'That is strange, he was a strong man and usually threw a bag of grain easily enough.'

A. I did.

Q. You made that statement?

A. I made that statement. He lurched every time against the bag when he lifted it, but he lifted the two bags."

It is evident that the predisposing cause of Patrick's death operated in a very few minutes, and possibly within less time than a minute. The mere act of piling two bags would not consume a minute. It is argued that at one o'clock Mr. Robitaille, who was employed in the car pulling nails from the inside of the car, tried to talk with Patrick, who was then "looking at his tally slip which was nailed to the side of the car," and receiving no response to his remarks, ceased speaking, and continued his work. It is argued from this occurrence that Patrick was then affected by the attack of cerebral hemorrhage which caused his death. But it appears that George M.

Bailey, another employee, and the witness whose testimony reveals all the important facts and circumstances in the case, entered the car at five minutes after one o'clock and asked Mr. Patrick if he could take some corn in the south end of the car, and Patrick said "Yes, bring it in." A man stricken with cerebral hemorrhage would not be likely to answer so promptly. Immediately after this, Mr. Bailey brought in the first truck load of two bags and proceeded to unload the same with Patrick's help. In the act of jointly lifting and piling the two bags the cause of Mr. Patrick's death occurred, whether from accident arising out of and in the course of his employment, or from natural causes. It necessarily happened then. This is made certain by the testimony that Bailey returning for another load, said to another workman, "Joe has had a shock," and on returning Bailey found Patrick standing "where he had left him," and "Patrick reached down to take hold and lurched over again, smiled, and drool was running out of his mouth." He did not lift on the second truck load, but turned and tried to "hold himself to the side of the car." That Mr. Patrick was stricken while in the course of his employment is not disputed. That he was a man of middle age, of good habits and regular life, and in the same employment for many years, appears in the record.

Upon the second contention counsel urges that "the decision of the Commission throws the burden of proof upon the respondents instead of upon claimant." In his decision the chairman says: "The only question raised in this case therefore is whether the final cause of the cerebral hemorrhage was a natural one or an act of Mr. Patrick while in the course of his employment.

No evidence was produced at the hearing of any cause to which the hemorrhage could possibly be attributed, except the employment in which Mr. Patrick was engaged."

And again he says: "In view of the entire lack of evidence of any other possible cause of the hemorrhage, the Chairman finds that Mr. Patrick's death was due to a personal injury by accident arising out of . . . . the employment."

As to this contention, we do not perceive that the record supports the same, or that the language used by the chairman can be held to have any such import as claimed by appellant. When read in connection with the finding as a whole, the suggestion of any such position on the part of the chairman disappears. The statement of the

negative position was surplusage, and no doubt could have been omitted, but its inclusion cannot invalidate the positive fact found, which is the important inquiry here.

That the burden of proof was amply sustained within the rule laid down in Mailman's Case, 118 Maine, 172, is clearly shown in the record. And Mailman's Case, supra, is decisive of this case, and is authority for such change of burden of proof or proceeding had the same been required. There, as here, there was dispute as to the circumstances, and much was left for the Commission to settle from inferences to be drawn from the facts proved or admitted. There the court held, that "The decree of the Commission is analogous to a finding of a Judge who by consent determines facts or 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." And "In a case proved wholly, or in part, circumstantially, when there is dispute as to what the circumstances are, the determination of such dispute by the Commission 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." "And finally, 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 chairman found from facts proved and inferences from facts proved, that the decedent's death was due to personal injury by accident arising out of and in the course of his employment.

In *Saunders* v. *New England Collapsible Tube Co.*, et al, Supreme Court of Errors of Connecticut, June 10, 1920, 110 Atl., 538, a similar question was presented, and the court say:—

"It is the duty of the trier to infer what one has done or left undone, although there be no positive testimony of this. And when the appellate court passes upon whether this duty has been judicially performed by legal standard it cannot inquire whether it would have reached the same result; it must limit its inquiry to the ascertainment of whether the inference is so unreasonable as to be unjustifiable. It is the right of every trier to infer what one's conduct has been in the circumstances, even though the infer-

ence reaches beyond the positive testimony in the case. *Bunnell* v. *Berlin Iron Bridge Co.*, 66 Conn., 24, 36, 33 Atl., 533; *Union Bank* v. *Middlebrook*, 33 Conn., 95, 100; *Dubuque* v. *Coman*, 64 Conn., 475, 479, 30 Atl., 777." And the opinion adds: "It was the province of the commissioner to determine which theory was supported by the evidence. And if the evidence reasonably supported either theory he might adopt that theory, and the Superior Court on appeal could not disturb his decision upon that ground. The Superior Court does not weigh evidence in this class of cases; it may determine whether the finding of the commissioner should be corrected or not, or whether there was any evidence to support the conclusions reached. And when it has done this its control over the evidence ceases."

We are asked to reverse the decision of the Commission because, as defendant's counsel says, "there is not even a "scintilla of evidence to support its finding." We think there was sufficient evidence, though slight from the very nature of the case, to support the finding, and that the inference of death from accidental cause was reasonable and justifiable.

The petitioner claimed that Patrick's death was due to injury resulting from accident occurring while decedent was engaged in lifting bags of grain. Appellant contended that there was no accident, but that decedent died from natural causes.

In reaching his conclusion the chairman had to determine:—

1. Do the facts and circumstances of the case warrant a finding that an accident occurred injuring the decedent, within the meaning of the Act, and if so,—

2. Did the decedent die from the results of such injury by accident?

The answer to the first question, under the testimony solves the second, and sets at rest the contentions of counsel upon the main issue in the case.

What is an accident, and what is the meaning of the word, the generally accepted meaning, and the generally adopted application in Acts similar to that under consideration here? As defined by lexicographers, an accident is a befalling; an event that takes place without one's forethought or expectation; an undesigned, sudden, and unexpected event. Its synonyms include mishap, mischance, misfortune; disaster, calamity, catastrophe. Webster's New International Dictionary.

1. In general, anything that happens or begins to be without design, or as an unforeseen effect; that which falls out by chance; a fortuitous event or circumstance.

2. Specifically, an undesirable or unfortunate happening; an undesigned harm or injury; a casualty or mishap.

3. The operation of chance; an undesigned contingency; a happening without intentional causation; chance; fortune. Century Dictionary.

1. Anything that happens; an occurrence; event. Especially:

(1) Anything occurring unexpectedly, or without known or assignable cause; a contingency.

(2) Any unpleasant or unfortunate occurrence, that causes injury, loss, suffering or death.

(3) *Med.* An unfavorable or unanticipated symptom. New Standard Dictionary.

Bouvier, Rawles Revision, defines it, "An event which under the circumstances, is unusual and unexpected by the person to whom it happens."

These sources of information, defining the word, are in complete harmony with the popular and generally accepted use of the word, and especially as construed by courts in states having Workmen's Compensation Laws with provisions similar to the provisions of the Maine Act. Some of the authorities are: *Bystrom Bros.* v. *Jacobson,* 162 Wis., 180; 155 N. W., 919; *Zappala* v. *Ind. Ins. Commission* (Wash.) 144 Pac., 54; *E. Baggot Co.* v. *Ind. Commission,* (Ill.) 125 N. E. 254; *Clark* v. *Lehigh Valley Coal Co.,* (Pa.), 107 Atl., 858; *Miller* v. *Bell* (Ind. App.), 127 N. E., 567; *Bd. of Comrs.* v. *Shertzer,* (Ind. App.), 127 N. E., 843; *State Road Comm.* v. *Ind. Commission* (Utah), 190 Pac., 544; *Steel Sales Corp.* v. *Ind. Commission* (Ill.), 127 N. E., 698; *Grannison's Admr.* v. *B. & R. Const. Co.,* (Ky.), 219 S. W., 806; *Manning* v. *Pomerene* (Neb.), 162 N. W., 492; *State Ex.rel Rau* v. *District Court* (Minn.), 164 N. W., 916; *City of Joliet* v. *Ind. Commission,* (Ill.), 126 N. E., 618. *Peoria Co. Ind. Board,* 279 Ill., 352, 116 N. E., 651. *M. & H. Zinc Co.* v. *Ind. Board,* 120 N. E., 249.

In Peoria Co. Ind. Board, supra, may be found many cases cited both in this country and in England sustaining the petitioner's contention here, and the case holds that "Even where a workman dies from a pre-existing disease, if the disease is aggravated

or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident. Acceleration or aggravation of a pre-existing disease is an injury caused by accident. 1 Bradbury on Workmen's Comp., 385; Elliot's Workmen's Comp. Act (7th Ed.) 9, and cited cases. Another case directly to the point is also cited therein: "A workman, whilst tightening a nut with a spanner, fell back on his head and died. A post-mortem examination showed that there was a large aneurism in the aorta, and that death was caused by a rupture of the aorta. The aneurism was in such an advanced condition that it might have burst while the man was asleep, and a very slight exertion or strain would have been sufficient to bring about a rupture. The trial judge found that the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal, and held that it was an accident within the meaning of the law. This decision was upheld both by the court of appeal and the House of Lords. *Hughes* v. *Clover & Clayton & Co.*, (1909), 2 K. B., 798."

That Patrick was suffering from diseased arteries pre-disposing him to cerebral hemorrhage is of no consequence in the case. That he might have died, or would have died in his bed, of cerebral hemorrhage, in a year or a week is immaterial.

The question before the Commission was whether the work that he was doing on the afternoon of October 13th, 1919, caused the cerebral hemorrhage to then occur. If so, we think it was an accident arising out of and in the course of his employment.

This was a question of fact. The Industrial Accident Commission through its chairman has decided this question of fact in favor of the claimant. The finding is, we believe, supported by rational and natural inferences from proved facts.

Accidental injury causing death is at least as believable and reasonable, as the theory that a man continued to talk rationally and perform manual labor for a time, however short, after an attack of cerebral hemorrhage which causes death in a few hours. Of the two theories, the former was adopted by the Commission as the more reasonable, and we do not feel justified in disturbing its finding.

Appeal dismissed.
Decree affirmed.

PHILBROOK, J. Dissenting.

I am unable to concur in the foregoing opinion, and because I feel that this case is one of more than ordinary importance, and that the effect of the opinion will be so far reaching, I am constrained to express the reasons which control my dissent.

The statute under consideration awards compensation for personal injuries, but only when those injuries arise (a) in the course of the employment, (b) out of the employment, and (c) by accident.

By practically unanimous decisions of the courts of England and of this country it is held that an injury to an employee arises in the course of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in doing something incidental to it. In the case at bar it is conceded that the pathological conditions which resulted in the death of Patrick became manifest in the course of his employment so that discussion of this point becomes unnecessary.

Judicial authorities and text-writers have not found it so easy to give a comprehensive definition of the expression "Arising out of the employment," which shall precisely include all cases within and exclude all those without this statute. But there seems to be a practical unanimity in declaring that an injury may be said to arise out of the employment when there is a "causal connection between the conditions under which the employee worked, and the injury he received," Westman's Case, 118 Maine at Page 143. In discussing the application of this rule of law to the facts arising in the case at bar, it is difficult to avoid reference to matters which may be also properly treated under the "accident" clause of the statute, and in advance I crave indulgence if I repeat somewhat when that branch of the case is reached. At the outset of our present consideration we must discriminate between the so-called cause of death, as given in a medical death certificate, and the conditions which gave rise to that cause. That Patrick's death was due to cerebral hemorrhage, and that the hemorrhage was due to a bursting blood vessel no one will deny. It may also be frankly admitted that blood vessels in the human system more often burst because of increased blood pressure. But according to the testimony of

the physicians in the case, as well as from common experience, we learn that in many cases blood vessels, weakened from disease, burst when no unusual exercise precedes the event, occurring sometimes, as these physicians say, when the victim is in repose, sleeping in his bed. In such cases, and they are not infrequent say the doctors, the time appointed once for man to die has come on silent footsteps, the finger of death touches its victim and he sleeps forever. This being true, the petitioner must prove something more than cerebral hemorrhage, something more than a bursting blood vessel, something more, even, than increased blood pressure. She must prove that there existed a causal relation between these things and the "conditions under which the employee worked." In short, she must prove that the personal injuries, which resulted in death, arose out of the employment in which the deceased was engaged. This requires a careful, critical, impartial examination of the evidence. I yield to none in my sympathy for those who are in need, but the admonition which we impress upon jurors lest they be unduly influenced by this commendable trait of the human mind, must as well restrain us in our judicial findings.

The evidence relied upon by the chairman of the Commission, and by those who join in the opinion to which I am now dissenting, may be divided into two groups: First, the testimony of Bailey, the only person present when Patrick was stricken; second, that of the physicians. Here it is proper to remark that I do not disregard that portion of the statute regarding finality of findings of fact made by the chairman of the Commission, my dissent being based upon what I regard as lack of evidence to support that finding, thus raising a question of law.

The finding of the chairman is embodied, verbatim, in the opinion, and as it is before us in the opinion, there is no necessity of repeating it. As to the testimony of Bailey, the crucial part is brief and I desire to point out what seems to me to be a contradiction, upon the vital point, between the testimony as given by the witness and the testimony as stated in the finding and opinion. The latter says, "Mr. Patrick stooped to pick up his end of the bag and as he threw it onto the pile Mr. Bailey said he noticed Mr. Patrick lurched a little. However, they put the bag in place and both stooped and picked up the second bag and placed it on the pile. Again Mr. Bailey says he noticed that Mr. Patrick lurched a little as he

swung the bag up." Apparently, from this statement of what the evidence was, the chairman drew the conclusion that the exertion of stooping and lifting caused the additional blood pressure and the train of fatal incidents followed. If such had been the testimony, I might be able to concede that the petitioner had produced some evidence to prove this branch of the case. But if I am capable of understanding Mr. Bailey's testimony, as it appears in the record, it does not measure up to the interpretation put upon it by the chairman but falls considerably short of it. Mr. Bailey distinctly says that he "trucked the first two bags of grain in after dinner" and that although this was the first work done, no previous lifting or straining being testified to, it was "When he (Patrick) went to unload those two bags, he lurched." This plainly shows that before he stooped, before he lifted, and before he had done anything pertaining to the work in which he was employed, the pathological conditions which resulted in his death had arisen. How can this testimony be said to show that there was causal relation "between the condition under which the employee worked and the injury he received?" It seems to me to negative rather than to sustain the claim of the petitioner that there was any such causal relation.

Turning to the testimony of the physicians, it will be observed that counsel for the petitioner, learned in law and familiar with the requirements of the statute, adroitly frames a hypothetical question which includes the condition of stooping and lifting before the lurching and asks if "in view of those facts, the work in the forenoon and in the afternoon, lifting the bags that he was lifting, would increase the blood pressure." To this inquiry Dr. O'Connell answers in the affirmative. Again he was asked, "And did the cerebral hemorrhage follow, directly, in your judgment, as a result of the lifting which produced the increased blood pressure." To this inquiry also an affirmative answer was returned. But, as we have already seen, the testimony of Mr. Bailey would not warrant the hypothetical question to be framed as it was. A similar hypothetical line of questions addressed to Dr. Scannell elicited similar affirmative answers. But we must not overlook other significant and important testimony of Dr. Scannell wherein he tells us that when he was seeking for the history of the case he learned that Patrick had hardening of the arteries, that he had been feeling poorly for a month

or six weeks, in the morning was sick to the stomach, and complained of headaches and dizziness. He also testified that "some of the common causes leading up to apoplexy are diseased conditions which have a tendency to cause hardening of the arteries, such as heart and kidney complications, worry, anxiety, overwork, and all those things that have a tendency to put wear and tear upon a man's vessels." May we not truthfully say that in the case at bar there is quite as great a possibility that Patrick's attack of apoplexy was the result of his diseased condition, which undoubtedly existed before the shock, rather than the lifting of the bags that afternoon which, according to Mr. Bailey's testimony, was not done before the shock? The burden is upon the petitioner to satisfy a tribunal that her claim is well founded. "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." Westman's Case, supra, at Page 138 and cases there cited.

The time once appointed for Patrick to die had arrived. Has the petitioner shown that there was a causal relation between that death and the conditions under which he worked. From the testimony in the case, and that is all we have a right to depend upon, I am unable to answer this question in favor of the petitioner.

Passing now to the third essential for recovery under the statute, the question arises whether the petitioner has shown that Patrick died from personal injuries arising from accident. From a fairly extensive examination of the authorities it appears that there is not complete harmony of views among the courts as to what constitutes an accident, or an accidental injury, arising out of and in the course of employment, which would authorize the injured party, or his dependent in case of death, to receive compensation. One writer upon the subject of Workmen's Compensation Acts declares that the term "accident" has probably been more discussed in adjudication than any other word in the whole English language. This may, in part, account for the varying views. On the one hand we should not be over technical and on the other we should not be too indulgent, when we attempt to construe the word and apply that construction to the case at bar. Damburn on Employer's

Liability, 4th edition, Page 100, says: "Roughly speaking, accidents are divided into two great classes; (a) accidents peculiarly known as such, such as railway accidents, breaking down of machinery, explosions, collisions, etc., where persons injured by them are spoken of as injured by accident; and (b) accidents where there is no such external mishap, but where a man injures himself, as we would say, by accident where he either strains a muscle, or ricks his back, or ruptures himself, or otherwise hurts himself in unexpected manner." *Boyed on Compensation Laws*, Sec. 458, says, "Strains sustained by employees of normal health in the course of their employment are generally regarded as accidental injuries.R uptures, resulting from lifting heavy objects, are generally held fortuitous and unexpected events, in other words, accidents." These words are oft quoted from *Fenton* v. *Thorley*, 89 L. T., 314, "If a man in lifting a weight, or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap, in ordinary parlance, would be described as accidental."

In an extended compilation of cases by Kiser, under the title Workmen's Compensation Acts, accompanying the Cyc-Corpus Juris system, fortified by many citations, it is said that "the term 'accident,' as employed in the compensation acts, is broad enough to include an injury from muscular strain or physical over exertion, such as hernia, or rupture, or bursting of blood vessels. This is true, although the physical condition of the employee is such as to pre-dispose him to the injury. But it has been held there must be a definite particular occurrence to which the injury can be attributed." Obviously, in the case at bar, the petitioner depends on proving an accident in that class of cases latterly spoken of, and which does not call for any external violence, but which has been alluded to as having been occasioned by some act of the deceased whereby a strain produced the injury. But even in this class of cases we must not overlook the conceded rule that there must still be an accident. Hence definitions of lexicographers and courts are of importance in determining what an accident consists of and what are the fundamental principles to which we must look in deciding this or any other case. Our own court, speaking through the late Chief Justice Peters, in *McGlinchey* v. *Fidelity and Casualty Company*, 80 Maine, at Page 253, says, "The definition of accident, generally assented to, is an event without any human agency,

or if happening through human agency, an event which, under the circumstances, is unusual and not expected to the person to whom it happens." If it should be urged that this definition was given in an accident insurance case then we are only obliged to turn to the very first case relied upon in the opinion from which I am now dissenting, namely, *Bystrom Bros.* v. *Jacobson, et al,* 162 Wis., 180; 155 N. W., 919, where the court holds that "the term accidental, as used in compensation laws, denotes something unusual, unexpected and undesigned." Here then is the angle of difference between myself and those who hold to the opinion, namely, on the day when Patrick suffered the shock did there occur anything as the cause of that shock that was unusual, unexpected and undesigned. Of course the shock and the subsequent death were unusual, unexpected and undesigned, but that is not the point involved, but rather were the shock and subsequent death caused by anything, arising from the conditions under which Patrick worked, which was unusual, unexpected or undesigned. Cause must not be confounded with effect, and this the majority opinion seem to do. The causal relations of conditions to the shock once more come to the surface. Again we note the difference between the evidence of Mr. Bailey and the statement of facts made by the chairman of the Commission as to whether the shock preceded or followed the lifting of the bags of grain. But at this stage of the discussion, the relative order of lifting and shock become less important because, whichever preceded the other, the vital question is whether anything unusual, unexpected or undesigned occurred as the cause of the shock. Plainly there can be but one answer and that is in the negative. It is undisputed that Patrick was only called upon to lift, with the aid of another man, the comparatively light load consisting of a bag of grain weighing one hundred pounds and place it on a pile. He was doing the same work, in the same way, with the same surrounding conditions, with the same load, as he had been doing for weeks, months and perhaps years. How can it possibly be said that an accident occurred under the cases cited by the opinion where it is held that an accident involves the happening of something unusual, unexpected or undersigned as a cause of the personal injury.

Lest this dissent may be unduly prolonged, I wish to cite only two cases from many which illustrate my position and then close.

The first is a Michigan case, *Stombaugh* v. *Peerless Wire Fence Co.*, 164 N. W., 537, where a dependent widow sought compensation for the death of her husband who, having had heart trouble of long standing, died as a result of heavy physical labor, the claim being made under the Workmen's Compensation Act of that state, Pub. Acts, No. 10 of the extra session of 1912, on the theory that death was accidental. The compensation was denied. The court held that the deceased was doing the work he agreed to do, in the way he intended to do it; that there was no evidence of mischance or miscalculation in what was being done, none of anything fortuitous or unexpected in the manner of doing it. The work in which the deceased was employed was lifting and lowering rolls of wire weighing from 150 to 160 pounds, from their place in a car and then rolling them to the car door. A case strikingly like the one at bar.

The second case is from the Illinois court, *Jakub* v. *Industrial Commission*, 123 N. E., 263, where an employee engaged in baling copper was found dead near the baling-press, with a completed bale of copper beside him and there was no evidence proving accident, or accidental injury, the claim being made that the heavy work which deceased was doing hastened his death by heart and kidney disease. The court said that this being the only claim made, namely, that heavy work, done in the ordinary course of his employment, caused or hastened his death, there could be no compensation, because it was not shown that anything unexpected or unforeseen occurred.

I said at the outset that this case appeared to me to be of more than ordinary importance and the decision to be far reaching. I still think so. I cannot bring myself to believe that where a man is doing his ordinary work, under ordinary circumstances, in the ordinary way, and is suddenly stricken with a fatal malady, nothing unusual, unexpected or unforeseen occurring as a cause of the malady, it was intended by the Legislature to be regarded as a case of accidental death. If such was and is the intention of the law making power, let it be declared in no uncertain way.

The duty of the court is to interpret and expound the law as it exists. Under this statute the employee has rights but the employer also has his. The scale beam should rest exactly horizontal. The balance weights should be of no baser metal than the pure gold of absolute justice.

ALICE MILLER *vs.* MABEL L. HOOPER, et als.

Cumberland. Opinion January 26, 1921.

Landlord and tenant. Alleged defective stairway leading from tenement occupied by tenant to street. Differentiation between an unsafe condition resulting from structural reasons, and one resulting from wear, breaking or decay. Landlord or owner must exercise due care to keep in reasonably safe repair stairways, passage ways and halls under his control, and disclose to tenant any hidden defects of which he knows or should know, and make such repairs as he expressly agrees to make.

On report. The case involves the duties which a landlord owes to his tenants and their households.

He must make such repairs as he expressly agrees to make. He must disclose to the tenants any hidden defects of which he knows or should know. No further duty devolves upon him in respect to premises of which the tenants are given exclusive possession.

But besides these he has a further duty in respect to halls, stairways and approaches which remain in his control subject to use by the tenant or ordinarily by several tenants. The landlord must exercise due care to keep these in reasably safe repair.

Applying these principles to the facts in the pending case it appears that the stairway upon which the plaintiff fell, sustaining the injuries described in her writ was a stairway controlled by the defendants who were owners of the building and that the stairway was used in common by the families of two tenants. The defendants owed a duty to the plaintiff to exercise due care to keep the stairway in reasonably safe repair. But a careful analysis of the testimony does not disclose that the defendants were derelict in the performance of this duty.

On report. This is an action on the case alleging negligence, brought by plaintiff, a daughter of a tenant of the defendants, to recover damages for an alleged injury received in passing down the back door steps leading from the first floor of the building, in which was the tenement occupied by her father, to the street. The building being located in Portland at the corner of Oxford and

Franklin streets. After the testimony was taken, by agreement of the parties, the case was reported to the Law Court to render such judgment as the law and evidence required. Judgment for defendants.

The case is stated in the opinion.

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

Maurice E. Rosen, and William A. Connellan, for defendants.

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

DEASY, J. The plaintiff was one of the household of her father who occupied as tenants of the defendants the lower of two tenements in a house situated on Franklin Street, Portland.

On Dec. 11, 1919, while leaving the house by the back stairway, used in common by the occupants of both tenements, she tripped and fell, sustaining injuries to recover damages for which this suit is brought.

The duties which a landlord owes to his tenants and their households are established by many judicial decisions. He must make such repairs as he expressly agrees to make. He must disclose to the tenant any hidden defects of which he knows or should know. No further duty devolves upon him in respect to the premises of which the tenants are given exclusive possession. But besides these, he has a further duty in respect to halls, stairways and approaches which remain in his control subject to use by the tenant or ordinarily by several tenants.

He must exercise reasonable care to keep these in safe repair.

Counsel for the defendant urges that the condition of the stairway at the time of the plaintiff's accident was substantially the same as when her father took his lease and moved to the premises, and he argues that the owner performs his full legal duty if he keeps stairways, dedicated to the common use of tenants, in the same state of repair or disrepair that they were in at the beginning of the tenancy.

This position finds support in a series of Massachusetts cases one of the earliest being *Moynihan* v. *Allyn,* 162 Mass., 272, and among the latest *Angevine* v. *Hewitson,* 126 N. E., 425 and *Kirby* v. *Tirrell,* 128 N. E., 28.

As applied to the plan of construction this position is sound.

An owner may build a tenement house with stairways which because of steepness or for other obvious structural reasons are inconvenient or even unsafe. The tenant cannot exact any change. If such stairways need to be repaired or rebuilt, the owner is not required to make them safer or more convenient.

But the application of this doctrine to repairs made necessary by wear, breaking or decay is opposed to the great weight of authority. We conceive the true rule to be that the owner must exercise due care to keep in reasonably safe repair, stairways and passage ways which remain under his own control.

Among the many cases supporting this rule are the following: *Horn* v. *Danziger*, 180 N. Y. S., 97; *Burke* v. *Hullett*, (Ill.), 75 N. E., 240; *Lang* v. *Hill*, (Mo.), 138 S. W., 698; *Starr* v. *Sperry*, (Iowa), 167 N. W., 533; *Widing* v. *Ins. Co.*, (Minn.), 104 N. W., 239; *La Plante* v. *LaZear*, (Ind.), 68 N. E., 312; *Butler* v. *Watson*, (Mich.), 159 N. W., 507; *Dodson* v. *Herndon*, (Ky.), 143 S. W., 1011; *Johnson* v. *Brewing Co.*, (N. J.), 68 At. 85; *Koskoff* v. *Goldman*, (Conn.), 85 At., 592.

The Maine case of *Sawyer* v. *McGillicudy*, 81 Maine 322 is in harmony with these authorities.

But applying this principle to the facts in the pending case we are not convinced that the plaintiff's accident was due to any breach of duty on the part of the defendants. The plaintiff testifies that she tripped upon the third stair from the bottom. The riser of this stair was claimed but not proved to be decayed. The tread was worn but not so worn as to be unsafe. If this stair was in an unsafe condition it was by reason of two cracks in the tread running from half to two-thirds of its length from opposite ends.

The plaintiff testifies that one or both of these cracks sprang open four inches as she stepped upon the tread and that "this toe went in and I went down"—and that after her fall the crack closed again or to use her words "sprang back." This account of the accident while probably related in good faith is so unreasonable as to be incredible.

If a step upon the tread would cause the crack to open four inches or any considerable space some of the occupants of the other tenements in their frequent use of the stairs would have observed it. If the unusual and remarkable defect existed as described that fact

might readily have been demonstrated in the months following the accident during which the condition of the tread remained unchanged. The man who in the spring of 1920 repaired the stairs testified that he found the tread strong and well secured.

We do not deem it necessary to consider the plaintiff's due care. Assuming due care on her part she fails because she has not shown the breach of any legal duty owed to her by the defendants.

Judgment for defendants.

MICHAEL M. CLARK *vs.* BYRON BOYD, et al.

Aroostook. Opinion January 29, 1921.

In the declaration in an action of debt on a bond, where the indebtedness is acknowledged in the instrument itself, it is not necessary to add to the count or counts in the usual form the allegation, Per quod actio accrevit or any words equivalent thereto. It is not necessary to repeat at the beginning of each count, the words, "In a plea of————."

In an action on a bond containing two counts, one in the usual form declaring on the penal part, the second, containing in addition the breach of the conditions of the bond relied upon, and commencing in the usual manner, viz: "Also for that," without repeating the nature of the action, as, "In a plea of debt." Upon special demurrer assigning as grounds of demurrer that neither count contained the words, "whereby an action has accrued to the plaintiff," or any allegation equivalent thereto, and secondly that the second count was also defective because the nature of the action was not stated therein,

Held:

That in an action of debt on a bond or other instrument where the indebtedness is acknowledged in the instrument itself, it is not necessary to add to the counts in the usual form the allegation, *Per quod actio accrevit* or any words equivalent thereto;

That whether the words, "In a plea of————" be regarded as a part of the writ or the commencement of the declaration, it is not necessary to repeat it at the beginning of each count. In the one case, because they are not a part of the declaration or count; in the other, once stated, they are to be supplied or understood after the word "also" at the beginning of each count after the first.

Every count is presumed to be intended as of the same nature as the action which the defendant is summoned to meet. This may be considered settled by long and well established practice in this State.

On exceptions by defendant. This is an action of debt on a bond containing two counts, one declaring on the penal part of the bond, and the second alleging a breach of the conditions of the bond. Defendants demurred specially on the grounds that neither count contained the words, "whereby an action has accrued to the plaintiff," or any allegation equivalent thereto, and secondly that in the second count the nature of the action was not stated, because of the omission to repeat the words "In a plea of debt." The demurrer was overruled by the presiding Justice, and the defendants excepted. Exceptions overruled.

Case is stated in the opinion.

Powers & Guild, and Cook, Hutchinson & Pierce, for plaintiff.

Strout & Strout, and Burleigh Martin, for defendants.

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

WILSON, J. An action of debt on a bond. The declaration contains two counts. The first count is in the form usually found in the books and held sufficient by the court in *York* v. *Stewart,* 103 Maine, 474; *Colton* v. *Stanwood,* 68 Maine, 482; *Inhabitants of Boothbay Harbor* v. *Marson,* 112 Maine, 505; being based simply on the penal part. The second count begins with the customary "Also for that," without stating the nature of the action, and after declaring on the penal part, sets forth the breach of the conditions that are relied upon.

Either of the courses followed in the respective counts was open to the plaintiff. *Inhabitants of Boothbay Harbor* v. *Marson,* supra. There can be no reason why a count in each form may not be joined in the same action.

One of the defendants filed a special demurrer at the second term without requesting the right to plead over, which was properly joined, and overruled by the presiding Justice. The case is now before this court on exceptions to this ruling.

The sole grounds on which the defendant relies are that both counts are defective because they do not contain the words, "whereby

an action has accrued to the plaintiff," or *per quod actio accrevit*, as the ancient form runs, or any allegation equivalent thereto, and that the second count is also defective because it does not begin with the phrase, "In a plea of debt."

We think that each count is sufficient both in form and substance and is in accord with the well and long established forms and rules of pleading recognized in this State. It is not necessary to add an allegation or the equivalent of the ancient *per quod actio accrevit* in an action of debt where the debt is acknowledged in or arises from the instrument or obligation declared on, as a bond or a judgment. In such cases it is only necessary after setting forth the obligation, to allege a non-performance and conclude with a breach *ad damnum*. Chitty on Pleading, 16th Ed. Vol. 1, Page 375; *Smith* v. *Payne*, 12 N. H., 34. For common form of declaration on a bond see Oliver's Precedents, 5th Ed. Page 249, and *York* v. *Stewart*, supra.

Where, however, the debt is the result of a failure to fulfill a promise or an agreement, and arises, as it were, *dehors* the instrument or obligation, as in the case of an action of debt on a promissory note, or for rent under a lease, or even for goods sold and delivered where the price has become due and payable, the allegation, "whereby an action has accrued," appears to be essential, or, at least, commonly used. See forms in Oliver's Precedents, 5th Ed. 245, 246; Chitty on Pleading, supra. No doubt this allegation is many times used out of excessive caution where unnecessary, and is a mere surplusage, and forms may be found in the books which do not square with the above distinction laid down by Chitty; but if it be unnecessary when the penal part of a bond alone is declared on, we see no good reason why it should be essential because the condition and breach are also set out.

As to the second point raised by the demurrer, that the form of action is not stated in the second count. Formerly declarations or statements of the cause of action were not attached to the writ when served, but were stated orally and later in writing and filed in court after the writ was returned. The writ itself then set forth in general terms the nature of the action the defendant was summoned to meet.

The declaration according to the forms then in use began with a recital of the writ and the nature of the action described therein and in general was an exposition of the writ itself with addition of time, place, and other circumstances. Tidd's Practice, Farrant's Ed. Vol. 1, Page 361. Also see forms in Stephens on Pleading, Pages 65-70.

But as the well known author on Practice in the Courts of the King's Bench says: "This practice being productive of great prolixity, a rule of Court was made that declarations in actions on the case and general statutes other than debt repeat not the original writ, but only the nature of the action; thus 'a plea of trespass upon the case.'" Tidd's Practice, Vol. 1, 377; Stephens' Pleading, 3rd Am. Ed., Page 367.

Under Chapter 63 of the Laws of 1821, however, by which the forms of writs were established in this State, a brief statement of the form of the action appears to be made a part of the writ as it clearly is a part of the summons established by the same Act and in common use with all writs of attachment. According to the form of writs thereby established the defendant is summoned to appear and answer unto the plaintiff "in a plea of————" see Chapter 63 *supra*, and *Mahan* v. *Sutherland*, 73 Maine, 158, 161. But whether regarded as a part of the writ by statutory enactment, or the mere insertion as a matter of form at the commencement of the declaration, to indicate that it was sufficient to begin declarations in all cases with this briefer form of statement of the nature of the action; in either case, it is unnecessary to repeat it at the beginning of each count. In the one case, if a part of the writ, it is obviously unnecessary to repeat it at the beginning of even the first count of the declaration which according to the modern practice of attaching it to the writ immediately follows. The practice of a century has settled this beyond question. For the same reason it is unnecessary to repeat it at the beginning of each following count. The words, "Also for that," being in such case the appropriate commencement of each count after the first.

In case the declaration be held to begin with the words, "In a plea of————," once stated, they are to be understood after the word "Also" and before the words "for that," with which according to the long established practice in this State each additional count begins. Every count is presumed to be intended as of the same nature as the action which the defendant is summoned to meet unless the contrary appear, in which case there would be a variance or misjoinder. Stephens on Pleading, 370; Chitty on Pleading, 16th Ed. Vol. 1, Page 264; *Allen* v. *Ham*, 63 Maine, 532, 535. Long usage and sound reason confirms us in this view; nor has the defendant called our attention to any authority or form to the contrary.

The court in *Nat. Exchange Bank* v. *Abell*, 63 Maine, 346, 350, cited by the defendant evidently took the same view. The declaration there was in a plea of debt, two counts were on a judgment and two were in the ordinary form of assumpsit on a note, but the latter counts did not contain any allegation *per quod actio accrevit*, nor did they begin with any words indicating the nature of the action. The defendant demurred and as a ground of demurrer claimed the third and fourth counts were in assumpsit and there was a misjoinder. But the court held that they were simply defective counts in debt; that the defendant was called to answer only to a plea of debt; and there was no count in which the defendant was obliged to answer to a plea of the case.

The counts in the case at bar are both in debt, and the demurrer was properly overruled. The demurrer having been filed at the second term without reserving the right to plead over the judgment should be final at the next term. Sec. 36, Chap. 87, R. S., *Fryeburg* v. *Brownfield*, 68 Maine, 145; *Fox* v. *Bennett*, 84 Maine, 338; *Rollins* v. *Power Co.*, 112 Maine, 175; *Furbish* v. *Robertson*, 67 Maine, 38.

Exceptions overruled.
Final judgment for the plaintiff at the next term after receipt of this mandate.

STATE *vs.* CLARENCE J. LONGLEY, Appellant.

Franklin. Opinion January 31, 1921.

Complaint under Public Laws of 1917, Chap. 219, Sec. 64, as amended by Public Laws of 1919, Chap. 180, alleging the offense of having a loaded shotgun in an automobile upon the highways and fields in Dead River Plantation. On demurrer held that the language of the complaint set out the offense with sufficent certainty and precision. Sec. 84, Chap. 219, Public Laws of 1917, as amended by Sec. 33, Chap. 196, Public Laws of 1919, is not repugnant to Section 6 of the Declaration of Rights.

A complaint under Public Laws of 1917, Chap. 219, Sec. 64, as amended by Public Laws of 1919, Chap. 180, alleging that A. "did, at Dead River Plantation, Somerset County, Maine, on the 16th day of October, A. D. 1919, have a loaded shotgun in his automobile upon the highways and fields in said Dead River Plantation against the peace of the State and contrary to the form of the statute in such case made and provided," must be held, upon general demurrer, to charge the offense with sufficient certainty and precision.

Sec. 84 of Chap. 219 of the Public Laws of 1917, as amended by Sec. 33 of Chap. 196 of the Public Laws of 1919, conferring jurisdiction upon trial justices and other courts, of offenses under the inland fish and game laws committed in an adjoining county, is not repugnant to Section 6 of the Declaration of Rights, guaranteeing to the accused in criminal prosecutions, the right;

"To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity."

On exceptions by respondent. The respondent was arrested on a complaint charging a violation of Chapter 180 of the Public Laws of 1919, which provides as follows: "No person shall have a rifle or shotgun, either loaded or with a cartridge in the magazine thereof, in or on any motor vehicle while the same is upon any highway or in the fields or forests." The respondent waived examination in the trial justice court, found guilty, and appealed to the Supreme Judicial Court, and at the first term filed a general demurrer, with leave to plead over, alleging that the language of the complaint was vague and indefinite and did not sufficiently set forth the offense charged, and further alleging that the statute conferring jurisdiction upon trial

justices and other courts, of offenses under the inland fish and game laws committed in an adjoining county, is repugnant to Section 6 of the Declaration of Rights, guaranteeing to the accused in criminal prosecutions, the right "To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity." The demurrer, after joinder, was overruled by the presiding Justice, and respondent excepted. Exceptions overruled.

Case stated in the opinion.

J. Blaine Morrison, for State.

H. S. & E. L. Wing, for respondent.

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

MORRILL, J. The respondent was arraigned at Kingfield in Franklin County, before a trial justice of that county, upon a complaint charging him with a violation of the Public Laws of 1917, Chap. 219, Sec. 64, as amended by Public Laws of 1919, Chap. 180; the offense is charged as committed at Dead River Plantation in Somerset County; upon appeal to this court held in Franklin County, he filed a general demurrer to the complaint; the demurrer was overruled and the case is here upon exceptions.

In support of the demurrer the respondent contends:

"First. The charge in the complaint is vague and indefinite, is not formally, fully and precisely set forth as required by law so that the accused may know and be prepared to meet the exact charge against him.

Second. The statute conferring jurisdiction upon trial justices and all other courts, of offenses under the Fish and Game Laws, committed in an adjoining county, is void as against public policy and is repugnant to the provisions of the Constitution of Maine."

Under the first contention the respondent argues that the complaint is vague and indefinite because (a) it charges two offenses in a single count; and (b) does not sufficiently specify the place in Dead River Plantation where the offense was committed.

We think that the complaint is sufficient; it charges that the respondent "did, at Dead River Plantation, Somerset County, Maine, on the 16th day of October, A. D. 1919, have a loaded shotgun in his automobile upon the highways and fields in said Dead River Planta-

tion against the peace of the State" etc. This complaint charges but a single offense; if it appeared in evidence that upon the day named the respondent rode, with a loaded shotgun in his automobile, along certain highways and, leaving the highway, across two or more fields in Dead River Plantation, he would be guilty of but one offense, a single act at one time and place. *State* v. *Burgess*, 40 Maine, 592. *State* v. *Cates*, 99 Maine, 68. *Woodford* v. *People*, 62 N. Y., 117, 20 Am., R. 464. *State* v. *Warren*, 77 Md., 121, 39 Am. St. R., 401. *Byrne* v. *The State*, 12 Wis., 577, 585, *526. 1 Wharton's Crim. Proc. 10th Ed., Sec. 292. And the complaint may be sustained if the evidence shows that he rode over a certain highway, and not over any fields. The offense would be complete. "It is a general rule, that runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." *State* v. *Burgess*, supra, at Page 595. Roscoe's Crim. Ev. 3d. Am. Ed., by Sharswood, Page 98. 1 Bishop's New Criminal Procedure, Section 436.

Nor is the complaint defective because the highway or field in which the offense was committed is not specified. The offense is charged as committed in Dead River Plantation in Somerset County; that is sufficient, the locality of the highway or field not being an essential element in constituting the offense against the statute, as was the case in *State* v. *Turnbull*, 78 Maine, 392. The respondent relies upon *State* v. *Lashus*, 79 Maine, 541; but the complaint in that case did not allege an offense committed within the jurisdiction of the court. It is familiar law that the object of the rule requiring the charge to be particularly, certainly and technically set forth, is three fold: To apprise the defendant of the precise nature of the charge made against him: To enable the court to determine whether the facts constitute an offense and to render the proper judgment thereon: That the judgment may be a bar to any future prosecution for the same offense.

The allegations of this complaint meet this test; the respondent cannot be in doubt as to the offense with which he is charged. And the court, according to the modern practice, in cases of general allegations, will take care that the defendant shall not be surprised, but that in proper cases he shall seasonably be furnished with such specifications and particular statements, as may be necessary to enable him to prepare for his trial, and to meet all the proof which may be brought against him. *Com.* v. *Pray*, 13 Pick., 359, 363.

Under the second contention in support of the demurrer the defendant challenges the authority of the Legislature to enact Sec. 84 of Chap. 219 of the Public Laws of 1917, as amended by Sec. 33 of Chap. 196 of the Public Laws of 1919, conferring jurisdiction upon trial justices and other courts, of offenses under the inland fish and game laws committed in an adjoining county. This provision originated in R. S., 1883, Chap. 30, Sec. 16 as amended by Public Laws of 1891, Chap. 95, Sec. 8, and was enacted in its present form in Public Laws of 1899, Chap. 42, Sec. 51.

The authority of the Legislature to enact this provision cannot be denied unless it is restrained by some constitutional provision or declaration, intended as a limitation upon its authority. By the common law the grand jury was sworn to inquire only for the body of the county, and therefore they could not regularly inquire of a fact done out of that county for which they were sworn, unless particularly enabled by an act of parliament. Blackstone mentions many acts of parliament by which offenses committed in one county might be inquired of and tried in another county. 4 Black. Com. 303; and in this State such statutes, other than the one question, are found, R. S., Chap. 133, Secs. 2, 4, 5; some are of early enactment. Laws of 1821. Chap. 59, Secs. 40, 41.

It is contended that such limitation upon the authority of the Legislature is found in Section 6 of the Declaration of Rights:

"In all criminal prosecutions, the accused shall have a right . . . To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity."

The argument is that the word "vicinity" is equivalent to the word "county," and "was intended to limit the trial of offenses to the county in which the crime was committed."

An examination of "American Charters, Constitutions and Organic Laws," compiled and edited by Francis Newton Thorpe under Act of Congress of June 30, 1906 and published by the U. S. Government, discloses that in some twenty-five states the constitutional guaranty of an impartial trial requires a jury of the county or district—in Louisiana, of the parish—where the offense was committed; in the Constitutions of Kentucky (1792, 1799, 1850, 1890), Michigan (1835), Pennsylvania (1790, 1838, 1873), and Virginia (1776, 1830, 1850, 1864, 1870, 1902) the word "vicinage" is used, "a jury of the vicinage;" and it is an interesting fact that this word "vicinage" is found

in the earlier Constitutions of Illinois (1818), Louisiana (1812, 1845, 1852), and Missouri (1820, 1865), and was later changed to the other form of expression. The word "vicinage" does not mean "county;" it means "neighborhood." Taylor Law Glossary. Bouvier; in the New International Dictionary it is given as the synonym of "vicinity." In *State* v. *Lowe*, 21 W. Va., 783; 45 Am. Rep., 570, 573, in *Ex parte McNeeley*, 36 W. Va., 84, 32 Am. St. Rep. 830, 837, and in the recent case from Pennsylvania, *Com.* v. *Collins*, 110 Atl., 738, the distinction in the use of the words "county" and "vicinage" is very clearly pointed out.

The word "vicinity" is a word of popular and common meaning, and in using it the framers of the constitution of 1820 undoubtedly had reference to its common, ordinary meaning, that which is near, not remote. The constitution of Massachusetts of 1780 contained the following declaration: "In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen." Under this provision in the judicial legislation affecting the District of Maine many instances occur in which criminal trials were not confined to the county in which the offense was committed. In 1782, by Chapter 57 of the laws of that year, the place for holding the term of the Supreme Judicial Court for the Counties of Cumberland and Lincoln was fixed at Falmouth in the County of Cumberland. Twenty years before, by the Act of April 14, 1761, it had been provided that the Superior Court of judicature, court of assize and general jail delivery to be held at Falmouth shall have the same jurisdiction, power and authority for the trial of all actions, civil and criminal, the cause whereof shall arise within the body of the County of Lincoln, as the said Superior Court would have if the cause of such actions and such matters and things had arisen within the body of the County of Cumberland. Thus the practice prior to the constitution of 1780 was continued under the constitutional declaration above quoted.

By the Act of June 10, 1791, it was provided that the Supreme Judicial Court to be held in the County of Lincoln should be holden for the Counties of Lincoln, Hancock and Washington, and have the same original jurisdiction of all matters criminal, civil and mixed, arisen or which shall arise in either of the said Counties, as if the same actions, matters and things had arisen within the body of said County of Lincoln.

By the Act of February 27, 1807, after the County of Oxford was established, jurisdiction was conferred upon the Supreme Judicial Court holden in the County of Cumberland for the trial of all matters civil and criminal and mixed arising within the County of Oxford, as if the same actions, matters and things had arisen in the County of Cumberland; in 1809, June 20, the court sitting at Augusta in the County of Kennebec was given jurisdiction of all actions, civil and criminal, arising in the County of Somerset, as if they had arisen in the County of Kennebec; and in 1816, June 17, the court held at Castine, in the County of Hancock, for the Counties of Hancock and Washington, was given jurisdiction over all matters, civil and criminal arising within the County of Penobscot, as though said County of Penobscot had not been established. These provisions were continued for a time after the separation, and the adoption of the Constitution of Maine. Laws of 1821, Chap. 54, Sec. 5.

Further, it appears by the records now in the custody of this court in the County of Hancock that at a term held at Castine, for the Counties of Hancock and Washington, on the third Tuesday of June, 1811, by Justices Sewall, Thatcher and Parker, one Ebenezer Ball was tried and convicted of a murder committed in the Plantation of Robinstown, in the County of Washington, and was sentenced to death.

Therefore, in view of this history of legislative proceedings in Massachusetts prior to the separation, we think that the framers of the Constitution of Maine did not use the word "vicinity" as meaning "county"; they were undoubtedly familiar with this Legislation and the practice of the courts thereunder; and if they had intended to establish a more restricted and exactly defined procedure, we think that they would have made the intention clear by the use of some other word or phrase.

While no usage for any course of years, nor any number of legislative or judicial decisions, will sanction a violation of the fundamental law, clearly expressed or necessarily understood, (*Pierce* v. *Drew*, 136 Mass., 79) if the words of the constitutional provision could be deemed ambiguous, their interpretation must be held to be settled by the contemporaneous construction, and the long course of practice in accordance therewith. *Com.* v. *Lockwood*, 109 Mass., 339.

In *Com.* v. *Parker*, 2 Pick., 550, decided in 1824, the contention here urged, that "vicinity" is used as synonymous with "county," was urged against the St. 1795, Chap. 45, Sec. 1, and was overruled; that

statute was adopted in Laws of 1821, Chap. 59, Sec. 40, and is found in substantially the same form in R. S., 1916, Chap. 133, Sec. 2.

When we consider the vast extent of forest lands in this State where violations of the inland fish and game laws frequently occur, it is clear that the provision of law here in question does not operate as a hardship upon the accused, but in many cases to his benefit and for his convenience, obviating travel for long distances, with the attendant increased expense of witnesses, and securing trial in the vicinity or neighborhood of the alleged crime; thus the reason underlying the practice at common law is promoted.

The entry will be,

Exceptions overruled.
Respondent may plead anew in accordance with the leave granted.

STATE *vs.* GRANT FARNHAM.

Lincoln. Opinion January 31, 1921.

Indictment under R. S., Chap. 126, Sec. 6, for taking indecent liberties with a female child under sixteen years of age. Language of the statute sufficient to meet the tests of certainty and precision. A general motion to set aside a verdict in a criminal case as against evidence, and grant a new trial, is not cognizable by the Law Court. Such motion should be presented to the presiding Justice, and if overruled by him, an appeal may be taken in case of a felony to the Law Court.

An indictment under R. S., Chap. 126, Sec. 6, alleging that A. of etc., at etc., "on the first day of July, in the year of our Lord one thousand nine hundred and nineteen, being more than twenty-one years of age, did take indecent liberties with the sexual parts of one B, a female child under the age of sixteen years, against the peace of the State and contrary to the form of the statute in such case made and provided," must be held sufficient, upon motion in arrest of judgment, against the contentions:

1. That it does not allege that at the time of the commission of the alleged offense the respondent was twenty-one years or more of age.
2. That it does not allege that the child, with whom the offense is alleged to have been committed, was under the age of sixteen years at the time of the commission of the offense charged.

3. That it does not set out specific acts of the defendant which constitute the indecent liberties of which he is accused.

The indictment charges the offense in the language of the statute, and that language is sufficient to meet the tests of certainty and precision.

A general motion to set aside the verdict in a criminal case as against evidence, and to grant a new trial, is not cognizable by the Law Court; it should be presented to the presiding Justice; if overruled by him, an appeal may be taken in case of a felony to the Law Court.

On exceptions and motion by respondent. An indictment was found against respondent under R. S., Chap. 126, Sec. 6, alleging the taking of indecent liberties with a female child under sixteen years of age. The case was tried to a jury and a verdict of guilty returned. After the verdict and before judgment the respondent filed a motion in arrest of judgment which was overruled by the presiding Justice, and respondent excepted. The respondent also filed a general motion to set aside the verdict, and grant a new trial, which was not presented to the presiding Justice, but taken directly to the Law Court, without the presiding Justice either granting or overruling such motion, and an appeal taken from such ruling to the Law Court. Exceptions overruled. Motion dismissed. Judgment for the State.

Case is stated in the opinion.

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

W. H. Hilton, for respondent.

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

MORRILL, J. The motion in arrest of judgment in this case challenges the sufficiency of an indictment found under R. S., Chap. 126, Sec. 6, in three particulars:

1. Because it does not allege that at the time of the commission of the alleged offense the respondent was twenty-one years or more of age. The allegation is, "that Grant Farnham, of Boothbay Harbor etc., on the first day of July, in the year of our Lord one thousand nine hundred and nineteen, being more than twenty one years of age, did take" etc. The argument of defendant's counsel is that the averment as framed may as well refer to the time of finding the indictment as to the time of the commission of the offense.

This contention cannot be sustained. "A material averment may sometimes be introduced with as much clearness and certainty by means of the participial clause commenced by the word "being," as

in the form of the direct proposition of a declarative sentence." *State* v. *Dunning*, 83 Maine, 181. While a careful observance of the rules of pleading would lead the pleader to use the word "then," or the words "then and there," after the word "being," such use of the adverb is not necessary when the participial clause refers to the person and precedes the verb.

Thus in the early case of *Rex* v. *Moore*, 2 Mod., 128, upon an information on the St. 4 and 5 Phil. & M. c. 8 averring that the defendants "being above the age of fourteen years, took A. then being a virgin unmarried" etc., it was held that the *existens*, added to the person, carries the tense to the time of the offense committed; so in Johnson's Case, Cro. Jac., 609; and in *Rex* v. *Ward*, 2 Ld., Raymond 1467 it was held that the allegation "being chargeable to deliver three hundred and fifteen tons of alum" (*existens onerabilis ad deliberandum*) referred not to the time of exhibiting the information, but the committing of the offense; and referring to *Rex* v. *Moore*, supra, the report says, "In the case of Moore the *existens* precedes the verb *ceperunt*, and so refers and is tied up to time of the taking;" thus cases of this kind are distinguished from Bridge's Case, Cro. Jac. 639, and the like.

2. Because the indictment does not allege that the child, with whom the offense is alleged to have been committed, was under the age of sixteen years at the time of the commission of the offense charged; the language is, "Dorathy Bucklin, a female child under the age of sixteen years." While it is usual to allege the exact age, for example, "to wit, of the age of nine years," the averment is sufficient and, as to the objection here raised, conforms to approved precedents. Bishop's Directions and Forms, Page 500, note 4. It is evident that the allegation must refer either to the time of finding the indictment or of the commission of the offense. If the child was under sixteen years of age when the indictment was found, she must have been under that age at any previous time.

3. Because the indictment does not set out specific acts of the defendant which constitute the indecent liberties of which he is accused. The crime is created and made punishable by statute, and the indictment follows the language of the statute in charging that the respondent, on a day named, "did take indecent liberties with the sexual parts of one Dorathy Bucklin, a female child under the age of sixteen years." Although the words of the statute are used, the

indictment is insufficient unless the facts constituting the offense are expressly set forth with such fullness and precision as to apprise the respondent of the charge which he must meet, and to enable him to prepare his defense, to enable him to plead the judgment, whether of conviction or acquittal, in bar of a later prosecution, and to enable the court to determine whether the facts stated in the indictment are sufficient to support a conviction. These familiar principles are at the foundation of the constitutional protection of every citizen. *State* v. *Learned,* 47 Maine, 426. *State* v. *Mace,* 76 Maine, 64. *State* v. *Munsey,* 114 Maine, 408. *State* v. *Crouse,* 117 Maine, 363.

When one is indicted for any offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges; and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of the charge and has no knowledge of the facts charged against him in the pleading. He is unable to secure and present the evidence in his defense—indeed, he is deprived of all reasonable opportunity to defend—unless the indictment clearly discloses the facts upon which the charge of the commission of the offense is based. *Miller* v. *U. S., C. C. A.,* 133 Fed. 337, 341. *Fontana* v. *U. S., C. C. A.,* 262 Fed., 283, 286. These observations are very pertinent when the crime is of the character here charged, a charge easily made, but difficult of refutation except by the denial of the accused.

The statute is of recent origin in this State. It reads:

"Whoever, being twenty one years or more of age, takes any indecent liberty or liberties, or indulges in any immoral practice or practices, with the sexual parts or organs of any other person, male or female, under the age of sixteen years, either with or without the consent of such male or female person, shall, upon conviction thereof, be punished" etc.

Does this statute so fully set out the facts which constitute the offense, that an indictment framed upon it and containing no other averments will meet the above tests? We think that it does. If the statute had read, "takes any indecent liberty or liberties with any other person" etc., and the indictment, following such statute, had charged that the respondent "did take indecent liberties with one Dorathy Bucklin" etc., the averment probably would have been insufficient for want of a statement of the acts actually committed, (see form of indictment for indecent assault under St. 14 and 15 Vict.

Chap. 100, Sec. 29, given in 1 Arch. Cr. Pr. & Pl., 1023, Pomeroy's Ed.) or for want of an allegation that a more particular description of the acts committed is "too obscene and too gross to be spread upon the record of the court," as in Butler's Case, 268 Ill., 635, 637. But here the allegation is that the respondent "did take indecent liberties with the sexual parts of one Dorathy Bucklin, a female child under the age of sixteen years;" we think that this allegation is sufficient to apprise the respondent of the charge which he must meet. See *State* v. *Haddock*, (N. C.), 13 S. E., 714.

We think that it is also sufficient to enable the respondent to plead the judgment in bar of a later prosecution. The statute describes the offense in the disjunctive; yet we think the acts prohibited constitute but one offense which may be charged in the conjunctive or may be charged by alleging either description of the offense. It is difficult to see how acts which can be considered as taking indecent liberties with the sexual organs are not also the indulgence of immoral practices with such organs. Therefore the judgment upon this indictment may be pleaded successfully to a later prosecution, although such later indictment may charge the indulgence of immoral practices. The evidence necessary to support such second indictment would be sufficient to procure a legal conviction on the present indictment; therefore the second is barred by a conviction or acquittal on the present. 2 Wharton's Crim. Pr. Sec. 1407. Tenth Ed. If the same acts constitute another and different offense, as, for example, assault with intent to commit statutory rape, the respondent may be punished for the other offense. *State* v. *Inness*, 53 Maine, 536. *State* v. *Jellison*, 104 Maine, 281.

The record contains a general motion that the verdict be set aside as against evidence, and a new trial granted.

But this motion is not properly before us; it should have been presented to the Justice sitting at nisi prius; if overruled by him, an appeal might have been taken to the Law Court. In the case under consideration the motion was not presented to the trial Judge; he did not rule upon it and no appeal was taken. The motion must be dismissed. *State* v. *Perry*, 115 Maine, 203. *State* v. *Steeves*, id., 220. *State* v. *Googins*, id., 373.

Exceptions overruled.
Motion dismissed.
Judgment for the State.

STATE *vs.* BENJAMIN I. GLOVSKY.

Cumberland. Opinion February 10, 1921.

In an indictment under R. S., Chap. 121, charging wilfully and maliciously setting fire to a building of another, it is not necessary to allege that the act was done without the consent of the owner. The word "maliciously" as used in criminal statutes, is equivalent to saying that the act was done voluntarily, unlawfully, and without excuse or justification, hence without consent.

Demurrer to an indictment charging the respondent with wilfully and maliciously setting fire to a building belonging to another person. The claim is made that the indictment is fatally defective because it does not allege that the act was done without the consent of the owner. The statute is silent as to such allegation, but it alleges that the act must be, and the indictment declares that it was, done maliciously.

Held:

1. The word "maliciously," as used in criminal statutes, means that the act should be done voluntarily, unlawfully, and without excuse or justification.
2. Since the indictment alleges that the act was done maliciously, it is equivalent to saying that it was done without excuse or justification.
3. If done without excuse or justification it follows that it was done without consent.
4. Allegation of non-consent, in an indictment drawn under the chapter of the Revised Statutes under which this was drawn, Chapter 121, is unnecessary.

On exceptions by respondent. The respondent was indicted under the provisions of R. S., Chap. 121, for wilfully and maliciously setting fire to a building of another, with intent to burn the building, and the building was burned. The indictment was drawn in the language of the statute. The respondent filed a general demurrer to the indictment, with the right to plead over in case the demurrer should be overruled, alleging that the indictment was fatally defective in that it did not allege that the act complained of was done without the consent of the owner of the building. The presiding Justice overruled the demurrer and the respondent excepted. Exceptions overruled.

Case is stated in the opinion.

Carroll L. Beedy, and Clement F. Robinson, for the State.
Joseph E. F. Connolly, and William C. Eaton, for respondent.

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

PHILBROOK, J. The respondent was indicted under the provisions of R. S., Chap. 121, for wilfully and maliciously setting fire to a building belonging to one Simon Glovsky, otherwise known as Samuel Glovsky, with intent to burn said building, and said building was thereby burned. Upon arraignment, he filed a general demurrer, reserving the right, with the consent of the presiding Justice, to plead over, in case said demurrer should be overruled. The presiding Justice overruled the demurrer and the case is before us upon exceptions to that ruling.

His counsel concedes that, broadly speaking, an indictment for a statutory crime is sufficient where it charges the offense in the words of the statute, but urges that this is true only in those cases where, in the statute itself, there is a sufficient description of the offense intended to be created by the Legislature. He does not contend that this indictment fails to charge the offense in the words of the statute, but claims that it is fatally defective in that it fails to allege that the act complained of was done without the consent of the owner of the building.

The statute does not say that the act must be done without the consent of the owner and we do not think such an allegation is necessary in the indictment. For the statute does say that the act must be done maliciously. It is an elementary principle that an act is, in contemplation of law, done maliciously where it is wrongful and is done intentionally. *Davis* v. *Pacific Tel. & Tel. Co.*, 57 Pac., 764. The court, in *United States* v. *Gunther*, 38 N. W., 79, said that "Maliciously" as used in criminal statutes, means nothing more than that the act should be done voluntarily, unlawfully, and without excuse, or justification. This indictment charges that the act was done maliciously, which is equivalent, therefore, to saying that it was done without excuse or justification. The demurrer admits this. If done without excuse or justification it follows that it was done without consent. Why, then, should the indictment necessarily charge that the act was done without the consent of the owner. Reason, and the plain meaning of language, negative such an idea.

Where, as in R. S., Chap. 129, Sec. 25, relating to malicious injury to buildings, non-consent of the owner is made a material part of the offense, then an allegation of such non-consent would be necessary. Not so under the statute defining the offense with which this respondent is charged.

Exceptions overruled.

FREEMAN G. DAVIS

vs.

UNITED STATES BOBBIN & SHUTTLE CO.

Androscoggin. Opinion February 10, 1921.

The record and evidence in a former trustee action and scire facias proceedings, between the parties, are admissible to show the conduct and attitude of a party to a suit, as bearing on the establishment of the truth or falsity of controverted questions. No grounds for invoking the principles of estoppel. Verdict justified on the evidence.

The plaintiff brought this suit against the defendant as an original promisor to recover a balance of $1293.61 for supplies furnished one Bean for use in his lumbering operation. The jury returned a verdict for the defendant and the case is before the Law Court on plaintiff's exception and motion.

Held:

1. That the record of a previous trustee suit brought by the plaintiff against Bean as the original promisor and the U. S. Bobbin & Shuttle Company as trustee, and of the subsequent scire facias action against the company as a guarantor of Bean's debt, was properly admitted as showing the conduct and attitude of the plaintiff.
2. That the company was not estopped to prove the same and the exception is without merit.
3. That the verdict of the jury was fully warranted by the evidence.

On exceptions and motion by plaintiff. An action of assumpsit to recover of defendant as an original promisor a balance of $1293.61, for supplies furnished one Bean in a lumbering operation. The presiding Justice ruled that the record and evidence in a former trustee action and scire facias proceedings between the parties, was

admissible, against the contentions of counsel for plaintiff claiming that defendant was barred by estoppel.

To which ruling plaintiff excepted. The jury returned a verdict for defendant, and plaintiff filed a general motion for a new trial. Motion and exceptions overruled.

The case is fully stated in the opinion.

Pulsifer & Ludden, for plaintiff.

Harry Manser, for defendant.

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

CORNISH, C. J. This is an action of assumpsit to recover a balance of $1293.61 for supplies alleged to have been sold to the defendant but delivered to one I. S. Bean for use in his lumbering operation in the Winter of 1916-1917. The question is this, was the defendant an original promisor and was credit originally given to him by the plaintiff? The jury have found in favor of the defendant and the case is before the Law Court on plaintiff's motion and exceptions.

The situation can be briefly stated. In the Fall of 1914 the defendant having purchased certain stumpage from the Great Northern Paper Company made a contract with one I. S. Bean to cut, haul and deliver on cars consigned to the defendant's mill at Auburn the logs at an agreed price. The supplies for the operation were furnished by the plaintiff after a conference with Mr. Bean, and Mr. Skinner the general manager and representative of the defendant. The present claim of the plaintiff is that Mr. Skinner then agreed that the defendant company would pay all the supply bills. Mr. Skinner on the other hand claims that he made no such agreement, but did agree that the company would pay Bean for the logs as fast as delivered and so far as they would go would keep the funds to meet the plaintiff's supply bills if duplicate bills were sent to the company. No question arose concerning this in the first year's operation because the funds in defendant's hands were ample to pay the supply bills and leave a balance for Bean. The second year's operation was carried on under the same arrangement, and that year the funds were sufficient and the question of defendant's liability did not arise.

The third year, 1916-17, the year in question, proved unfortunate, due in part at least to the illness of Bean, less than half the contemplated amount was cut, and the amount due Bean for the logs could not meet the supply and other bills due. Mr. Babcock, a creditor of

Bean, sued him and trusted the funds remaining in the defendant's hands, and then Mr. Skinner advised Davis to protect himself by also suing Bean and trusteeing the defendant. Davis did this and subsequently the Babcock claim was settled by the payment by the defendant as trustee of $100.75, by check dated May 9, 1917, and the balance of the funds due Bean from the defendant company, amounting to $389.30, was paid to the plaintiff, May 28, 1917.

The Davis writ, which had been entered at the April Term, 1917, was continued from term to term with no docket entry of the discharge of the trustee, and at the January Term, 1919, the principal defendant and the trustee were both defaulted, the trustee having paid no attention to the suit after the payment was made. Execution was returned in no part satisfied, and then at the April Term, 1919, a scire facias writ was sued out by Davis against the Bobbin & Shuttle Company to recover the balance of the execution and costs, $1452.72.

The scire facias case was heard by a single justice, at which hearing the plaintiff admitted that the Bobbin and Shuttle Company had paid over all the balance in its hands due Bean at the time of the service, $389.30, but that through its Superintendent Skinner it had guaranteed to the plaintiff the payment of the bill for all supplies that he might furnish to Bean, and that in the scire facias suit the company should be charged as having in its hands the balance of said bill because of said guaranty. In other words the plaintiff sought to hold the company in the trustee action as a guarantor of the debt owed by Bean to him. The sitting Justice denied this contention and dismissed the suit. To this ruling the plaintiff took exceptions, which were subsequently overruled by the Law Court and the decision of the sitting Justice sustained. *Davis* v. *U. S. Bobbin & Shuttle Co.*, 118 Maine, 285.

After all this had transpired the plaintiff brought this suit against the company not as a guarantor but as original promisor, and after trial at which the jury heard the testimony of Mr. Davis, Mr. Bean and others for the plaintiff, and Mr. Skinner for the defendant, and also had before them the proceedings in the previous suits, a verdict was rendered in favor of the defendant.

1. EXCEPTIONS.

The exceptions are based upon the admission of the records and evidence connected with the former trustee action and the scire facias proceedings. The reason assigned is that the defendant "was estopped from using the same to the prejudice of the plaintiff because

of the defendant's alleged representation that it was immaterial to him how said goods were charged upon the books of the plaintiff and because of the alleged request of the said defendant that the plaintiff begin such trustee suit." This involved controverted facts, the evidence on the point being flatly contradictory, and the plaintiff in asking the exclusion of the evidence virtually asked the court to decide the controverted facts in plaintiff's favor and then rule thereon as to their effect. This the court properly declined to do. It should be added however that the whole theory of estoppel as set up by the plaintiff was without foundation in fact. It was a theory and nothing more. The elements of estoppel were wholly lacking.

In his attempt to maintain this action upon an alleged original promise by the defendant, the conduct and acts of the plaintiff in bringing previous suits were of the utmost importance. The records were properly admitted and the plaintiff takes nothing by his exceptions.

MOTION.

The verdict of the jury was fully warranted. It was based upon the positive and convincing testimony of the defendant's superintendent as to the original agreements between the parties, upon the probabilities of the case, and the reasonableness of the defendant's position, upon the original book charges of Davis against Bean and not against the company, and the book accounts of the company with Bean and not with the plaintiff; the conduct of the plaintiff in claiming Bean as the original debtor, by bringing suit against him as such and making the company not a debtor to the plaintiff but to Bean and therefore a trustee; in accepting the amount in the hands of the trustee, $389.30, not as funds originally belonging to the plaintiff but as belonging to Bean, and therefore attachable in payment of Bean's debt to the plaintiff; upon his shifting position when in the scire facias action he set up an independent guaranty on the part of the company, claiming that Bean was still the original debtor and that the company had guaranteed the payment of the bill. All these pertinent facts were of such persuasive power as to utterly overthrow the third and latest contention of the plaintiff, and the testimony introduced to support it, and to lead the jury straight on to the verdict which they rendered.

The entry must therefore be,

Motion and exceptions overruled.

BESSIE M. SMITH, Petitioner

vs.

HEINE SAFETY BOILER COMPANY, Employer

AND

OCEAN ACCIDENT AND GUARANTEE CORPORATION LTD., Insurers.

York. Opinion February 12, 1921.

Workmen's Compensation Act. Marriage certificate of petitioner admissible without authentication. Its probative value a proper question to be considered with other evidence. A presumption of lawful marriage arises from cohabitation. Rule as to general reputation and cohabitation being sufficient evidence of marriage. A lawful marriage may be inferred from collateral facts and circumstances. Cohabitation presumed to be lawful till contrary appears. The finding by the chairman on the question of marriage, one of law, not of fact, hence reversible if erroneous. Claim for compensation not necessarily to be made in writing. It is sufficient if employer is appraised that compensation is claimed. Notice of claim for compensation may be waived by employer. Employer having once waived such notice is estopped thereafter. "Casual" employment defined.

This is an appeal from the decree of a single justice in conformity with the decision of the late chairman of Industrial Accident Commission, denying compensation to Bessie M. Smith claiming as dependent widow of Warren H. Smith.

The chairman considered but two of the defenses raised by the respondents, to wit, the first and fourth, and holding thereunder in the order named.

(a) That the petitioner had not proved her marriage to the decedent, or that she was a dependent widow of Warren H. Smith, and

(b) That no claim for compensation under the laws of the State of Maine had been made by the petitioner or by any person in her behalf upon the respondents within one year from the time of the injury.

Held:

1. As to the question of proof of marriage, the burden of proof, and the character of testimony necessary to prove marriage in a case coming under the act, we think the finding of the chairman is erroneous.

In the progress of the case and in his deliberations thereon, upon the question of marriage, he was dealing with a question of law. He rejects the marriage certificate unless substantiated by testimony. Such testimony of its authenticity was not produced, but the certificate of marriage was admissible nevertheless, without authentication. What its probative value might be was a question for him to consider with all the other evidence in the case upon the issue involved.

2. Cohabitation, as husband and wife, is evidence from which the law presumes lawful marriage. So also where the presumption may be repelled, it will fix upon the party, who thus holds himself out to the world in the character of a husband, liabilities as it respects others, which attach to this relation.
3. It is a general rule that in all civil personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage.
4. The proof of marriage, as of other issues, is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances from which its existence may be inferred. Evidence of the former kind, or what is equivalent to it, is required upon the trial of indictments for polygamy and adultery and in actions of criminal conversation; but in all other cases, any other satisfactory evidence is sufficient.
5. It is competent to show their conversation, addressing each other as man and wife. Their cohabitation also as man and wife is presumed to be lawful till the contrary appears.
6. The act does not require the claim for compensation to be in writing, or that it should be made in unequivocal language or terms. It does require that claim for compensation shall be made within one year after the accident. Such claim may be made orally, by a claimant or some person in his behalf, may be made in writing, and the terms will meet the requirements of the act if the employer is thereby apprised that compensation is claimed, and is put upon his notice that a claimant seeks the benefit of the act. And, too, the notice of a claim for compensation may be waived, and was waived in this case by the defendant through its manager and superintendent, Mr. Cline, who immediately after the accident corresponded with petitioner, offering counsel and assistance and seeking to take charge of the proceedings and expenses of enforceing the claim for compensation.
7. A statutory or even a constitutional provision made for one's benefit is not so sacred that he may not waive it, and having once waived it he is estopped from thereafter claiming it.
8. Our conclusion therefore is that the appeal should be sustained, the decree reversed, and that the petitioner is entitled to receive compensation at the rate of ten dollars per week for a period of three hundred weeks from the date of the injury, the maximum amount fixed by Section 12 of the Act.

On appeal by claimant from a decree of a single justice in conformity with the decision of the chairman of the Industrial Accident Commission, denying compensation to Bessie M. Smith claiming as dependent widow of Warren H. Smith. On December 10, 1916, Warren H. Smith, alleged husband of claimant, a resident of Elmira, New York, while in the employment of Heine Safety Boiler Company in superintending the erection of four boilers for the Pepperell Manufacturing Company at Biddeford, Maine, sustained injuries by falling from a ladder which caused his death thirty-five minutes later. On October 21, 1918, claimant filed her petition with the Industrial Accident Commission of Maine. Prior thereto claimant filed a petition with the New York Industrial Accident Commission, which eventually was dismissed, the court refusing to take jurisdiction of the injury. Of the eight different defenses raised by the respondents in their answer, the chairman considered but two, viz: That the petitioner had not proved her marriage to the decedent, or that she was a dependent widow of Warren H. Smith, and that no claim for compensation under the laws of Maine had been made by the petitioner or by any person in her behalf upon the respondents within one year from the date of the injury. After a hearing on the petition the chairman ruled that claimant had not sustained the burden of proving her alleged marriage to decedent, and further ruled that claimant, or any person in her behalf, had not made a claim for compensation upon respondent within one year after the death of Warren H. Smith. From such findings claimant appealed. Appeal sustained, and decree reversed. Decree in accordance with opinion.

The case is fully stated in the opinion.

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

William H. Gulliver, and William B. Mahoney, for respondents.

SITTING: SPEAR, HANSON, PHILBROOK, MORRILL, WILSON, JJ.

HANSON, J. This is an appeal from the decree of a single justice in conformity with the decision of the late chairman of the Industrial Accident Commission, denying compensation to Bessie M. Smith claiming as dependent widow of Warren H. Smith.

Warren H. Smith, the deceased employee, a man forty years of age, was at the time of the accident causing death, and for many years preceding, a resident of Elmira, New York. He had been employed

by the Heine Safety Boiler Company since nineteen hundred, and at the date of his death and for two years prior thereto, he had been receiving ninety dollars per month for his services. His employment required him to work wherever his employers had contracts to erect boilers. This duty made it necessary during the years since 1900 to visit various States, and he had several times prior to the date of his death worked for his employer in Maine.

On March 20, 1916, decedent came to Biddeford to superintend the erection of four boilers for the Pepperell Manufacturing Company. He brought with him his own crew of skilled mechanics, and secured his unskilled laborers in Biddeford. The work was finished November 16, 1916, and decedent and his crew returned to Massachusetts. Later, on receipt of notice that a leak had occurred in some of the connecting pipes, decedent with a helper returned to Biddeford to make necessary repairs.

The work was performed on Sunday, December 10, 1916, and was nearing completion in the evening of that day when decedent fell from a ladder sustaining injuries causing death thirty-five minutes later.

The defendant's general superintendent, Edward S. Cline, was at once notified, through the Boston office of the Company, and he on December 18, 1916, caused an employer's report to be filed with the Commission, and also made a report to the Ocean Accident & Guarantee Corporation.

Upon advice of counsel the petitoner herein filed a claim before the New York Industrial Commission and received an award of compensation. On appeal by the respondents to the Supreme Court the award was affirmed, but on further appeal to the Court of Appeals the decision of the lower court and Commission was reversed and the claim dismissed, May 28, 1918.

On October 21, 1918, the claimant filed her petition with the Industrial Commission of Maine.

The respondents in their answer admit that the accident occurred as claimed, that the cause of the injury was as stated, and that decedent was in the employ of the defendant company, but

1. Not denying that the applicant is the widow of Warren H. Smith, and as to whether there are any other dependents of said Warren H. Smith, they allege they are not informed, "and leave the applicant and others interested to make such proof thereof as to them may seem material."

2. They deny liability under the Compensation Insurance Act of the State of Maine, or

3. That the dependent was carrying on business in the State of Maine within the meaning of the statute, and deny that it had in its employ in said State employees to the number of five or more.

4. They deny that any notice or claim for compensation with respect to said injury was made upon either of the respondents within one year after the occurrence of the same.

5. They deny the jurisdiction of Industrial Accident Commission, because the defendant is a Missouri corporation, and because decedent was not a resident of Maine, and

6. Because the contract of employment was made in the State of Massachusetts, and

7. Because the business of the Heine Safety Boiler Company in Maine was of purely transitory and casual character, and

8. Because the claim has been finally adjudicated in the State of New York.

The chairman considered but two of the defenses raised by the respondents, to wit: The first and fourth, and holding thereunder in the order named.

(a) That the petitioner had not proved her marriage to the decedent, or that she was a dependent widow of Warren H. Smith, and

(b) That no claim for compensation under the laws of the State of Maine had been made by the petitioner or by any person in her behalf upon the respondents within one year from the time of the injury.

On the question of proof of marriage and dependency, the chairman says: "As evidence of her marriage claimant offered what purports to be an original certificate of marriage issued in another State and signed by John Masterson, Justice of the Peace or Alderman—Claimant's Exhibit H. This certificate was admitted on condition that it be later substantiated by testimony. No oral testimony whatever was later offered as to the source from which this certificate came, as to identity of the parties or qualification of person solemnizing the marriage. It was simply produced by the witness Smith. This bare certificate unsupported by testimony either as to its genuineness or applicability to the parties in interest is not admissible evidence and has no probative value as evidence of the fact it was offered to prove.

The chairman would not care to base a finding of dependency in whole or in part on this certificate. He is not satisfied that the certificate is genuine.

No evidence was presented by anyone who had witnessed the ceremony of marriage. Evidence was given by Cline, Smith and Weatherhold as to cohabitation of parties, and their reputation as man and wife. This alone from these witnesses is not sufficient.

The question of who are legal dependents of a deceased employee is a matter that should not be lightly passed on by a compensation commission. Claimants as dependents are frequently residents of other States far removed from the place of injury, and often reside in foreign countries. This fact is an inducement to fraudulent claims and each claim must be closely scrutinized.

While perhaps a strict proof of marriage as required in criminal indictments is not necessary, yet the Commission should be supplied with such evidence as to make a reasonable certainty of any finding based thereon. In this case a marriage in the State of Pennsylvania was to be proved. It seems to the chairman that it would have been a simple matter by the production of the record and testimony of Bessie M. Smith to have established this fact, if fact it is, beyond any doubt or suspicion instead of depending for proof of this fact on a kind of evidence that is never convincing.

The chairman is not satisfied with the evidence offered and finds as a fact that claimant has not sustained the burden of proof upon this point of marriage. Upon which her dependency is based."

As to the question of proof of marriage, the burden of proof, and the character of testimony necessary to prove marriage in a case coming under the act, we think the finding of the chairman is erroneous.

In the progress of the case and in his deliberations thereon, upon the question of marriage, he was dealing with a question of law. He rejected the marriage certificate "unless substantiated by testimony." Such testimony of its authenticity was not produced, but the certificate of marriage was admissible nevertheless, without authentication. What its probative value might be was a question for him to consider with all the other evidence in the case upon the issue involved. *Camden* v. *Belgrade*, 78 Maine, 209.

In addition he rejects as insufficient the very definite testimony of witnesses, including witnesses for the defendants, as to "cohabitation of the parties and their reputation as man and wife." And he holds

that "while a strict proof of marriage as required by the criminal indictments is not necessary, yet the commission should be supplied with such evidence as to make a reasonable certainty of any finding based thereon." In conclusion the chairman "finds as a fact that claimant has not sustained the burden of proof upon this point of marriage." Such finding is not a finding of fact but of law, based upon rules of law, and being erroneous is reversible under the act.

For fifteen years decedent had worked with Mr. Cline in the same employment for the defendant. He was the immediate superior of decedent, and they were friends. Mr. Cline knew the wife and children of decedent and testified to their friendship and his knowledge of their home surroundings, and that as the agent of the defendant he immediately communicated with her by letter as the wife of decedent tendering his sympathy and aid, as appears in his letter hereinafter quoted.

Until the question arose in this case no denial of the relation of husband and wife was ever made, nor is it denied here. The defendants challenge proof merely, and we think the petitioner has maintained the burden of proof.

In *Cram* v. *Burnham*, 5 Maine, 214-216, the court said: "In most cases, cohabitation, as husband and wife, is evidence from which the law presumes lawful marriage. So also where the presumption may be repelled, it will fix upon the party, who thus holds himself out to the world in the character of a husband, liabilities as it respects others, which attach to this relation."

"In Cunninghams and Cunninghams, also in the House of Lords on an appeal from the court of sessions in Scotland, 2 Dow, 482, which is to be found in a note to 4 Johns., 53, Lord Eldon and Lord Redesdale held 'that in cases of cohabitation, the presumption was in favor of its legality.' "

In *Carter* v. *Parker*, 28 Maine, 509, the court said: "In the case of *Birt* v. *Barlow*, Doug., 174, Lord Mansfield is reported to have said 'an action for criminal conversation is the only civil case where it is necessary to prove an actual marriage.' " The remark was in substance repeated by Lord Kenyon in the case of *Leader* v. *Barry*, 1 Esp. R., 353. In other civil cases a marriage may be inferred from long cohabitation as man and wife, and other usually attending circumstances, unless such cohabitation appear to have been illicit in its origin."

In *Taylor* v. *Robinson*, 29 Maine, 328, the court said: " 'It seems to be a general rule, that in all civil personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage.' 2 Stark., Ev., 939. Mr. Greenleaf in his treatise on Evidence, Vol. 2, Sec. 461, says, 'the proof of marriage as of other issues, is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances, from which its existence may be inferred. Evidence of the former kind, or what is equivalent to it, is required upon the trial of indictments for polygamy and adultery and in actions of criminal conversation; but in all other cases, any other satisfactory evidence is sufficient.' And he says in Section 462, 'It is competent to show their conversation, addressing each other as man and wife. Their cohabitation also as man and wife is presumed to be lawful, till the contrary appears. The evidence introduced in proof of the marriage, was such as had been allowed in all civil cases. And we find no authority for a distinction in cases where the party to the marriage is a party to the suit, and wishes to prove the marriage, and where the attempt to establish the marriage is by one who is a stranger thereto.' " *Fenton* v. *Reed*, 4 Johns, 52, *Pratt* v. *Pierce*, 36 Maine, 448, *Taylor* v. *Robinson*, 29 Maine, 323, *Camden* v. *Belgrade*, 78 Maine 209, in which is cited 2 Greenleaf Ev. Chaps. 462-3; 1 Gr. Ev. Chap. 104, et seq., *Snowman* v. *Mason*, 99 Maine, 493, L. R. A. 1915, E., 35, and cases cited; *Voshall* v. *Kelley Island L. & T. Co.*, 13 Ohio, L. Op., 278; *Rossi* v. *S. Oil Co.*, 2 Cal. Ind. Acc. Comm., 338; See note, 13 Neg. & Com., Cases 199-200; *Hill* v. *Fuller Co.*, 1 Cal. Ind. Acc. Comm., No. 10, Page 5; cited also in No. 6 Neg. & Com. Cases 253; *Travers* v. *Reinhardt*, 205 U. S., 423, 27 Sup. Ct. Reps., 563; Davis Pryor, 112 Fed., 274; *Barnam* v. *Barnum*, 42 Md., 251; *Eaton* v. *Eaton*, 66 Neb., 676.

As to the claim for compensation, Chap. 50, R. S., 1916, Sec. 17 of the act provides that "no proceedings for compensation for an injury under this act shall be maintained unless a notice of the accident shall have been given to the employer within thirty days after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within one year after the occurrence of the same, or, in case of his physical or mental incapacity, within one year after the death or the removal of such physical or mental incapacity."

That written notice of the accident was given to the employer is conceded, and the chairman in his finding states that "it is the latter part of this section alone that we have to consider under this part of the answer," and rejecting the oral testimony offered by the brother of decedent that he had made claim for compensation representing the widow, as well as declining to admit a copy of a letter of petitioner's attorney to the defendant stating that a claim would be filed, the chairman ruled thereon as follows:

"A fair construction of that part of Section 17 relative to claim for compensation would seem to be this: That an unequivocal claim for compensation under the Maine law should be made by the employee upon the employer within the period named, and should be made in such unequivocal language or terms as will clearly convey to the employer the knowledge that compensation under the Maine law is claimed."

The chairman concludes in these words: "The chairman finds as a fact that claim for compensation, as provided for in Section 17, was not made either by the claimant or by anyone in her behalf upon the repondent employer within one year after the death of Warren H. Smith. At the trial the chairman ruled, and now holds, that any notice of a claim or the making of a claim for compensation, under the New York Act would not satisfy the necessity for making the same under the Workmen's Compensation Act of the State of Maine."

Again we think the chairman erred in his ruling and finding upon questions of law.

His construction of the statute is too strict, and its adoption would deprive the act of the broad and liberal interpretation which the Legislature intended it should have.

The act does not require the claim for compensation to be in writing, or that it should be made in unequivocal language or terms. It does require that claim for compensation shall be made within one year after the injury. Such claim may be made orally, by a claimant or some person in his behalf, may be made in writing, and the terms will meet the requirements of the act if the employer is thereby apprised that compensation is claimed, and is put upon his notice that a claimant seeks the benefit of the act. And too the notice of a claim for compensation may be waived, and was waived in this case by the defendant through its manager and superintendent, Mr. Cline, who immediately after the accident corresponded with petitioner, offer-

ing counsel and assistance and seeking to take charge of the proceedings and expenses of enforcing the claim for compensation. And he very frankly states that he conferred for hours with the brother of decedent upon this question, and that acting upon advice of counsel the brother decided to seek compensation in New York with the result as above stated. 224 N. Y. Court of Appeals, 9; 119 N. E., 878.

In *Conway* v. *Industrial Board of Ill.*, 118 N. E., 705, 282 Ill., 313, the court said:

"Jan. 21, 1915, claimant filed an application for adjustment of claim for injuries received August 25, 1914. Company had no notice of this claim until April 27, 1915. The act provides claim must be made within six months. 'Section 24 of the Workmen's Compensation Act of 1913 provided that no proceeding for compensation should be maintained unless claim for compensation had been made within six months after the accident. This provision is mandatory. But the claim need not be in writing. A verbal claim is sufficient. To ask for a right as due is to make a claim of that right and there is every tendency to show Kors did this. He talked the matter over with Murray, his foreman, and asked if he was not under the compensation act and ought not be getting half wages, and Murray told him *he guessed he was* under the act. Another time Murray told him his money was as good as gold; that the Conway Co., was going to pay it, and he should come and see M., who was going to pay it. It was manifest that K. was asking for compensation and the plaintiff in error was *admitting its liability.* This was sufficient claim for compensation." See also *Hornbook-Price Co.* v. *Stewart*, 118 N. E., 315, and *Moustgard* v. *Ind. Board of Ill.*, 287 Ill., 156, 122 N. E., 49, case decided in 1919 in which the court said:

"The claim need *not be in writing*, but may be verbal, and is sufficient if the employer is informed by it that the employee *intends* to claim the benefit of the act." *Suburban Ice Co.* v. *Ind. Bd. of Ill.*, 274 Ill., 630. *Lowe* v. *Myers & Sons*, 2 K. B., 265; *Thompson* v. *Gould*, 103 L. T. R., N. S. 81, supra; *Luckie* v. *Merry*, 3 K. B., 83." See *Thompson* v. *Gould*, 103 L. T. R., N. S. 8;

The letter herein referred to reads as follows:

"General Office Shops

St. Louis, Mo. St. Louis, Mo., and Phoenixville, Pa.

HEINE SAFETY BOILER CO.

Water Tube Boilers and Superheaters

Answering yours of By Phoenixville, Pa.

Subject: 1-18-17.

MRS. BESSIE M. SMITH,

The Phoenix,

410 E. Second St.,

Elmira, N. Y.

DEAR MRS. SMITH:

I am just in receipt of your letter of the 16th, and have just received a letter from our attorney, Mr. Samuel A. Whitaker, which I am enclosing to you. Had a long talk with Mr. Whitaker last night and it is his opinion that the law of the State of Maine will apply to this accident, and from his letter you will note you will be entitled to $10.00 a week for a period of three hundred weeks. He only received the copy of the Maine law yesterday and it has to be returned to the State Department at Harrisburg and he has not had time to go thoroughly into it. It seems that a lawyer in the State of Maine will have to be employed to look after that end of it. However, the act or the law provides the fees they can charge so that they will not be allowed to hold you up for any big amount. I have asked Mr. Whitaker to write to a lawyer in Maine and get copies of the legal forms that must be filled out. Mr. Whitaker's services won't cost you anything as we will take care of that so that if you have not gone to any expense or made any agreement with any attorney, do not do so for the present as Mr. Whitaker advises me that everything so far has been done to comply with the law so that your interests are being protected.

It may be a week before we get a reply from the lawyer in Maine as these lawyers do not seem to be very prompt. The Secretary of the State of Maine is certainly very dilatory as we have written him twice for copy of the law but have not even received a reply.

Yours very truly,

HEINE SAFETY BOILER CO.,

ESC-S. (Signed) Per E. S. CLINE,

Supt. Erection

S"

The rejection of the copy of the letter of January 9, 1917, by which petitioner sought to show written claim for compensation, works no injury to petitioner's rights in view of the frank statement in the above letter from the Heine Safety Boiler Company, signed by E. S. Cline, and dated January 18, 1917, that "Mr. Whitaker's services (their own lawyer's services) won't cost you anything as we will take care of that, so that if you have not gone to any expense or made any agreement with any attorney, do not do so for the present as Mr. Whitaker advises me that everything so far has been done to comply with the law so that your interests are being protected."

The defendant employer on the 14th day of December, 1916, wrote to Mrs. Smith at her home at Binghampton, N. Y., as follows:

"I feel sure that the Insurance Co. will have to settle with you liberally but do not know how long it will take or what law will apply, whether the New York, Penna. or Maine, but write me fully and I will do all I can to get as much as possible for you.

I assure you I regret this unfortunate accident and sincerely sympathize with you in your bereavement."

In the presence of such admissions of liability the defendants cannot now prevail in their contention that the petitioner failed to make a proper legal claim under the law, and it would be difficult to recall a more complete instance of waiver.

In *Roberts* v. *Packing Co.*, 95 Kan., 726, the court said: "Apart from the fact that the defendant and its officers knew the circumstances and extent of the injury and the plaintiff was treated by

defendant's physician, *there were admissions* of liability and offers to confess judgment as well as motions that judgment be awarded in favor of plaintiff and against defendant for limited sums. . . . . The defendant thereby waived the failure of the plaintiff to make a claim within the prescribed time or at a time earlier than it was made." *Ackerson* v. *Zinc Co.*, 96 Kan., Atl., 781, 153 Pac., 530; *Halverhout* v. *S. W. Milling Co.*, 97 Kan., 484; *Gailey* v. *Manuf. Co.*, 98 Kan., 53 at 55; 157 Pac., 431; *Gailey* v. *Manuf. Co.*, 98 Kan., 484; 157 Pac., 431; *Knoll* v. *City of Salina*, 97 Kan., 428; *Thompson* v. *Gould*, 103 L. T. R., N. S., 85-86. See also *Wright* v. *Bagnal*, 2 Q. B. 240; 82 L. R. T., N. S., 346; 69 L. J., N. S., 557; 1916 A. L. R. A., 92.

In *Bank* v. *Marston*, 85 Maine, 493, the court said: "A statutory or even a constitutional provision, made for one's benefit is not so sacred that he may not waive it, and having once waived it he is estopped from thereafter claiming it." See also *Banking Co.* v. *Riley*, 108 Maine, 24-25.

In *Allen* v. *Goodnow*, 71 Maine, 425, the court said:

"When one by his *words or conduct*, wilfully causes another to believe the existence of a certain state of facts, and induces him to act on that belief, so as to alter his own previous position, or to omit to assert some right which he otherwise would have asserted, he shall not afterwards be permitted to set up a different state of facts to the injury of him thus deceived." See also *Copeland* v. *Copeland*, 28 Maine, 539. See also *Foster* v. *Dwinel*, 49 Maine, at 48; *Holt* v. *Telephone Co.*, 110 Maine, 12; *Rogers* v. *St. Railway*, 100 Maine, 90; *Libby* v. *Haley*, 91 Maine, 331; *Titus* v. *Morse*, 40 Maine, 352; *Martin* v. *M. C. Ry. Co.*, 83 Maine, 104.

The remaining contentions of defendants are not sustained by the facts and the law of the case, for it is manifest that the petitioner is: 1. Entitled to receive the compensation provided by law. 2. The Safety Boiler Company was carrying on business in the State of Maine at the time of the accident. 3. That the defendants were notified of the claim for compensation within the meaning of the act, and further that by their acts they waived such notice. 4. That the Industrial Accident Commission of the State of Maine had jurisdiction to hear the claim, and the fact that the defendant, Heine Safety Boiler Company, was a foreign corporation, and that decedent was not a resident of Maine are immaterial; and 5. That the contract of employment was made in Massachusetts, does not affect the rights

of petitioner, and it is manifest as well that the business of the Heine Safety Boiler Company was not of casual and transitory character, within the meaning of the act, as applicable to this case; and finally that the petitioner is not precluded by the decision of the Court of Appeals of New York. That court in effect denied jurisdiction, and did not adjudicate on the merits of the case. The injury occurred in Maine, not in New York, and the decision of that court was in harmony with the intention of the laws of New York. Mistake in seeking a forum will not work a forfeiture of a right if a petitioner applies to the proper forum in the time prescribed by the law of that forum, and that requirement and all others have been met by the petitioner herein.

In *Douthwright* v. *Champlin*, 100 Atlantic, 97; 15 Neg. & Comp., cases 870; 91 Connecticut, 524: "Nor does our act provide compensation for residents alone. Its language is not that of restriction or limitation, but all-embracing. For example; it applies to 'all contracts of employment,' and this was intended to mean wherever and by whomsoever made. It gives compensation for 'any injury' and this was intended to furnish to non-resident and resident alike the new remedy. It defines an employer and an employee as 'any person'. It excepts certain classes, and the designation of these exceptions marks the only limitation upon the definition."

Sec. 1 of Chap. 50, R. S., Paragraph II, reads; " 'Employee' shall include every person in the service of another under any contract of hire, express or implied, oral or written." . . . .

Paragraph III reads: " 'Assenting employer' shall include all employers who have complied with the provisions of section six hereof." . . . . The exceptions not being necessary are omitted.

The defendant, Heine Safety Boiler Company, was an assenting employer under the act.

In *Scully* v. *Industrial Commission of Illinois*, 120 N. E., 492, 284 Ill., 567, the court said: "The word 'casual' as applied to employment in Workmen's Compensation Acts, has reference to the contract of service, and not to the particular item of work being done at the time of the injury; and an injured employee having been regularly employed for five months at the time of the accident, his employment was not casual."

Warren H. Smith had been employed by the defendant in the same work for fifteen years. His employment was therefore not casual.

Our conclusion therefore is that the appeal should be sustained, the decree reversed and that the petitioner is entitled to receive compensation at the rate of ten dollars per week for a period of three hundred weeks from the date of the injury, the maximum amount fixed by Section 12 of the act. Decree in accordance with this opinion.

So ordered.

EZEKIEL SPITZ *vs.* GEORGE LAMPORT, et als.

Cumberland. Opinion February 22, 1921.

Measure of damages. Special damages and damages under the general rule. Injured party shall be placed in same position he would have been, had no breach of contract occurred. Consequential damages may be recovered. Notice to the other party to the contract of another contract with a stranger need not be in writing, a verbal notice being sufficient to entitle one to special damages.

It will serve no useful purpose to analyze the testimony in this case, which is largely written, as the evidence when fully considered sustains the burden of proof in favor of the contention of the plaintiff, of a contract on the part of the defendants to supply him with 500 tons of ice f. o. b. Biddeford, for shipment to New London, Connecticut, and a breach of the contract. The defendants shipped about 100 tons.

The real question in the case is the measure of damages. The plaintiff contends he is entitled to special damages; the defendants that he is entitled to damages under the general rule, if to any; which rule shall control depends upon the testimony. The rule permitting the assessment of special damages is now well established and well defined.

Held:

1. That the fundamental principle of law upon which damages for breach of contract are assessed is that the injured party shall be placed in the same position he would have been, if the contract had been performed.
2. That the principle that in case of breach of contract such consequential damages may be recovered as may fairly be presumed to have been in the contemplation of the parties at the time of making the contract, has been affirmed in this State.

3. That where the plaintiff makes the contract in order to fulfill another contract with a stranger and so informs the defendant, he may recover such damages as the information given would indicate as likely to happen.
4. That the notice need not be a part of the contract as a verbal notice is sufficient although the contract was written.
5. That the plaintiff's evidence brings this claim for damages within the rule.

On report. The plaintiff alleges that on the third day of May, 1919, he bought of defendants five hundred tons of ice at $4.25 per ton, f. o. b. Biddeford; that only about one hundred tons were furnished under the terms of the contract, and that he had sold the ice at a net profit of $5.90 per ton. At the return term of the Supreme Judicial Court in Cumberland County, October, 1919, the case was being tried to a jury, when by agreement it was taken from the jury and reported to the Law Court for final determination. Judgment for plaintiff for $2000.00.

Case is stated in the opinion.

Harry C. Libby, and Joseph E. F. Connolly, for plaintiff.

William A. Connellan, and Harry H. Connell, for defendants.

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

SPEAR, J. It will serve no useful purpose to analyze the testimony in this case, which is largely written, as the evidence when fully considered sustains the burden of proof in favor of the contention of the plaintiff, of a contract on the part of the defendants to supply him with 500 tons of ice f. o. b. Biddeford, for shipment to New London, Connecticut, and a breach of the contract. The defendants shipped about 100 tons.

The real question in the case is the measure of damages.—The plaintiff contends he is entitled to special damages; the defendants that he is entitled to damages under the general rule, if to any; which rule shall control depends upon the testimony. The rule permitting the assessment of special damages is now well established and well defined. The leading Maine case upon this subject is found in *Thoms* v. *Dingley,* 70 Maine, 100, in which it is said:

"Ordinarily, the measures of damages applying to warranty of personal property is the difference between the actual value of the articles sold and what they would have been worth if as warranted.

Wright v. *Roach*, 57 Maine, 600. But this is not an invariable standard. It is not always adequate to produce just results. There are cases where more extended damages are recoverable for special or consequential or exceptional losses.

"The rule that embraces cases of special damages is the one formulated in the case of *Hadley* v. *Baxendale*, 9 Exch., 353. Alderson, B., there said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract, should be either such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and were thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of the contract under those special circumstances so known and communicated."

The rule is fully stated and approved in *Hetherington* v. *Firth. Co.*, 210 Mass., 8, in which it is said:

"The fundamental principle of law upon which damages for breach of contract are assessed is that the injured party shall be placed in the same position he would have been, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties as reasonable men as a probable result of the breach, and so far as compensation therefor in money can be computed by rational methods upon a firm basis of facts. When a claim for prospective profits is brought to the test of this principle, recovery can be had where loss of profits is the proximate result of the breach, and is such as in the common course of events reasonably might have been expected, at the time the contract was made, to ensue from a breach, and where it can be determined as a practical matter with a fair degree of certainty what the profits would have been."

Our court in the recent case of *Keeling-Easter Co.* v. *R. B. Dunning & Company.* 113 Maine, 34, have stated the rule as follows:

"The principle that in case of breach of contract such consequential damages may be recovered as may fairly be presumed to have been in the contemplation of the parties at the time of making the contract, has been affirmed in this State. *Miller* v. *Mariner's Church*, 7 Greenl., 51; *True* v. *Telegraph Co.*, 60 Maine, 9; *Grindle* v. *Express Co.*, 67 Maine, 317; *Thoms* v. *Dingley*, 70 Maine, 100. So in Massachusetts. See *Merrimack Mfg. Co.* v. *Quintard*, 107 Mass., 127. So elsewhere, 13 Cyc., 361."

Sedgwick on Damages, Vol. 1, Page 291, says:

"Where the plaintiff makes the contract in order to fulfill another contract with a stranger and so informs the defendant, he may recover such damages as the information given would indicate as likely to happen."

"The notice need not be a part of the contract as a verbal notice is sufficient although the contract was written."

From these cases it may be regarded as a fair deduction to say that one of the important considerations that differentiates the rule of special damages from that of general damages is proof of knowledge of the parties of the special purpose for which the contract is made. The question now arises: Does the evidence bring the plaintiff's claim for damages within the rule? We think it does.

The profits which the plaintiff seeks to recover are not contingent or speculative, but capable of ascertainment. They are the natural and direct result of the breach of the contract. The defendants had notice of the plaintiff's contract of sale to parties in New London at $12.00 per ton. The evidence proves all of these propositions.

The evidence shows that the plaintiff was a coal dealer and engaged in the ice business for the purpose of supplying his coal customers with ice. As a means of doing this, he had made a contract with two men in New London, Connecticut, for a sale of two hundred and fifty tons of ice each, at $12.00 per ton, for delivery during the summer season. The contract and the price were proved, and were executed to the extent of the taking of one hundred tons and payment therefor to the plaintiff at the rate of $12.00 per ton. Hence there was nothing speculative or contingent in regard to the plaintiff's contract for the sale of 500 tons of ice. Accordingly, the loss of the plaintiff's claimed profits was the natural and direct result of the failure of the defendants to deliver the ice, which was to be delivered by the plaintiff to his two contractors.

The defendants' own testimoney shows that they were informed of the contracts the plaintiff had for the sale of the ice to other parties, and, in other respects, fully understood the circumstances and conditions under which the plaintiff entered the ice business and the purposes for which he contracted for the ice.

All the elements necessary to bring the plaintiff within the rule of special damages seem to be well borne out by the evidence.

It further appears that the plaintiff made every reasonable effort that could be required of him to obtain ice elsewhere to enable him to fill his contracts, but without success. He therefore, without fault on his part, lost the benefit of his contracts.

The ice f. o. b. Biddeford was to cost the plaintiff $4.25 per ton, to which was to be added $1.85 freight, making a total cost of $6.10 per ton for the ice in the freight yard at New London.

The plaintiff claims that his damages should be measured by the difference in the cost at New London and his contract price at New London; that is the difference between $12.00 per ton and the cost $6.10, or a net profit of $5.90 per ton, amounting to $2360 on 400 tons, the quantity of ice not delivered. We are of the opinion, however, that, in view of meltage to be borne by the plaintiff, that the damages should not be assessed above $2000.

In fixing this as the fair amount of damages we have not overlooked the specific claim for meltage on the ice shipped via Portland nor the claim for installing the ice box as it is called in the testimony.

Judgment for plaintiff for $2000.00.

AETNA LIFE INSURANCE COMPANY, In Equity,

vs.

BENJAMIN G. KIMBALL, et als.

Cumberland. Opinion March 7, 1921.

In an appeal from the finding of a single Justice upon matters of fact in equity, the burden of clearly convincing the Appellate Court of the incorrectness of such finding is upon the appellant. The assignment of a life insurance policy, valid in its inception, as an ordinary business transaction, without suspicion of fraud and entirely free of the character, attributes, and surroundings of a wager policy, made by the assured and beneficiary in good faith for ample consideration, and assented to by the insurance company, vests the assignee with the entire legal interest in the policy, whether the assignee has an insurable interest in the life of the assured or not.

This was a bill of interpleader brought by the Aetna Life Insurance Company against Benjamin G. Kimball, Henry J. Conley and Theodore Kerr for the purpose of determining which one of the defendants was entitled to the proceeds of a certain policy of insurance issued by said Aetna Life Insurance Company on the life of Rosina W. Kimball, deceased, wife of the defendant Benjamin G. Kimball.

The sitting Justice found that the defendant, Theodore Kerr, was entitled to the fund in question, and from the final decree, the defendant, Henry J. Conley, appeals to this court.

Held:

1. Examination of the record discloses such finding to be supported by the testimony in the case, and the appellant presents no sufficient evidence in opposition thereto.
2. It is a rule well established in this jurisdiction that the decision of a single Justice upon matters of fact in an equity case should not be reversed unless the Appellate Court is clearly convinced of its incorrectness, and that the burden of showing error is upon the appellant.
3. An assignment of a policy made by the assured in good faith for the purpose of obtaining its present value, and not as a gambling risk between him and the assignee, or a cover for a contract of insurance between the insurer and the

assignee, will pass the interest of the assignor; and the fact that the assignee has no insurable interest in the life of the insured is neither conclusive nor prima facie evidence that the transaction is illegal.

4. It is well settled that an assignment of a life insurance policy executed in compliance with the terms of the policy by the assured and the only beneficiary, divests both of them of, and vests the assignee with, the entire legal interest in the policy.

5. An insurable interest in the life of another, such as will take the contract of insurance out of the class of wager policies is such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.

6. The weight of authority appears to hold that a life insurance contract is not one of indemnity, and so does not require the insurable interest to continue as in case of fire insurance, but is a mere chose in action, which may be assigned in a bona fide transaction as any other chose in action. If the contract or policy was valid at its inception it may be assigned for a valuable consideration and the assignee may thereafter carry it on and receive the proceeds. *A fortiori* is this so, if the assignee also has an insurable interest.

On appeal. A bill of interpleader brought by the Aetna Life Insurance Company against Benjamin G. Kimball, Henry J. Conley and Theodore Kerr to determine to which one of the defendants should be paid the proceeds of a certain policy of insurance issued by plaintiff on the life of Rosina W. Kimball, deceased, wife of the defendant Benjamin G. Kimball, viz; five thousand dollars which had been deposited by plaintiff with the clerk of the Supreme Judicial Court for the County of Cumberland. The sitting Justice found in favor of one of the defendants, Theodore Kerr, and decreed that the fund in question, with interest accrued thereon less the costs and counsel fees allowed by the court to plaintiff, was the property of defendant, Theodore Kerr, from which decree the defendant, Henry J. Conley took an appeal to the Law Court. Appeal dismissed with costs. Decree affirmed.

The case is fully stated in the opinion.

Henry J. Conley, pro se, for appellant.

William H. Murray, for appellee.

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

HANSON, J. This was a bill of interpleader brought by the Aetna Life Insurance Company against Benjamin G. Kimball, Henry J.

Conley and Theodore Kerr for the purpose of determining which one of the defendants was entitled to the proceeds of a certain policy of insurance issued by said Aetna Life Insurance Company on the life of Rosina W. Kimball, deceased, wife of the defendant, Benjamin G. Kimball.

The sitting Justice found that the defendant, Theodore Kerr, was entitled to the fund in question, and from the final decree, the defendant, Henry J. Conley, appeals to this court.

The facts which were not in dispute are briefly as follows: On the 20th day of June, A. D. 1908, the plaintiff in this action issued to Mrs. Rosina W. Kimball, wife of the defendant, Benjamin G. Kimball, a policy of insurance for $5,000, payable at the death of said Rosina W. Kimball, or if she survived, at the end of twenty-four years, to the said Rosina W. Kimball. In case of death before the end of the term of twenty-four years, said $5,000 was to be paid to her husband, Benjamin G. Kimball, as beneficiary under said policy.

On the 6th day of June, A. D. 1912, said Rosina W. Kimball and Benjamin G. Kimball executed an instrument to sell, assign and transfer to the defendant, Theodore Kerr, all their right, title and interest in and to said policy above mentioned, and said instrument of assignment was delivered to said Kerr, and by him forwarded to the said insurance company which assented thereto. At the time of the execution of this assignment there was also executed between said Benjamin G. Kimball and Rosina W. Kimball and the said defendant, Theodore Kerr, a memorandum of agreement by which it was agreed between the parties thereto that said policy was assigned to said Theodore Kerr as collateral security to secure certain notes given by the said Kimball to Theodore Kerr. According to the uncontradicted testimony in the case, the indebtedness described in the assignment of this policy as collateral was never paid according to the terms of the agreement accompanying said assignment, and it appears from the evidence that all premiums on said policy were paid by the defendant, Theodore Kerr, except two partial payments on said premiums, amounting to $50, being paid by said Benjamin G. Kimball.

Subsequently under date of June 12th, 1915, a supplementary assignment was given by Benjamin G. Kimball and Rosina W. Kimball to said Kerr, covering the same period, extending the indebtedness secured by said assignment to all the indebtedness between the parties at that time.

Finally under date of June 20, 1918, a further assignment was given by said Rosina W. Kimball and Benjamin G. Kimball to Theodore Kerr of all their right, title and interest and claims and demands of every name and nature in said policy, said assignment containing the following clause: "It is understood and agreed that this is a supplemental assignment or release of said policy and is to be considered as an assignment in full (a prior assignment dated June 6, 1912, being for collateral purposes only)." This assignment was delivered to said company and was assented to by it. At the time of the execution and delivery of said assignment there was executed an agreement between the Kimballs and said Kerr by which it was agreed between the parties thereto that said assignment was accepted by said Kerr in full payment and satisfaction of $1750, being slightly more than the cash surrender value of said policy, the balance of the indebtedness mentioned in said agreement of $371.44 being discharged by a promissory note given that date by said Kimball to said Kerr. At the date of the last assignment the defendant Conley was the owner and holder of seven promissory notes of $500 each signed by Benjamin G. Kimball, the beneficiary named in the policy of insurance, amounting in all to $3500. On the death of the insured, Mrs. Rosina W. Kimball, both defendant Kerr and the defendant Conley made claim against the plaintiff herein for the amount set forth in the policy of insurance, namely, $5,000. The plaintiff thereupon brought this bill and deposited with the clerk $5,000, to be subject to the final disposition of the same by this court.

The sitting Justice found "that Rosina W. Kimball and her husband Benjamin G. Kimball, assigned the policy in question to the defendant Kerr in settlement of certain indebtedness for which she was responsible at least as endorser, and that she was liable on other indebtedness of her husband to Kerr in addition to the amount for which the policy was assigned in payment."

The sitting Justice further found "that the policy being a valid one at the time of the assignment, the insured and the beneficiary had a legal right to assign all their interest therein in payment of certain of their liabilities to the assignee, and having received it in a bona fide business transaction, we think it was within the privilege of the assignee to carry it on by paying the premium or surrendering it for its cash value, as he might at any time elect."

Examination of the record discloses such finding to be supported by the testimony in the case, and the appellant presents no sufficient evidence in opposition thereto.

It is a rule well established in this jurisdiction that the decision of a single Justice upon matters of fact in an equity case should not be reversed unless the appellate court is clearly convinced of its incorrectness, and that the burden of showing error is upon the appellant. *Stewart v. Gilbert,* 115 Maine, 262.

The appellant contends that the final assignment "did not pass to Kerr the full face of the policy, but only the sum of seventeen hundred and fifty dollars, the indebtedness for which said policy had been held as collateral security."

The sitting Justice found "that the deceased Rosina W. Kimball and her husband Benjamin G. Kimball, had an insurable interest in her life, and the policy was therefore valid at its inception; that the defendant, Theodore Kerr, at the time of the several collateral assignments in 1912 and 1915, and of the absolute assignment as a creditor of Rosina W. Kimball, also had an insurable interest in her life and that the assignments to Kerr by the assured, Rosina W. Kimball, and the contingent beneficiary, Benjamin G. Kimball, were, therefore, valid, and that the absolute assignment in 1918 was assented to by the Insurance Company."

The testimony shows conclusively that the transaction was entered into and carried on in good faith from its inception. There were business dealings between the parties upon which no criticism can be made. The first assignments were for security merely, and finally when the absolute assignment was made, the consideration was ample and was equal to the cash surrender value of the policy at the date of the assignment. The assignee, Kerr, elected to pay the premium and continue the policy, as he had the legal right to do. The policy was valid in its inception, the relations of the parties and their business dealings were such as comports with ordinary relations and business transactions, without suspicion of fraud and entirely free of the character, attributes, and surroundings of a wager policy. Nor was the assignment illegal as a wagering contract.

An assignment of a policy made by the assured in good faith for the purpose of obtaining its present value, and not as a gambling risk between him and the assignee, or a cover for a contract of insurance between the insurer and the assignee, will pass the interest of

the assignor; and the fact that the assignee has no insurable interest in the life of the insured is neither conclusive nor prima facie evidence that the transaction is illegal. *Mutual Life Ins. Co.* v. *Allen,* 138 Mass., 31.

It is well settled that an assignment of a life insurance policy executed in compliance with the terms of the policy by the assured and the only beneficiary, divests both of them of, and vests the assignee with, the entire legal interest in the policy. *Tremblay* v. *Aetna Life Ins. Co.,* 97 Maine, 547.

An insurable interest in the life of another, such as will take the contract of insurance out of the class of wager policies is such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. Appeal of Corson, Executor of McLean, 113 Pa., State Rep., 438.

The weight of authority appears to hold that a life insurance contract is not one of indemnity, and so does not require the insurable interest to continue as in case of fire insurance, but is a mere chose in action, which may be assigned in a bona fide transaction as any other chose in action. If the contract or policy was valid at its inception it may be assigned for a valuable consideration and the assignee may thereafter carry it on and receive the proceeds. A *fortiori* is this so, if the assignee also has an insurable interest. See *Conn. Mut. Life Ins. Co.* v. *Schaefer,* 94 U. S., 457; *Griggsby* v. *Russell,* 222 U. S., 149; *Mutual Life Ins. Co.* v. *Allen,* 138 Mass., 24; *King Jr.* v. *Cram,* 185 Mass., 103; *Mechanics Nat. Bank* v.*Comins,* 72 N. H., 12, 19; *Prudential Ins. Co.* v. *Leach.,* 112 Mich., 436; *Martin* v. *Stebbins,* 126 Ill., 387; *Ritter* v. *Smith,* 70 Md., 261; *Fitzgerald* v. *Rawlings,* 114 Md., 470; *Steinbach* v. *Diepenbrock,* 158 N. Y., 24; *Clark* v. *Allen,* 11 R. I., 439; *Rahders* v. *Peoples Bank,* 113 Minn., 496; In re Phillips, 238 Pa. St., 423, and cases referred to in the above authorities.

Many of the authorities to the contrary are based upon *Warnock* v. *Doris,* 104 U. S., 775, which has since been differentiated and explained by the Federal Supreme Court in *Griggsby* v. *Russell,* supra.

The entry will be,

Appeal dismissed with costs.
Decree affirmed.

KATE P. CLIFFORD, et als,

vs.

ANDROSCOGGIN & KENNEBEC RAILROAD COMPANY.

Androscoggin. Opinion March 7, 1921.

An estate upon condition does not terminate upon its breach, unless an entry be made by one authorized to take advantage of the condition. The statute (R. S., Chap. 109, Sec. 4,) dispensing with proof of actual entry under a demandant's title, contemplates only a case where the party already has acquired a title, and otherwise entry would be requisite to perfect the remedy.

These plaintiffs brought this writ of entry for the recovery of possession of certain real estate in Lewiston, which had been leased to a street railway corporation for a term of years still unexpired. The lease carries a covenant against assignment without previous written permission; the covenant being accompanied by a condition subsequent giving the landlord a right to enter and terminate the estate on its breach.

The street railway company went to receivership. The bondholders of the company thereupon organized the defendant corporation and, under decree of foreclosure and sale, purchased the lease and went into possession of the demised premises.

Neither the insistence of the plaintiffs, advanced not only on alleged breach of the covenant against assignment, but also upon provision for determination of the lease in the event the leased estate were taken from the lessee "by proceedings in bankruptcy or insolvency or otherwise," nor the contentions of the defendant that, as the bondholders of the old corporation became the stockholders of the new, the transfer of the lease involved no change in property ownership, and that the judicial sale operated as an involuntary assignment, whereas the stipulation of the lease means only a voluntary one, are in order for decision.

An estate upon condition does not terminate upon its breach, unless an entry be made by one authorized to take advantage of the condition. This common law rule has not been abrogated by statute. The statute (R. S., Chap. 109, Sec. 4,) providing that, in a real action, demandant need not prove an actual entry under his title, but proof that he is entitled to such an entry under his title, but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, shall be sufficient proof of his seizin, was early interpreted as contemplating only a case where the party already has

acquired a title, and entry is necessary to perfect the remedy. The statute does not apply to cases, where entry is required not as a matter of form, but for the purpose of causing a change of title, or a forfeiture of the estate, or an entry upon a conditional estate to cause a forfeiture.

On report. This is a writ of entry to recover the possession of certain real estate in Lewiston. On October 13, 1908, the plaintiffs leased to the Lewiston, Augusta & Waterville Street Railway for the term of twenty years, at an annual rental of $2800, a brick block located in Lewiston at the southeasterly corner of Main and Lisbon Streets. Before the expiration of the term of the lease, lessee was placed under receivership by the court. The trustee for the bondholders of lessee foreclosed on the property of lessee, and its property and franchises were sold under a decree of the court and the lease in question was included in the sale. Plaintiffs claimed a forfeiture of the lease because of the sale, under the decree of court, of the property of lessee, alleging a breach of a covenant in the lease, that no assignment could be made without written consent of lessor, which covenant was accompanied by a condition subsequent allowing landlord to enter and terminate the estate on its breach. No entry was made by demandants to terminate the estate. Plea, nul disseizin, with brief statement. By agreement of parties the case was reported to the Law Court. Plaintiffs nonsuit.

The case is fully stated in the opinion.

B. L. Berman, Clifford & Clifford, and Tascus Atwood, for plaintiffs.

William H. Newell, for defendant.

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

DUNN, J. Declaring on their own seizin, these plaintiffs brought this writ of entry for the recovery of possession of certain real estate in Lewiston, which some of them, and presumably an ancester of the others, had leased to a street railway corporation for a term of years still unexpired. The lease carries a covenant, on lessee's part, against assignment without previous written permission; the covenant being accompanied by a condition subsequent giving the landlord a right to enter and terminate the estate on its breach.

Under decree of foreclosure and sale, made and entered in the course of proceedings in two consolidated suits,—the one of which

was commenced against the railway corporation as a creditor's bill, and the other by the trustee under a mortgage given to secure payment of bonded indebtedness,—this defendant, a new corporation organized by the bondholders of the old (R. S., Chap. 57; Chap. 51, Sec. 73), purchased the lease and went into possession of the demised premises.

By way of brief statement, supplemental to a plea of nul disseizin, defendant sets up that, forasmuch as the bondholders in the former corporation became the stockholders of the new, the transfer of the lease involved no change in property ownership. And, besides, that the judicial sale operated as an involuntary assignment, whereas the stipulation of the lease means only a voluntary one.

But neither the insistence of the plaintiffs, advanced not only on alleged breach of the covenant against assignment, but also upon provision for determination of the lease in the event the leased estate were taken from the lessee "by proceedings in bankruptcy or insolvency or otherwise," nor the contentions of the defendant, related to the brief statement, are in order for decision.

An estate upon condition does not terminate upon its breach, unless an entry be made by one authorized to take advantage of the condition. This rule originally was based on the theory that the estate, having commenced by livery of seizin, might be terminated only by an act of like solemnity. Physical entrance, as a condition precedent to the maintenance of an action for the breach of a condition subsequent, is as an essential a prerequisite today, in a case of this kind, as when Littleton and Coke and Blackstone wrote. *Frost* v. *Butler*, 7 Maine, 225; *Spofford* v. *True*, 33 Maine, 283; *Tallman* v. *Snow*, 35 Maine, 342; *Hall* v. *Pickering*, 40 Maine, 548; *Osgood* v. *Abbott*, 58 Maine, 73; *Peaks* v. *Blethen*, 77 Maine, 510. A breach of a covenant not to assign will not of itself determine the lease and revest the estate in the lessor. *Shattuck* v. *Lovejoy*, 8 Gray, 204. The proposition that a lease, like the one here, remains in force unless forfeiture become effective by entry, is recognized in *Small* v. *Clark*, 97 Maine, 304, and in the cases and the text-books there cited. Said the court in *Stone* v. *Ellis*, 9 Cush., 95. "It is not enough to show a mere breach of a condition subsequent. That alone does not defeat the estate. It is entirely optional with the grantor of an estate upon condition, in case a breach of the condition occurs, whether he will avail himself of the same as a forfeiture of the estate

thus granted. To do this, requires action on his part, and the usual form is by an actual entry upon the party in possession, assigning, for the cause of the entry, the breach of the condition of the deed. Until this is done, the grantee holds his estate, liable only to be defeated, but not actually determined by a forfeiture." "*—the party must first make an entry,* and then he may maintain his Writ of Entry in the Quibus,—." Stearns on Real Actions, 193.

Demandants argue that, though this be the common law rule, it is unavailing in the instant action, because of statutory abrogation. R. S., Chap. 109, Sec. 4. The argument is untenable. The statute provides that, in a real action, the demandant need not prove an actual entry under his title; but proof, that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, shall be sufficient proof of his seizin. For interpretation of this statute recourse may be had to *Marwick* v. *Andrews,* 25 Maine, 525. "The cases provided for by that section are those, in which a formal entry was required by the common law to restore the seizin to one, who had been disseized, or otherwise deprived of it. The statute does not in terms, and was not intended to apply to cases, where an entry was required not as a matter of form, but for the purpose of causing a change of title, or a forfeiture of the estate,— or an entry upon a conditional estate to cause a forfeiture. The statute contemplates a case, where the party has already acquired a title, and an entry is necessary only to perfect the remedy."

The case is here on report. Technical questions of pleading must be regarded as waived. Proof of entry there is none. The single issue of the right of present possession of the demanded premises is presented for decision. That issue we decide. The docket entry will be,

Plaintiffs nonsuit.

LLEWELLYN BARTON, In Equity, *vs.* HENRY J. CONLEY.

Cumberland. Opinion March 8, 1921.

The recording of the affidavit of mortgagee required under Chap. 192 of the Laws of 1917, in foreclosure proceedings, applies to all foreclosures, regardless of date of mortgage foreclosed, and such provision does not come within the constitutional inhibition of impairment of contracts, as it relates to a remedy for enforcement of rights, and there is no vested right in any particular remedy. A remedy for enforcement of a contract does not offend against the constitution, unless the value of the contract is lessened, and no substantial and efficacious remedy remains.

Chapter 192 of the Laws of 1917 requires a mortgagee within three months after completion of foreclosure to record in the Registry of Deeds an affidavit setting forth certain facts. The recording of such affidavit is by the Act made a condition upon which the validity of the foreclosure depends. The question involved is whether the Act which was passed in 1917 applies, and whether under the constitution it can effectually apply to a mortgage dated before 1917 and which contains a one year foreclosure covenant in the familiar form.

Held:

That the Act by its terms purports to apply to all foreclosures begun after its passage without regard to the date of the mortgage foreclosed, and that the one year foreclosure clause is not such a contract as is contemplated and protected by the constitution.

But it is contended that the Act impairs the obligation of the mortgage contract by extending the time, fixed for foreclosure, by the law in force at its date.

Held:

That the Act relates to the remedy for enforcement of rights.

An Act relating to precedure only may be changed by the Legislature at its will. There is no vested right in any particular remedy.

But a statute relating to remedy may so far affect the remedy as to impair the obligation of the contract, and for that reason be void.

To determine whether a remedy for enforcement of a contract so impairs its obligation as to offend against the constitution, the test is whether the value of the contract is lessened and whether a substantial and efficacious remedy remains.

Applying this test it is apparent that the requirement of the affidavit of foreclosure does not affect the value of a mortgage contract, and it is also apparent that a substantial and efficacious remedy for its enforcement remains.

The Act therefore applies to foreclosures begun after its passage without regard to the date of the mortgage foreclosed, such application not being in violation of the constitution.

On appeal by respondent. A bill in equity to redeem a mortgage of real estate upon which foreclosure proceedings had been begun. The mortgage contained a one year foreclosure covenant, and was dated prior to the amendment of Sec. 4 of Chap. 95, of the R. S., by Chap. 192 of the Laws of 1917, requiring the mortgagee within three months after the completion of foreclosure to record in the Registry of Deeds an affidavit setting forth certain facts. Such affidavit was not made or recorded. The bill was brought the next day after the expiration of the one year for redemption. The complainant contended that the failure to record the affidavit of the mortgagee rendered the foreclosure proceedings null and void. Respondent on the other hand contended that the Act of 1917 could not apply to a mortgage dated prior to the passage of the Act, and further contended that the Act impaired the obligation of the mortgage contract by extending the time fixed by law for foreclosure. The sitting Justice found in favor of the complainant and the respondent appealed. Bill sustained.

Case is stated in the opinion.

Samuel L. Bates, for complainant.

Henry J. Conley, pro se, for respondent.

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

DEASY, J. This suit, a bill in equity for redemption of a real estate mortgage, comes to the Law Court on the defendant's appeal.

The mortgage was in 1905 given by the plaintiff to one Geo. W. Towle. It contains a one year foreclosure clause in the form then commonly in use. In 1919 the mortgage was by Towle's executors assigned to the defendant.

On Feb. 20, 1919 the mortgagee's executors by consent in writing of the mortgagor, and for the purpose of foreclosure, entered into possession of the mortgaged premises. A year and a day later, on Feb. 21, 1920, without prior tender, this bill for redemption was begun.

The defendant contends that the suit was begun after completed foreclosure and therefore too late.

The plaintiff claims that the foreclosure is not effectual because no affidavit has been recorded in the Registry of Deeds as provided by Chapter 192 of the Laws of 1917.

The statute in force in 1905 when the mortgage was given provided a redemption period of three years after the beginning of foreclosure. This was changed in 1907 to one year. The statute of 1907 embodied in the R. S. of 1916 as Chap. 95, Sec. 4, together with the amendment of 1917 are as follows, the amendment being italicized.

"Possession obtained in either of these three modes and continued for one year forever forecloses the right of redemption, *provided that an affidavit—. . . is within three months after the expiration of one year from the taking of such possession recorded in the Registry of Deeds.*" The act further specifies what the affidavit shall contain.

In this case no affidavit was recorded within the specified time.

There can be no doubt that the amendment by its terms relates to all foreclosures begun after its passage including foreclosures of prior existing mortgages.

Bird v. *Keller*, 77 Maine, 272.

The defendant contends that to apply this amendment to a mortgage in force prior to its passage is to violate the provisions of the Federal and State constitutions forbidding the enactment by states of laws impairing the obligation of contracts.

The one year foreclosure clause is in the familiar form of a covenant "that the right of redeeming the above mortgaged premises shall be forever foreclosed in one year next after the commencement of foreclosure by any of the methods now provided by law."

It is urged that the statute impairs the obligation of this contract by extending the foreclosure period for three months after the expiration of the year. But the statute does not extend the foreclosure period. In effect it imposes a condition which the mortgagee must perform or be held to have waived his foreclosure. He may perform the condition at once on the expiration of the year or at his option at any time within three months. If the affidavit is seasonably recorded the foreclosure is complete at the end of the year. If not, it is invalidated.

The defendant urges that to thus make conditional, rights which under the terms of a contract are absolute, is to impair the obligation of the contract. But the covenant relating to foreclosure is not in and of itself such a contract as is contemplated by the constitutional limitation.

The right of foreclosure is not a contractual but a statutory right. It depends not at all upon agreements of the parties but entirely upon the provisions of positive law. The statute in force in 1905 when the mortgage was given fixed three years as the strict foreclosure period. However it permitted the parties to elect by agreement a shorter period not less than one year.

Whatever form of words was used the effect was limited by the statute by authority of which alone the parties could contract on the subject. The effect of this covenant was to fix the period of one year as the time in which by operation of law, and not by contract the foreclosure should become complete.

"The contract in substance contains a stipulation between these parties that this state shall continue in force the legal process of distraining for rent. If this is a subject on which parties can contract, and if their contracts when made become by virtue of the constitution of the United States superior to the power of the legislature, then it follows, that whatever at any time exists as part of the machinery for the administration of justice may be perpetuated if parties choose so to agree. That this can scarcely have been within the contemplation of the makers of the constitution, and that if it prevails as law it will give rise to grave inconveniences, is quite obvious."

Conkey v. *Hart*, 14 N. Y., 29; *Worsham* v. *Stevens*, (Tex.), 17 S. W., 404; *Webb* v. *Lewis* (Minn.), 47 N. W., 803; *Scott* v. *District Court*, (N. D.), 107 N. W., 61.

The Amendment of 1917 is not unconstitutional by reason of adding a condition to the one year foreclosure clause. Does it impair the obligation of the mortgage contract?

An act relating simply to procedure may be changed by the Legislature at its will. There is no vested right in any particular form of remedy.

Kennebec R. R. Co. v. *Portland R. R. Co.*, 59 Maine, 9; *Poor* v. *Chapin*, 97 Maine, 304; *Sturges* v. *Crowinshield*, 4 Wheat., 122, 4 L. Ed., 529; *Tennessee* v. *Sneed*, 96 U. S., 69. 24 L. Ed., 610.

But a statute relating to remedy for enforcement of a contract may so far affect the remedy as to impair the obligation of the contract, and for that reason be void.

Louisina v. *New Orleans*, 102 U. S., 203, 26 L. Ed., 132, 12 Corpus Juris 1067, 6 R. C. L., 353.

Thus a law granting an absolute right of redemption where no right existed when the mortgage was executed has been held void as impairing the obligation of the contract. *Barnitz* v. *Beverly,* 163 U. S., 118, 41 L. Ed., 93.

So held in this state as to a statute indefinitely extending the right of redemption in certain cases in favor of attaching creditors.

Phinney v. *Phinney,* 81 Maine, 462.

The test to be applied in determining whether a statute purporting to relate to remedy for enforcement of contracts so far affects contracts as to impair obligations has been stated "in various forms but with the same meaning." Thus:—

Does the act amending the remedy "impair and lessen the value of the contract?" *Edwards* v. *Kearzey,* 96 U. S., 595, 24 L. Ed., 778, 6 R. C. L., 355 and cases cited.

Does a "substantial and efficacious remedy remain?" *Water Works* v. *Oshkosh,* 187 U. S., 439, 47 L. Ed., 250; *Surety Co.* v. *Decorating Co.,* 226 U. S., 276, 57 L. Ed., 221.

Corpus Juris summarizes the result of numerous cases cited thus— "The remedy available under the statute must be substantially equivalent in coercive force to that provided by law when the obligation was contracted. But on the other hand there is abundant authority for the rule that the new or remaining remedy if substantial need not be so effective or advantageous as the old." 12 Corpus Juris 1069.

In 1905, as now, a holder of a defaulted mortgage desiring to foreclose it could, in some if not all cases, proceed by bill in equity or he could resort to one of the methods prescribed by R. S. of 1903, Chap. 90, (R. S. of 1916, Chap. 95).

The amendment of 1917 does not affect foreclosure by process in equity. If one of the statutory legal methods is adopted it requires the mortgagee by simple affidavit, recorded within three months, to make proof of the facts necessary to show such foreclosure to be prima facie complete and effectual.

It is perfectly plain that the amendment of 1917 did not impair or lessen the value of any mortgage, and that after its passage a substantial and efficacious remedy by foreclosure remained and now remains.

An almost precisely similar case arose under the Act of 1849, Chapter 105.

That act added to the then existing statute a requirement that if the foreclosure was by action at law an abstract certified by the Clerk of Courts should be recorded in the Registry of Deeds within thirty days. This was held to be applicable to existing mortgages and while "material and its omission fatal," not to be unconstitutional. *Bird* v. *Keller*, 77 Maine, 272.

Two other points require comment though not affecting the result.

Possession taken for purpose of foreclosure fails of effect unless continued for one year. R. S., Chap. 95, Sec. 4. The burden of proving such continued possession is on the mortgagee. In this case, while it is admitted and determined that the mortgagee took possession there is no admission and no evidence of continued possession.

In a bill in equity for redemption, brought against a resident, it must appear either that a tender was made or was prevented by the defendants fault. In this case no tender was made. No oral evidence appears in the record. We have nothing before us except the pleadings and certain documents having no bearing on these matters.

The single Justice who heard the case sustained the bill and in his decree states that the sole issue other than amount due is the construction and effect of the amendment of 1917 above quoted. The conclusion is irresistible that at the hearing below the fact of continued possession and facts excusing tender were proved or waived.

Pride v. *Lumber Co.*, 109 Maine, 455.

The defendants claim that the plaintiff is barred by estoppel to maintain this suit is clearly without foundation.

Bill sustained.
Decree in accordance with this opinion.

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

ORMAN P. DOW, App't *vs.* EDWIN A. SHEPARD.

Piscataquis County. Decided March 3, 1920. This is an action on the case to recover damages resulting from a breach of warranty in the sale of a pig, alleged to have been sick with cholera. The verdict was in favor of the plaintiff.

All the disputed issues are those of fact and were presented to and passed upon by the jury.

The burden now resting upon the defendant to convince this court that the verdict was manifestly wrong has not been sustained. Motion overruled. *Hudson & Hudson,* for plaintiff. *J. S. Williams,* for defendant.

MAX SARLET *vs.* J. A. MCMENNANIN.

Oxford County. Decided March 24, 1920. The plaintiff, admittedly a resident of the State of New York, bought from a trustee in bankruptcy the stock in trade formerly owned by the bankrupt. With this stock he intermingled other goods bought from other places in New York State and from Lewiston in this State. He then proceeded to sell the bankrupt stock and the intermingled goods in the

store formerly occupied by the bankrupts. He made no attempt to comply with Chapter 41 of the Revised Statutes relating to itinerant vendors, to which class of persons he clearly belonged according to the terms of that statute. The duly elected assessors of the town in which the sale was carried on, acting within the provisions of the same statute, assessed a tax upon the stock and intermingled goods and committed the same for collection to the defendant, who was the duly elected collector of taxes. Under protest the tax was paid and the money was turned over by the collector to the duly elected town treasurer, the former taking receipt for the same from the latter. The money was used by the town treasurer in paying proper town charges. Later the plaintiff demanded return of the money by the defendant and upon his refusal to do so this action was brought for money had and received. The case is before us upon report. No irregularity in the assessment or collection of the tax by any town officer is alleged. No suggestion is made that the tax was an illegal one. No claim of duress is made. Only a protest at the time of payment is contained in the record but that protest was not shown to have been made to avoid arrest of his person or seizure of his property. *Smith* v. *Readfield*, 27 Maine, 145. The plaintiff cites no authorities to establish his right to maintain this action and we know of none. Plaintiff nonsuit. *B. L. Berman*, for plaintiff. *James B. Stevenson*, for defendant.

JOHN KAMILLOWITZ

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

Cumberland County. Decided March 27, 1920. The plaintiff, an invited passenger in an auto-truck operated by one Hayes, was injured in a collision with a car of the defendant company. Hayes was driving along Brighton Avenue in the City of Portland with the electric railroad tracks at the right side of the street. Discovering

that he had passed his destination, he turned his truck toward the left and then backed, preparatory to turning about, and retracing his course. He backed upon or so near to the railroad tracks that the truck was struck by a passing electric car.

Upon plaintiff's exceptions to an order of nonsuit by the presiding Justice it is,

Held:

1. The fact that the plaintiff was not the driver of the vehicle in which he was riding did not relieve him of all care.

2. It was his duty, although a mere passenger, to use reasonable diligence in apprehending danger and in avoiding it if practicable.

3. The plaintiff's own testimony indisputably proves that he made no effort whatever to ascertain whether a car was approaching when the course of the truck was changed, and that had he used the diligence of an ordinarily prudent man concerned for his own safety he would have discovered the peril and avoided it.

Without considering the question of negligence on the part of the defendant, it was a clear case of contributory negligence on the part of the plaintiff, and the nonsuit was properly ordered.

Exceptions overruled. *Harry E. Nixon, and Jacob H. Berman,* for plaintiff. *Verrill, Hale, Booth & Ives, Leon V. Walker, and Joseph E. F. Connolly,* for defendant.

SAMUEL SHEPHERD *vs.* FRANK L. MARSTON.

York County. Decided March 30, 1920. This case came up on motion. The evidence is conflicting and irreconcilable both as to the theory and manner of the accident by which the plaintiff claims to have been injured.

The plaintiff was driving along the road with a single horse and riding wagon, well on the right hand side as he says. The defendant's wife was driving his automobile behind the plaintiff, going in the same direction.

He says the automobile in passing collided with his left forward wheel, thereby throwing him out of his wagon.

The defendant's wife, and another witness who was riding with her, say that the defendant's carriage had stopped; then they drove along side and stopped; and that the accident happened while the two vehicles were thus standing still, beside each other in the road. It was admitted that the plaintiff's horse was well broken, kind and not afraid of an automobile.

Upon these conflicting contentions it was purely a question of fact for the jury, as to which contention to them seemed the most reasonable upon the testimony, with the parties and witness before them.

They found a verdict for the plaintiff, and we do not think they are so manifestly wrong as to warrant the court in revising their finding.

The defendant's counsel stated the precise question at issue as follows: "They claim we rode into them. If we didn't we are not liable. That is the only question in this case."

The defendants say they neither heard nor saw anything that caused the accident. The only thing they heard was the word "whoa" and the first they saw, was the plaintiff picking himself up from the ground.

As a matter of fact the left forward wheel of the plaintiff's wagon had every spoke broken out of it, so that the rim was entirely free, and the wheel rotating on the hub. He describes the wheel as follows: "The left forward wheel was minus spokes and rim; the hub was on the axle and the axle bent down some, and the end of the hub, there was a piece taken out of it, and the shaft, the left hand shaft, was broken off."

An eye witness testified as to what happened to the plaintiff as follows: Q. What did you see in regard to the man in the wagon? A. I looked up directly and saw the man apparently in the air. Further along the witness in substance repeats this testimony.

Upon these undisputed facts which contention seems the more probable and more reasonable?

The jury evidently thought the plaintiff's was, and we should hesitate to say they were wrong.

In view of values as they reckoned in 1917 we cannot say that, upon the evidence, the damages were so excessive to require interference on the part of the court in that regard. Motion overruled. *Emery, Waterhouse & Paquin*, for plaintiff. *Hinckley & Hinckley*, for defendant.

J. W. WHITE COMPANY *vs.* MARY J. WOOD.

Androscoggin County. Decided April 20, 1920. This is an action of assumpsit on an account annexed. The case was tried before the presiding Justice without a jury, and with exceptions to rulings of law reserved. The presiding Justice found for the defendant, and the case is before the court on exceptions.

The plaintiff excepts to the following finding and ruling of law of the presiding Justice: "I find accordingly that this is not a case of agency so far as Mrs. Wood and the J. N. Wood Co. is concerned and that consequently the plaintiff is not entitled to recover from the defendant as undisclosed principal in the transaction."

The exception cannot be sustained. The plaintiff's contention "that the facts in the case show an agency on the part of the J. N. Wood Co., and that the defendant was an undisclosed principal, with a private arrangement with the manager of the J. N. Wood Co.", is not sustained by the testimony.

The ruling of the presiding Justice was correct. Exceptions overruled. *R. W. Crockett,* for plaintiff. *Dana S. Williams,* for defendant.

ERMA I. COFFIN *vs.* ERSKINE NORTHROP.

Waldo County. Decided April 21, 1920. This is a complaint under the provisions of R. S., Chap. 102. Trial before a jury resulted in a verdict against the defendant. He comes to this court upon motion for new trial on the usual grounds, and upon exceptions to admission of evidence, and to parts of the charge of the presiding Justice.

The motion cannot prevail because the defendant has not sustained the burden of showing that the verdict was clearly wrong or that the jury was influenced by prejudice, bias, or misunderstanding.

The evidence objected to was admissable as relating to ill-will between the defendant and witness, if not also upon other grounds.

The charge of the presiding justice contains no incorrect statement of law. His comments upon testimony, based upon either evidence or arguments of counsel, did not transgress the bounds set by statute or common law. Motion overruled. Exceptions overruled. *Arthur Ritchie,* for plaintiff. *H. C. Buzzell,* for defendant.

THE FIRST NATIONAL BANK of Portland, In Equity
KATHLEEN MCGEE, Claimant, Applts.

vs.

FRANKLIN MOTOR CAR COMPANY.

Cumberland County. Decided May 1, 1920. Appeal from a decree disallowing a claim against the receiver of Franklin Motor Car Company for a debt alleged to be due from that corporation to the claimant.

It was undisputed that the claimant loaned to Franklin Motor Car Company the sum of forty-five hundred dollars, and that the debt was afterward canceled in consideration of stock in the same company issued to the claimant.

On the ground that she had been induced to exchange her obligation, for stock, by fraud of the company and certain of its officers and agents, the claimant sought to rescind the contract by which such substitution was made and presented her claim as a debt due her from the corporation.

Obviously the claim is valid if, and only if fraud is proved. The single Justice who heard the evidence disallowed the claim. His decree based on a finding of fact is not to be reversed unless clearly erroneous.

A reading of the case and briefs discloses no such error as will justify this court in sustaining the appeal.

That the claimant, a woman evidently without experience bought and paid a premium for a large amount of stock in a crumbling corporation four months before it went into the hands of a receiver, naturally excites suspicion.

But a painstaking review of the testimony fails to reveal any fraud in fact on the part of any officer or agent of the corporation and confirms the correctness of the decree. Appeal dismissed. Decree below affirmed. *Henry Cleaves*, for plaintiff. *Verrill, Hale, Booth & Ives, and Philip G. Clifford*, for defendants.

CHARLES E. SWEENEY, et als, *vs.* CHARLES N. TREFETHEN, et al.

Cumberland County. Decided May 28, 1920. A joint action to recover for an alleged breach of contract. The plaintiffs were awarded damages in the sum of one thousand nine hundred and eighty-seven dollars and forty cents. The action is before this court on a motion for a new trial on the usual grounds; also upon a separate motion based upon alleged newly discovered evidence.

The alleged newly discovered evidence cannot form the basis for a new trial inasmuch as it does not conform to the conditions laid down by this court. Reasonable diligence on the part of the defendants would have discovered it in time for use at the trial. Following the testimony of Sweeney telephone messages to three well known, local business concerns, one the Portland Water District, would have produced or rendered available this evidence in ample time for use at the trial, if indeed the defendants should not have anticipated its importance and readily discovered it before the trial. On this point the defendants were content to go to the jury on the plaintiff's testimony. They cannot now complain.

The only ground the defendants now rely upon under the general motion is that the damages were excessive. The evidence discloses that the total amount which could have been earned under the contract, if it had been completed, was $6451.72, of which it seems to be admitted the share of the four plaintiffs suffering damage according to the evidence would have been $3686.68. The evidence also discloses that these four plaintiffs during the remainder of the contract period of sixty-three and one-half weeks after the breach on October 26th, 1916, adopting the minimum amounts admitted by them, earned in other employment as follows: Charles E. Sweeney, $711.94;

Peter Foley, $635.00; Thomas Foley, $762.00; and Jack Foley, $872.70; or a total of $2981.64. The other two plaintiffs offered no evidence of any damage suffered by them. Hence the damage proved by the plaintiffs could not exceed the sum of $705.04.

It is suggested by counsel for the plaintiffs, however, that the earnings under the contract prior to the breach did not represent their entire earnings, which each estimated to be approximately one hundred dollars per month; while the sums testified to as representing their earnings after the breach represent their entire earnings. We do not think the evidence warrants this inference. On the contrary we think it clear that the testimony of the plaintiffs as to their earnings prior to the breach was under the contract. The charge of the presiding Justice shows the case was tried upon this basis; and an analysis of the earnings after the breach and under the contract satisfies us that if the Jury's verdict was based upon this inference it was unwarranted.

One other question is raised by the alleged newly discovered evidence, viz: whether it should not be considered in the reduction of damages as it apparently would have had it been produced at the trial. We think we must apply the rule and hold that the defendants by their laches are not entitled to have the benefit of this evidence in this respect, since it cannot form the grounds for granting a new trial. Entry will be: Motion sustained and new trial granted unless the plaintiffs shall within thirty days after the notice of this decision is filed with the Clerk of Courts for the County of Cumberland, file a remittitur remitting all damages in excess of $705.04 and interest on said sum from January 13, 1918 to date of judgment, in which case motion is overruled. Motion for new trial on the ground of newly discovered evidence overruled. *William A. Connellan, and Harry H. Cannell,* for plaintiffs. *W. R. Anthoine, and Jackson Palmer,* for defendants.

CHANDLER & COMPANY *vs.* EDWIN P. SULLIVAN.

Penobscot County. Decided July 21, 1920. In brief phrase it may be said that the verdict obviously is wrong. Plaintiff, a Bangor

mercantile concern, founded this suit on demand promissory note which defendant, a former employe, made and delivered to it almost five years before. Defendant filed an account in set-off, predicated that there remained unpaid to him, as his proportionate part accrued from profit-sharing plan in plaintiff's store, a sum of money greater in amount than that due on the note. Superior Court jury so viewed the situation.

Whether the main proposition of the defense, namely, that plaintiff carried on business in gain-dividing way, was satisfactorily shown, may well be regarded as doubtful. If, as defendant testified, such system was there set in action, with banquet publicity the act attendant, and sundry persons thereby probably to benefit, it is significant that other testimony was not offered in contradiction of evidence tending persuasively to opposite conclusion. It seems inconsistent that defendant would wait three years from the time he asked an accounting, partial compliance with which he said was had, and next advert to the bonus only after his discharge from employment for what he hastened to say was fit cause.

Yet grant acceptance tentatively to defendant's general insistance, then, having reference to the total profits proven, it becomes glaringly apparent that mathematics is a factor the jury did not take enough account of, for application of arithmetic's rule readily makes evident that defendant owes plaintiff rather than that plaintiff owes him. Motion sustained. New trial granted. *L. V. Jones,* for plaintiff. *A. L. Thayer,* for defendant.

ORRIN M. CRUMMETT, In Equity *vs.* EVA L. TAYLOR.

Lincoln County. Decided July 29, 1920. This case was not argued orally but was submitted on briefs. It is entitled an equity appeal. But comprehensible record of the appeal has not been furnished by the appellant. There is absence of the substance of the material pleadings on which the parties rely, and of the decree appealed from. As record, nothing has been filed excepting what purports to be a transcript of the notes of a stenographer of testimony

given on trial of an action between persons who presumably are the same persons engaged in litigious experience here. Even the transcript is without the clerk's certification. It is almost superfluous to add that, for want of an accompanying intelligible record, the appeal has not arguable status, and for that reason should be summarily dismissed.

Still, it may not be amiss now to say, with a view to ending controversy, on the aspect of its merits, that the briefs of counsel tend to relate the aforesaid transcript to this particular case. From a reading of the transcript and the briefs it would seem that the plaintiff, by his bill for that purpose, sought to set aside, as null and inoperative for want of delivery, a deed of certain real estate in Lincoln County, which he had executed to the defendant, a daughter of his, as grantee; and which, without intent on his part, to make that document effective to invest her with title to the property it described, he caused to be recorded in the registry there. If this be the fact, and also it be true that, upon hearing, a single Justice entered decree sustaining plaintiff's bill and granting relief as prayed, then no reason is by this court perceived why such decree should be disturbed. Appeal dismissed, with costs. *McLean, Fogg & Southard,* for plaintiff. *Arthur Ritchie,* for defendant.

STATE OF MAINE *vs.* ANDREW G. LIPSETT.

Penobscot County. Decided August 11, 1920. This is a complaint againt the respondent for the violation of a traffic ordinance of the City of Bangor. At the close of the evidence respondent moved for a directed verdict in his favor. This was refused by the presiding Justice and a verdict of guilty was rendered by the jury. Thereupon the respondent alleged exceptions. At the Portland Law Term the entry was made that briefs should be filed on or before August 1, 1920, or exceptions would be overruled. No brief has been filed by the respondent and the entry must therefore be, Exceptions overruled. Judgment for the State. *A. L. Blanchard, County Attorney, and J. B. Mountaine,* for the State. *E. P. Murray,* for respondent.

GEORGE KIDNEY, Adm'r *vs.* AROOSTOOK VALLEY RAILROAD.

Aroostook County. Decided October 15, 1920. This is an action on the case by the administrator of the estate of Hanford Kidney. Plaintiff's intestate was instantly killed in a collision between an automobile in which he was riding, and defendant's train, at Parsons Crossing, so-called, in the town of Presque Isle, on the 30th of September, 1918.

At the conclusion of the evidence the defendant's counsel moved for a directed verdict, which was ordered by the presiding Justice, and the case is before the court on plaintiff's exceptions to such order. We think the exceptions must be overruled.

Counsel for the plaintiff in opposing the motion, and now in argument upon the exceptions, urges the application of Chap. 27, Public Laws, 1913, which provides: "In actions to recover damages for negligently causing the death of a person, or for injury to a person who is deceased at the time of the trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury, and if contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant."

Contributory negligence of the decedent was pleaded as a defense, and was therefore in issue under the pleadings. The record shows that the case is not brought within the terms of the foregoing statute, but on the contrary, the testimony of Mr. Allen Bull, the only witness to the accident, shows conclusively that the plaintiff's intestate, was not in the exercise of due care, thus not only rebutting the presumption, but showing affirmatively that the accident was due largely, if not wholly, to the plaintiff's intestate's own want of care. *Curran* v. *Railway Company*, 112 Maine, 96.

The ruling of the presiding Justice was correct. Exceptions overruled. *Shaw & Thornton*, for plaintiff. *Powers & Guild, and W. R. Pattangall*, for defendant. MORRILL, J., Concurred in the result.

IDA C. STAHL *vs.* H. G. BARKER COMPANY.

Lincoln County. Decided October 16, 1920. This is an action of trover to recover the value of an opossum skin coat which the plaintiff delivered to the defendant to be made over.

On completing the work the defendant sent the coat to the plaintiff by parcel post, and from the evidence it appears that the coat was lost in transit, and this suit followed. The jury returned a verdict for the plaintiff of $360.50, and the case is before the court on a general motion.

The main issue was upon the method of delivery of the coat to the defendant when the work should be completed. The plaintiff contended that she told the agent of the defendant, with whom the contract was made, that, if he would let her know when the coat was done, she would call for it and pay for the coat. The defendant does not deny that such was the understanding when it received the coat, but says that later the plaintiff telephoned the defendant that it was getting late in the winter, and she wouldn't be able to come, and "as soon as it was done she wished us to send it to her." This the plaintiff denies.

The case was tried with that issue paramount, as appears by the ruling of the presiding Justice denying the defendant's motion for a directed verdict.

The jury believed the plaintiff's testimony, and we find no reason appearing in the record to disturb the verdict upon the issue involved, which was purely a jury question, nor can we say in view of all the evidence that the damages are excessive. Motion overruled. *George A. Cowan*, for plaintiff. *Ralph W. Farris*, for defendant.

ALBERT G. THORNE *vs.* F. C. JOHNSON COMPANY.

Cumberland County. Decided October 25, 1920. This is an action to recover damages for personal injuries sustained by plaintiff while in the employment of the defendant in its business of coal and

wood dealer. The latter was not an assenting employer within the meaning of the Workmen's Compensation Act, and regularly employed more than five men in the same business in which plaintiff was employed. The only issue, therefore, was the alleged negligence of defendant.

It is the opinion of the court, after a careful examination of the evidence, that the jury were fully justified in returning a verdict for the plaintiff. Motion overruled. *Hinckley & Hinckley,* for plaintiff. *Howard Davies, and Joseph E. F. Connolly,* for defendant.

JOHN W. PHILBROOK *vs.* AROOSTOOK VALLEY RAILROAD COMPANY.

Aroostook County. Decided November 20, 1920. This case presents questions of inference from practically undisputed facts; the questions involved are, (1) the negligence of the defendant company in following its regular train by a freight within about 100 feet, across a farm crossing, on the plaintiff's farm, over which he was accustomed to pass; and (2) the negligence of the plaintiff in not looking up the track after the regular had passed to observe whether any other train was following.

The jury found for the plaintiff. Under all the circumstances of the case we do not think the court should intervene. The issues are questions for the jury and not for the court.

Under the carefully wrought rule, in *York* v. *Railroad Company,* 84 Maine, 117, we are of the opinion that the verdict was based upon evidence sufficient to warrant the jury in finding it. Motion overruled. *Cyrus F. Small, and A. S. Crawford,* for plaintiff. *Herbert T. Powers,* for defendant.

FARRIS N. SAWYER *vs.* FRED H. EATON.

Penobscot County. Decided November 26, 1920. This is an action in assumpsit on an account annexed. The defendant filed a

set-off. The evidence was fully and carefully presented on both sides. No exceptions upon points of law are presented. The issues are wholly issues of fact. Upon those issues the jury returned a verdict declaring that there is no balance due either party. The plaintiff presents a motion for a new trial. It is true that the testimony is conflicting but the jury, seeing and hearing the witnesses, passed upon their credibility and we are not persuaded that the verdict is wrong. Motion overruled. *George H. Morse,* for plaintiff. *Ryder & Simpson,* for defendant.

STATE OF MAINE *vs.* ROSINA CAPODILUPO.

SAME *vs.* SAME.

Cumberland County. Decided February 17, 1921. These are indictments for larceny, and after a verdict of guilty in each case are before the Law Court on appeal from the ruling of the presiding Justice denying defendant's motions for new trial under R. S., Chap. 136, Sec. 28.

The appeals cannot be sustained. These were cases of alleged shoplifting from the stores of two different parties in Portland. The only question involved was one of fact, the guilt of the accused. The jury have sustained the charge, and the evidence abundantly justifies their conclusions beyond a reasonable doubt.

In addition to the evidence, the finding of the goods in the possession of the respondent was convincing evidence of the truth of the charge unless she could give some reasonable account of how she came by them. *Commonwealth* v. *Millard,* 1 Mass., 5.

The attempted explanation presented by her witnesses the jury must have found was neither reasonable nor credible, and in this they were also fully warranted. The verdicts should stand. Appeal

dismissed. Judgment for the State. *Carroll L. Beedy, County Attorney, and Clement F. Robinson,* for the State in each case. *Arthur D. Welch, and Joseph E. F. Connolly,* for respondent.

FRED S. THOMPSON,

Appellant from the decree of The Judge of Probate.

Waldo County. Decided February 21, 1921. This case has been twice before presented to the Law Court as will appear in Thompson, *Appellant,* 114 Maine, 338, and *Thompson, Appellant,* 116 Maine, 473.

In these cases every question raised in the present case was before the court and decided adversely to the appellant.

We discover no new question, federal or state, raised by the present exceptions.

The question now presented is clearly res judicata. Exceptions overruled. Decree of Supreme Court of Probate affirmed with costs. *Aurelia E. Hanson, Arthur S. Littlefield, Eugene C. Upton, and George P. Gould,* for appellant. *William P. Whitehouse, Robert F. Dunton, and Robert T. Whitehouse,* for appellees.

RULE OF COURT

AMENDMENT TO SCHEDULE OF FEES TAXABLE AS COSTS.

STATE OF MAINE

SUPREME JUDICIAL COURT — At June Law Term, Portland
July 8, 1920.

ALL THE JUSTICES CONCURRING:

ORDERED, that the paragraph of the Schedule of Fees as printed at the top of Page 537 of the 103rd Maine Reports as amended by Rule of Court dated July 15, 1913, be further amended so as to read as follows:

Transcripts of cases made by the official stenographer and printed copies, certified by the clerks to the Law Court may be taxed for 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 one dollar and forty cents per page for pages averaging two hundred and forty words each, (exclusive of initials "Q" and "A" for "Question" and "Answer"), together with compensation to the clerk 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 forty 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 the testimony.

By the court,

LESLIE C. CORNISH, Chief Justice.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, FEBRUARY 10, 1921, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, Maine, February 10th, 1921

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article Six (VI), Section Three (3), and being advised and believing that the questions of law are important and that it is upon a solemn occasion, I, Percival P. Baxter, Governor of Maine, respectfully submit the following statement of facts and questions and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT

The Seventy-ninth Legislature of the State of Maine, at a special session thereof, to wit, on August thirty-first, nineteen hundred and twenty, enacted the following statute, to wit:

AN ACT TO PREVENT THE DENIAL OR ABRIDGMENT OF THE RIGHT TO HOLD OFFICE ON ACCOUNT OF SEX.

Be it enacted by the People of the State of Maine, as follows:

NO CITIZEN OF THE UNITED STATES HAVING A RIGHT TO VOTE IN THIS STATE SHALL BE DENIED THE RIGHT TO HOLD ANY CIVIL OFFICE UNDER THIS STATE OF ANY SUBDIVISION THEREOF ON ACCOUNT OF SEX.

On July 16, 1874, a majority of the Justices of the Supreme Judicial Court, advised the Executive Council that under the then existing Constitution and laws of this State, a woman could not be legally appointed as a Justice of the Peace, the opinion of such Justices being found in the Sixty-second Volume of the Maine Reports, Page 596.

QUESTION ONE

Can the Governor now lawfully appoint a woman as a Justice of the Peace under the existing provisions of the Constitution of the United States and of this State, and the statute enacted by the Seventy-ninth Legislature referred to in the foregoing statement of facts?

QUESTION TWO

Does the Constitution of Maine prevent the appointment by the Governor of women, qualified in every respect other than sex, to the other civil offices to which a male citizen might be lawfully appointed?

QUESTION THREE

Does the Constitution of Maine prevent the election of women, qualified in every respect other than sex, to fill civil offices to which male citizens might be lawfully elected?

Very respectfully,

PERCIVAL P. BAXTER,

Governor.

TO HIS EXCELLENCY PERCIVAL P. BAXTER, GOVERNOR OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which our advisory opinions were requested by you under date of February 10th, 1921, respectfully submit the following answers.

The request was accompanied by the following statement:

"STATEMENT.

The Seventy-ninth legislature of the State of Maine, at a special session thereof, to wit, on August thirty-first, nineteen hundred and twenty, enacted the following statute, to wit:

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"QUESTION ONE.

Can the Governor now lawfully appoint a woman as a Justice of the Peace under the existing provisions of the Constitution of the United States and of this State, and the statute enacted by the Seventy-ninth Legislature referred to in the foregoing statement of facts?"

Answer to Question One.

This question we answer in the affirmative.

The office of Justice of the Peace is a judicial office, the establishment, method of appointment and tenure of which are governed by our State Constitution, Article V. Part First, Section 8, and Article VI, Section 5.

The qualifications and eligibility of persons holding the office are not specified in the Constitution, except in the general educational clause in Article XXIX, which provides that "no person shall have the right to vote or be eligible to office under the Constitution of this State, who shall not be able to read the Constitution in the English language and write his name; . . . . ."

This precise question was submitted to the Justices of this court by the Executive Council on February 6, 1874, 62 Maine, 596, and a minority then held that even under the Constitution as then existing it was competent for the Legislature to enact a law authorizing the appointment of a woman as Justice of the Peace, and that such a statute would not be in violation of the Constitution. The opinion was based upon the fundamental principle that the sovereign power is lodged in the people, and that the powers of the Legislature as representatives of the people in matters of legislation, are, broadly speaking, absolute, except when restricted and limited by the Constitution; *Sawyer* v. *Gilmore*, 109 Maine, 169, 180; that the Constitution of Maine while providing for the mode of appointment and tenure of the office of Justice of the Peace did not specify the qualifications therefor, and that there was neither sentence, clause nor word in the Constitution forbidding the passage of a legislative act authorizing the appointment of women as Justices of the Peace. Therefore, the minority held that under their reserved powers, the people, acting through the Legislature, had full authority to enact such a law. There was great logical force in this position and it has received the approval and concurrence of cases in other jurisdictions, one of the most enlightening of which is *Wright* v. *Noell*, 16 Kan., 601, in which Justice Brewer, then of the Supreme Court of that State and later of the Supreme Court of the United States, analyzed the conflicting views with characteristic power and clarity and adopted the minority view of the Maine Justices.

The majority of the Justices however were of the opinion that under the then existing Constitution a woman could not be appointed a Justice of the Peace. This view was based upon the fact that the entire political power of the State was vested in its male inhabitants of a prescribed age, and that nothing in the Constitution or in the debates in the convention which framed it indicated any purpose to surrender that power on the part of those who had previously enjoyed it, or to transfer it to those who had never possessed it. They therefore concluded that "it was never in the contemplation or intention of those forming our Constitution that the offices thereby created should be filled by those who could take no part in its original formation, and to whom no political power was intrusted for the organization of the government then about to be established under its provisions or for its continued existence and preservation when established."

This view has the support of the Massachusetts Court. Op. Jus., 107 Mass., 604. 165 Mass., 599.

Conceding for the sake of argument that the majority view was the correct one at the time when rendered as interpreting the Constitution in its then existing form, a changed situation presents itself today and this question when re-asked must be examined and determined in the light of the Constitutional provisions as they now obtain.

Prior to the adoption of the Nineteenth Amendment of the Federal Constitution, the electoral franchise in this State was restricted to "male citizens of the United States of the age of twenty-one years and upwards," with certain exceptions not important here. Maine Constitution, Article II, Section 1. The Federal Amendment provided that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." It was duly ratified by the Legislatures of three-fourths of the several States, Maine being among the number so ratifying. See Resolve of Special Session, November, 1919. The effect of the adoption of this Amendment was to automatically strike the word "male" from Section 1 of Article II of the Maine Constitution, thereby granting the electoral franchise to "every citizen of the United States" etc., without regard to sex. Considering the history of the amendment and the agitation which preceded it, it might be more graphically said that by the amendment the words "and female"

were virtually inserted in Section 1, so that today as amended its true meaning is. "Every male and female citizen of the United States . . . . shall be an elector" etc.

This controlling effect of the Federal Amendment as the supreme law of the land upon the Constitution of a State was clearly stated in *Neal* v. *Delaware*, 103 U. S., 370. The fifteenth Federal Amendment, after which the nineteenth was modelled, provided that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." In Delaware at the time of the adoption of this fifteenth amendment a statute restricted the selection of jurors to persons possessing the qualifications of electors, and by the Constitution of Delaware the electoral franchise was limited to the white race. No amendment to the State Constitution was adopted in Delaware to make it conform to the Federal Amendment, but the Supreme Court of the United States in the above case in considering the qualifications of colored males as jurors, held that no such State amendment was necessary, saying in the course of the opinion: "Beyond question the adoption of the fifteenth amendment had the effect in law to remove from the State Constitution or render inoperative that provision which restricts the right of suffrage to the white race. Thenceforward the statute which prescribed the qualifications of jurors was itself enlarged in its operation so as to embrace all who, by the State Constitution as modified by the Supreme law of the land, were qualified to vote at a general election." See also Ex parte Yarborough, 110 U. S., 651 at 655, where it is stated that while in terms the amendment prevents discrimination against the colored race, in effect it confers the franchise upon that race.

The privileges conferred upon women by the nineteenth amendment are precisely the same as those conferred upon the colored race by the fifteenth. Hence it follows that under the Constitution of Maine today, as amended and modified by the nineteenth amendment, male and female citizens of the United States have equal political rights so far as voting is concerned, and while it might still be said, as in the majority opinion in 1874, that there was nothing in the original Constitution indicating any transfer of political power to those who had never possessed it, that power at the present time has

been transferred and shared by express and imperative command. If the compelling reason was, as it appears to have been, that the framers of our Constitution never contemplated that the offices thereby created should be filled by those who took no part in its original formation, but only by those who had taken such part, by the same process of reasoning the continuation of those offices should at all times be placed in the hands and administration of those who might be duly entrusted in after days with their "continued existence and preservation."

If the right to hold an office established by the Constitution was denied by the majority because the would-be-holder could have no part as an elector in the control and continuation of that office, that ground has been utterly taken away. The premises having failed the conclusion must fail. Therefore under the present Constitution and laws, there should be no conflict between the majority and minority opinions. Both should reach the same conclusion, because suffrage now is co-extensive with citizenship, so far as sex is concerned.

If, before the adoption of the 19th Federal Amendment, a doubt existed as to whether the majority or minority opinion in 1874 was the correct one at that time, the adoption of that amendment, supplemented by the Legislative Act of August 31, 1920, has resolved that doubt in favor of the legality of such appointment at the present time.

It is true that the case of *Neal* v. *Delaware*, supra, involved the status of a juror and not of a Justice of the Peace. But there can be no vital distinction. The broad principles of constitutional law laid down by the Supreme Court of the United States, apply equally well to the problems before us.

While a juror might not be regarded in the strictest technical sense as a public officer, yet that official is recognized by our Constitution and fills a most important part in the administration of justice. He is sworn to the faithful discharge of his duty, has within his keeping to a great extent the liberty and property of our citizens, and during his term of service is a component part of the judicial system of our State. To hold that a woman can serve as juror but not as a Justice of the Peace can be based upon no substantial reason.

We therefore answer the first question in the affirmative.

QUESTION TWO

"Does the Constitution of Maine prevent the appointment by the Governor of women, qualified in every respect other than sex, to the other civil offices to which a male citizen might be lawfully appointed?"

QUESTION THREE

"Does the Constitution of Maine prevent the election of women, qualified in every respect other than sex, to fill civil offices to which male citizens might be lawfully elected?"

Answers to Questions Two and Three.

These two questions can be considered together, number two referring to appointive and number three to elective offices. Question one had to do with a constitutional office alone. Numbers two and three include both constitutional and statutory offices, and as to the latter it has never been doubted that the Legislature has full power to prescribe the qualifications therefor.

At common law it was the general rule that a woman could not hold office and take part in the administration of government. But the common law can be changed at the will of the Legislature in the absence of constitutional inhibition, and it has been changed by our Legislature by the passage of the Act of August 31, 1920, which provides that:

"No citizen of the United States having a right to vote in this State shall be denied the right to hold civil office under this State or any subdivision thereof on account of sex."

This Act but carries out the legal effect of the Nineteenth Federal Amendment. True, that amendment grants in terms only the right of suffrage to women and not the right to hold office, and the one may not always be equivalent to the other. But so far as we have been able to ascertain, while the courts have frequently held con-

stitutional a woman's right to hold certain offices for which she had no power to vote, we have discovered no case in which her right to hold office was denied where she possessed the right to vote therefor.

Instances of the former may be found in the elegibility of a woman as County Superintendent of Schools, a constitutional office, although she could not vote for an incumbent of that office. *Huff* v. *Cook*, 44 Iowa, 639; *Wright* v. *Noell*, 16 Kan., 607; *State* v. *Gorton*, 33 Minn., 345; *Russell* v. *Guptill*, 13 Wash., 360; for County Treasurer, Opinion of Justices, 62 Fla., 1; *State* v. *Quible*, 86 Neb., 417; and for Clerk of Court, *State* v. *Hostetter*, 137 Mo., 636.

All these cases grant the right to hold office even without the right to vote, and that too before the passage of the Federal Amendment, and before the barrier to woman suffrage was completely removed.

Since the passage of that Amendment, the legal effect of which we have already explained in our answer to question number one, we have no hesitation in saying that when authorized by the Legislature, women are not disqualified from holding any public office, whether elective or appointive and whether established by the Constitution or by statute. Every political distinction based upon the consideration of sex was eliminated from the Constitution by the ratification of the amendment. Males and females were thenceforth, when citizens of the United States, privileged to take equal hand in the conduct of government. It would be a surprising outcome indeed if while enjoying the privilege of voting and of full citizenship they are still to be deprived of the other and more responsible privilege of holding office, a deprivation which could only be remedied by the adoption of another constitutional amendment, State or Federal, expressly granting the right to hold office.

When the ballot was conferred upon the colored race by the adoption of the fifteenth amendment, it is common knowledge that it was followed by the election of persons of that race to office in various sections throughout the southern States, and we are unable to find that their right to hold office was ever questioned. It was accepted as a corollary of their right to vote. There is nothing in our State Constitution expressly giving men the right to hold office. It is silent on that point. It has been implied from their having the right to vote. Now that women as well as men are qualified electors, the same implication follows respecting women.

We therefore answer the second and third questions in the negative, and hold that the Constitution of Maine does not prevent the election of women qualified in every respect other than sex, to fill civil offices to which male citizens might be lawfully appointed or elected.

Very respectfully,

LESLIE C. CORNISH
ALBERT M. SPEAR
GEORGE M. HANSON
WARREN C. PHILBROOK
JOHN A. MORRILL
LUERE B. DEASY

February 25, 1921

ANSWERS OF JUSTICES CHARLES J. DUNN AND SCOTT WILSON TO QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, FEBRUARY 10, 1921.

TO HIS EXCELLENCY PERCIVAL P. BAXTER, GOVERNOR OF MAINE:

The undersigned, while arriving at the same conclusion as the other Justices of the Supreme Judicial Court, do not fully adopt the reasoning on which the majority opinion is predicated.

The right to hold public office and the right to vote for public officers are distinct matters. The one is not a corollary of the other. We do not agree that the right to exercise the elective franchise implies the right to hold public office. We, therefore, do not accept the decision that granting suffrage to woman in effect conferred upon her the right to hold office.

When our Constitution was adopted, the rule of the common law, as that rule was recognized in the parent commonwealth, authorized man only, (using the word as descriptive of sex), to hold public office. The Constitution not otherwise providing, it must be construed as then contemplating that, until otherwise provided for by law, the offices which it mentions were exclusively to be occupied by male members of society. And this, not for the reason of their right to vote, but because from long established custom and practice they, and solely they, had performed such public duties. Aside from the requirement of citizenship in this State and Nation, together with defined qualifications regarding the office of Governor and that of members of the Legislature, as well as a declaration against official incompatibility, a provision for educational test, and optional referendum, the Constitution of Maine never has contained restriction, either expressly or by necessary implication, upon the power of the Legislature to determine who may hold office under this State.

The seventy-ninth Legislature, by an Act passed August 31, 1920, on which a referendum was not invoked, removed woman's disability in respect to office holding. The Legislature might have done so, had it seen fit, before the adoption of the nineteenth Amendment to the United States Constitution. That Amendment forbids denial by any State of the franchise to woman on account of sex; and automatically invested her with the right of suffrage in those States where before she had not had it.

Adopting, as we do, the views set forth in the dissenting opinion in 62 Maine 599, which views, as our associates have said, received unqualified approval in *Wright* v. *Noell*, 16 Kan., 601, we make answer in the affirmative to question numbered one, and in the negative to questions numbered two and three.

Very respectfully,

CHARLES J. DUNN
SCOTT WILSON

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ABATEMENT.

Where two actions for the same cause are brought and served at the same time, though differing in form, the plaintiff may not discontinue one and proceed with the other, but upon the defendant seasonably filing a plea in abatement to each writ, both actions must be abated. *Garoufalis* v. *Agia Trias*, 452.

ACCORD AND SATISFACTION.

When accord and satisfaction are relied upon as a defense;
Held:

1. Under R. S., Chap. 87, Sec. 63, as well as at common law, accord and satisfaction is based upon an agreement between the parties. No invariable rule can be laid down as to what constitutes such an agreement Each case must be determined largely on its own particular facts. The agreement need not be express but may be implied from the circumstances and the conduct of the parties. It must be shown that the debtor tendered the amount in satisfaction of the particular demand and that it was accepted by the creditor as such.
2. When the debtor makes tender with condition that if the creditor accepts it he does so in full settlement of the claim, then such tender and acceptance constitute accord and satisfaction, but the proof must be clear and convincing that the creditor understood the condition on which the tender was made, or the circumstances under which it was made were such that he was bound to understand it.
3. Accord and satisfaction is a fact to be submitted to the jury unless the testimony is such that only one inference or finding can be made.

Bell v. *Doyle*, 383.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

The phrase "supported by an affidavit of the claimant" is restricted to claims filed in the Registry of Probate, and does not apply to claims presented in writing to the administrator or executor. *Howe* v. *Gray*, 465.

ADVERSE PARTY.

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ARCHITECT.

When a building contract makes the architect an arbitrator between the parties to decide practical questions that may arise during the progress of the building, his decision within the limits of the matters committed to him is binding, so long as he does not act unreasonably, capriciously, arbitrarily, wilfully or fraudulently. But he cannot require the performance of additional work not within the terms and fair intendment of the contract.

Jacques v. *Otto Nelson Co.*, 388.

ASSIGNMENT.

A claim for damages arising from a tort concerning property is assignable, and under R. S., Chap. 87, Sec. 152, an action may be maintained by the assignee in his own name. *Metropolitan Ins. Co.* v. *Day*, 380.

See *Vested Remainder*.
See *Workmen's Compensation Act*.

ASSUMPTION OF RISK.

A careful review of the evidence fails to satisfy us that the plaintiff was negligent in placing himself where he was, and in doing what he did when injured. And as to defendant's contention that the plaintiff assumed all the risk of the particular danger which caused the damage to him, it is the opinion of the court that the plaintiff did not assume the risk. That he did assume the ordinary risks of his employment, and too that he assumed the extraordinary and unusual risks which are obvious, and risks of which he knew and which he appreciated, is well settled. But the circumstances of this case, place it in a class far removed from the ordinary happening, and one in which, if cases do occur, they seldom reach courts of last resort. *Smith* v. *Hines*, 442.

BAILMENT.

Where a sum of money was raised by public subscription for the purchase of a bell and tolling-fork, and the bell was given to the town with the understanding it was to be hung in a church to be rung for church purposes and on public occa-

BANKRUPTCY.

BONA FIDE PURCHASER.

BONDS.

The mere fact that a fifteen day bond, given under R. S., Chap. 115, Sec. 15, is not returned to court during the pendency of the action in which it was given, is not a defense to a suit upon the bond.

The statutory requirement that the officer "shall return it (such bond) to the court or justice where the suit is pending" is directory rather than mandatory.

Soule v. *Goodrich*, 280.

Action of debt on bond of administrator de bonis non with will annexed. Exceptions to directed judgment for the plaintiff.

Held:

That as a breach of at least two of the conditions of the bond was proved, namely, the failure to return an inventory and to file an account, judgment against the principal and sureties necessarily followed, for the penal sum of the bond with the right to have execution issue for so much of the penalty as may be adjudged on trial to be just. *Brackett* v. *Thompson*, 359.

BOUNDARIES.

It is firmly established in this State that the survey must govern when its location can be shown, and that when land is conveyed by lot, without further descriptions, the lot lines determine the boundaries of that lot when they can be located. *Bradstreet* v. *Winter*, 30.

In a real action for the recovery of a certain lot of land, the alleged title to which was based upon a quit-claim deed, a disclaimer was filed up to a definite line, covering a part of the locus claimed in the writ. The plaintiff's deed did not define the east end of her lot either by metes or bounds, but described it as bounded "on the east and south by land of William Whitney." That is, the west boundary of Whitney's land, when located, would be the east boundary of the plaintiff's land, as described in her deed. The issue involved was not the capacity of the deed to convey, but the location of the Whitney line. The Whitney line was the only question in dispute. It was incumbent upon the plaintiff, in order to establish her line to prima facie prove where, upon the face of the earth, the Whitney line was located. *Everett* v. *Whitney*, 128.

BREACH OF CONTRACT.

The defendant was fully justified in leaving his hotel in view of the implied duty on the part of the plaintiff to provide the defendant and his party, as his guests a dining service that was reasonably free from unsanitary conditions having in mind at all times upon the question of reasonableness, the particular dangers that are now well known to be effective in causing such conditions.

Williams v. *Sweet*, 228.

BROKER.

As a general rule a broker is not entitled to compensation until he has performed the undertaking assumed by him; and in the absence of any contrary provision in his contract, it matters not how great have been his efforts nor how meritorious his services; if he has been unsuccessful he is not entitled to compensation. The plaintiff's principal witness on being questioned as to the commission said that the same were to be paid "in the event we sold the boats." That understanding of the contract can only mean an actual sale, or the procuring a completed, definite and unconditional contract of sale binding upon both parties.

But in order to entitle a broker to commissions, the customer produced by him, and the principal, must come to a final agreement on the terms of the transaction. Consequently, the conclusion of a preliminary or tentative agreement which is not binding on the parties, and which is not carried into effect, does not give a right to compensation.

To entitle a broker to a commission when no sale is actually consummated, a broker employed to find a purchaser must either produce to the owner a customer who is able, ready, and willing to buy on the terms prescribed by the owner, or else take from the customer a binding contract of purchase, unless those requirements are waived by the principal's refusing to proceed after notice by the broker that he has such a contract or purchaser.

A broker employed to sell, as distinguished from a broker employed to find a purchaser, is not entitled to compensation until he effects a sale, or procures from his customer a binding contract of sale.

To entitle a broker to his commissions, he must accomplish what he undertook to do in his contract of employment, for as a rule nothing short of that is sufficient to constitute a performance on his part. In the absence of hindrance or fraud on the part of his employer, he must perform all the conditions of the contract made with his principal, or he cannot recover.

Damers v. *Fisheries Co.*, 343.

BULK SALES LAW.

See *Philoon* v. *Babbitt*, 172.

BURDEN OF PROOF.

It is familiar law that the plaintiff is bound to recover upon the strength of his own title, and when alleging seizin upon which he relies, the burden of proving it rests upon him. *Bradstreet* v. *Winter*, 30.

In a bill in equity brought to enforce a lien claim for work done and materials furnished in repairing a building, the sitting Justice found that plaintiff had a

valid mechanic's lien upon the building and land on which it stood, from which decree defendant appealed.

Held:

1. The sitting Justice sustained the plaintiff's contention, and, as to the facts so found, the decree must stand unreversed, because the defendants have failed to maintain the burden of showing that the decree is clearly wrong.
2. The decision of a single Justice upon matters of fact in an equity hearing, should not be reversed unless it clearly appears that such decision is erroneous. The burden to show the error falls upon the defendant. He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed.

Hahnel Bros. Co. v. *Gardiner*, 305.

See *Appeal.*
See *Real Action.*

CARRIERS.

It is well settled that a common carrier may limit his responsibility for property entrusted to him by a notice containing reasonable and suitable restrictions if brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by him. *Mason* v. *M. C. Railroad Co*, 195.

CHATTEL MORTGAGES.

In case of personal property a subsequent purchaser or mortgagee for a consideration valid between the parties, as a security or part payment of pre-existing indebtedness, even with notice of a prior encumbrance, unless actual intent to defraud is shown, may hold over the prior encumbrance if unrecorded.

Hayden v. *Killman*, 38.

CHALLENGE FOR CAUSE.

Accused, not having exhausted peremptory challenges, cannot complain of overruling of challenge for cause. *State* v. *Albano*, 472.

CONSIDERATION.

See *Valuable consideration.*

CONTRACT.

When a contract legal at its inception becomes illegal by subsequent statutory enactment, no action can be maintained on such contract after the illegality has attached. *Damers* v. *Fisheries Co.*, 343.

CONTRIBUTORY NEGLIGENCE.

This case comes up on exceptions to the order of a verdict by the presiding Justice after the evidence was all presented and involves a mixed question of law and fact. The question now before the court is: If the case had been submitted to the jury upon the evidence, under proper instructions, would a verdict for the plaintiff be permitted to stand? As the case is now presented, two important issues arise upon the plaintiff's theory of the accident.

1. The contributory negligence of the plaintiff, assuming the negligence of the defendant.
2. The subsequent negligence of the defendant, assuming the negligence of the plaintiff in the first instance.

Upon the first issue the evidence proves the plaintiff guilty of contributory negligence upon his own testimony. The second question raises the doctrine of the last clear chance. Upon this question a majority of the court are of the opinion that the case should be submitted to the jury.

Dyer v. *Cumberland County P. & L. Co.*, 224.

COUNTER CHARGES.

See *Jacques* v. *Otto Nelson Co.*, 388.

DAMAGES.

In an action under R. S., Chap. 100, Sec. 9, for trespass alleged to be wilful, if a trespass is shown without evidence of wilfulness, a verdict for single damages rendered upon appropriate instructions will not be set aside on motion.

It is ordinarily true that where an allegation of a greater, properly includes all the elements of a lesser liability or breach of duty, judgment may be for either as the evidence warrants. *Burrill Nat'l Bank* v. *Edminister*, 367.

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DOUBLE DAMAGES.

Under R. S., Chap. 100, Sec. 9, giving to an owner of land a statutory action for wasteful trespass with double damages if the trespass is wilful, if a trespass is shown without evidence of wilfullness, a verdict for single damages rendered upon appropriate instructions will not be set aside on motion. It is ordinarily true that where an allegation of a greater, properly includes all the elements of a lesser liability or breach of duty, judgment may be for either as the evidence warrants. *Burrill Nat'l Bank* v. *Edminister*, 367.

EQUITY.

In a bill in equity where an appeal was taken from a final decree accepting and confirming the report of a special master.

Held:

1. As a matter of equity practice the appeal should be dismissed because the case as reported does not contain the evidence. An appeal in equity like a general motion in an action at law carries with it all the evidence in the case.
2. As a matter of equitable right the bill was properly brought and the remedy sought was appropriate. A multiplicity of suits has been avoided and the rights of all the parties have been fully determined and protected.

Caverly v. *Small*, 291.

The decision of a single Justice upon matters of fact in an equity hearing, should not be reversed unless it clearly appears that such decision is erroneous. The burden to show the error falls upon the defendant. He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed.

Hahnel Bros. Co. v. *Gardiner*, 305.

ESTOPPEL.

Where a bailor by his voluntary act confers on his bailee an apparent right of property other than would ordinarily follow from possession and permit him to retain and use it under conditions that would naturally mislead an innocent purchaser without notice of the title, he is estopped from setting up his title as bailor against such innocent purchaser. *Andover* v. *McAllister*, 153.

See *Insurance*.
See *Andrews* v. *Nalley*, 500.

EVIDENCE.

Upon exceptions to a decree of divorce from the bonds of matrimony, for the cause of extreme cruelty, the question presented is whether as a matter of law the evidence warrants the decree. *Sweet, Libl't* v. *Sweet*, 81.

EXCEPTIONS.

When exceptions appear in the record of a case in equity, they are not to be considered as a matter of law, upon which a decree may or may not be overturned, but in determining whether there is sufficient legal evidence to sustain the decree, regardless of the merits of the exceptions. *Burrill* v. *Giles*, 111.

See *Motions*.

FAILURE OF TRUST.

A trust limited to a particular association, and that association was not intended as a mere conduit for the application of the fund to a general charitable purpose where there is a failure of the cestui que trust, itself fails. Under such circumstances in this class of gifts, if the donee fails the gift itself fails.
Bancroft v. *Sanatorium Ass'n*, 56.

FEDERAL EMPLOYMENT LIABILITY ACT.

Action by employe of the Portland Terminal Company to recover damages for injuries sustained while at work "trimming coal" in the hold of a vessel at the company's wharf in Portland. Plaintiff recovered a verdict of $9120.27. On defendant's motion for new trial and exceptions to the refusal of the presiding Justice to direct a verdict for the defendant, it is,

Held:

1. That this action under the evidence does not fall within the provisions of the Federal Liability Act of April 22, 1908, U. S. Comp. St., Vol. 8, Secs. 8657-8665.
2. Two facts must co-exist to bring a case within that statute, first the injury must be sustained while the railroad carrier is engaged in interstate commerce; and second, the employe at the very moment of the accident must be employed in, and the particular service rendered must be a part of, such commerce.
3. The plaintiff concedes that the defendant was engaged in interstate commerce, but the evidence shows that the plaintiff in doing his particular work at that time was not employed in such commerce.
4. The test is whether the employe at the time of the injury was employed in interstate transportation or in work so closely related to it or in an act so directly and immediately connected with it as substantially to form a part or necessary incident thereof.
5. Instrumentalities which have not as yet become impressed with an interstate character are not within the act even though at some future time they may be or are intended to be devoted to such use.
6. The coal upon which the plaintiff was at work had not become so impressed. It was being removed from the hold of a vessel, a portion to a general pile on or near the wharf and a portion to the cars of the Maine Central Railroad Company for transportation to various stations. No part of it had been appropri-

ated or segregated for interstate use. It might later be used for that purpose or for intrastate locomotives or for both. The most that can be said is that the plaintiff was handling coal which at a later date might become part of an instrumentality used in interstate transportation. But that fact could not make him an employe engaged in interstate commerce.

7. The plaintiff therefore had the right to recover as at common law, aided by the Workmen's Compensation Act of Maine, R. S., Chap. 50, so that the sole question is that of defendant's negligence.
8. The jury found negligence on the part of the defendant and the court is of opinion that the verdict is not so manifestly wrong as to be set aside.
9. Nor are the damages so grossly excessive as to indicate prejudice or want of comprehension on the part of the jury. The plaintiff is a common laborer. Lack of education prevents his filling a clerical position and he must still rely for support upon his seriously diminished capacity as such common laborer. He lost a portion of his leg and must wear an artificial limb. The injury is permanent. The suffering was intense. Considering all the evidence we think the damages were large but not grossly excessive.

Foley v. *Hines*, 425.

See *Smith* v. *Hines*, 442.

FIDUCIARY CAPACITY.

A factor, commission merchant, or agent who has sold property of his principal and has failed to pay over to him the proceeds, is held not to owe him a debt in a fiduciary capacity. *New England Milk Producer's Asso.* v. *Wing*, 75.

FIXTURES.

The rule in this State relating to buildings erected on another's land never having been extended by this court to other fixtures, and having been abolished by the Legislature, the court now adopts as to other chattels the rule generally followed in other jurisdictions; that chattels attached to the realty in such manner as to indicate they are fixtures will pass by deed or mortgage of the real estate to an innocent purchaser or mortgagee, notwithstanding an agreement between the owner of the chattel and the owner of the realty, that they shall not become a part of the real estate. *Andover* v. *McAllister*, 153.

FORECLOSURE.

The recording of the affidavit of mortgagee required under Chapter 192 of the Laws of 1917, in foreclosure proceedings, applies to all foreclosures, regardless of date of mortgage foreclosed, and such provision does not come within the con-

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UNSANITARY CONDITIONS.

A dining service must be reasonably free from unsanitary conditions having in mind at all times upon the question of reasonableness, the particular dangers that are now well known to be effective in causing such conditions. Reasonable care is always measured by the imminence of the danger to be avoided.
Williams v. *Sweet*, 228.

INSTRUCTIONS TO THE JURY.

The court is not required to repeat instructions once clearly given to the jury.
Labrecque v. *Foresters*, 190.

INSURANCE.

Where one holding an accident insurance policy dies from injuries resulting solely from accident, the fact that the assured at the time of the accident was afflicted with Bright's disease, that being merely a condition and not a cause, does not effect the right to recover. *O'Brion* v. *Columbian National Insurance Co.*, 94.

Where one holding an accident insurance policy, while riding on a motorcycle, ran through a swarm of flies or insects, one of which struck his right eye with such force as to injure it;
Held:
(1) That the injury was clearly accidental.
(2) That the defendant is estopped to deny that the notice was not given in time.
(3) That the notice was sufficient in law.
(4) That the plaintiff at the time of his injury was not engaged in an overhazardous employment.
(5) That he did lose the entire sight of his eye, within the contemplation of the policy. *Tracey* v. *Standard Accident Insurance Co.*, 131.

On October 9, 1917, a policy of fire insurance in the defendant company was issued to the plaintiff by one Moran, its agent. The policy provided that it would be void if the insured then had or should thereafter make any other insurance on the same property without the written assent of the company.
On October 11, 1917, a policy in the American Eagle Insurance Company covering the same property was issued to the plaintiff by the same Moran who was

agent for both companies and whose indorsement both policies bore. No written assent to the subsequent insurance was given by the defendant.

Held:

1. That under R. S., Chap. 53, Sec. 119, the agent is to be regarded as in the place of the company in all respects regarding any insurance effected by him, and the company is bound by his knowledge of the risk and of all matters connected therewith.
2. That as this agent had actual knowledge of the placing of the subsequent insurance on the property, having issued both policies, his knowledge was the knowledge of the defendant company, his silence was its silence, and his waiver of the policy conditions was its waiver.
3. The ruling of the presiding Justice that judgment should be entered for the plaintiff, subject to a certain stipulation as to abiding the result of another suit, was without error. *Bradbury* v. *Insurance Co.*, 417.

See *Labrecque* v. *Foresters*, 190.
See *Insurance Co.* v. *Kimball*, 571.
See *Brisson v. Insurance Co.*, 355.

INSURABLE INTEREST.

An insurable interest in the life of another, such as will take the contract of insurance out of the class of wager policies is such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.

The weight of authority appears to hold that a life insurance contract is not one of indemnity, and so does not require the insurable interest to continue as in case of fire insurance, but is a mere chose in action, which may be assigned in a bona fide transaction as any other chose in action. If the contract or policy was valid at its inception it may be assigned for a valuable consideration and the assignee may thereafter carry it on and receive the proceeds. A fortiori is this so, if the assignee also has an insurable interest.

Insurance Co. v. *Kimball*, 571.

INTENT.

At common law the degree of care used by the respondent in doing criminal acts does not enter into the question of his guilt or innocence, although a different rule might apply to a statutory offense if an act mala prohibita was made so because it was negligently done. *State* v. *Chadwick*, 45.

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JURISDICTION OF THE LAW COURT.

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LARCENY.

LEASE.

LIBEL.

LICENSE.

See *Andover* v. *McAllister*, 153.

LIFE ESTATE.

See *Carver* v. *Wright*, 185.

LIENS.

Bill in equity to enforce a lien, brought by a subcontractor against the contractor to recover a claimed balance of $494.13. The Otto Nelson Company seeks to charge against this balance the sum of $327.95 expended by it in repainting, and of $280.16 in applying a coat of shellac, both in accordance with the orders of the architect. The case was heard by a single Justice, both items of counter charge were allowed, and therefore the bill was dismissed.

Upon appeal by plaintiff it is,

Held:

1. That the finding of fact by the sitting Justice that the painting by the subcontractor did not meet the contract requirement and therefore the expense of repainting should be allowed, was fully warranted by the evidence.
2. That the contract did not require the plaintiff to apply a coat of shellac to the woodwork. When a building contract makes the architect an arbitrator between the parties to decide practical questions that may arise during the progress of the building, his decision within the limits of the matters committed to him is binding, so long as he does not act unreasonably, capriciously, arbitrarily, wilfully or fraudulently. But he cannot require the performance of additional work not within the terms and fair intendment of the contract.
3. The requirement here was not within the terms or intendment of the contract, but involved additional work not contracted for. Therefore the counter charge of $280.16 should not have been allowed. The plaintiff is entitled to recover his lien claim of $494.13 less the cost of repainting $327.95, a balance of $166.18 with interest from date of the bill. *Jacques* v. *Otto Nelson Co.*, 388.

Lien on pledged policies not lost by suit on note. *Clark* v. *Downs*, 252.

See *Mechanic's lien.*

MALICIOUS PROSECUTION.

Upon trial of an action of malicious prosecution, for causing the arrest of the plaintiff under R. S., Chap. 7, Sec. 105, for fraudulently receiving the vote of a person, not qualified to be an elector, an instruction that if the jury finds that such person's voting residence was established in another town, or was not established in the town where he voted, on the day in question, their verdict will be for defendant, is erroneous.

Probable cause does not depend on the actual state of facts, but upon the honest and reasonable belief of the prosecutor.

Actual belief and reasonable grounds for that belief are essential to constitute probable cause. *Bowie* v. *Stackpole*, 333.

MASTER AND SERVANT.

A father who has provided an automobile for the pleasure of his family is not liable under the rule of master and servant, or principal and agent, for the negligent operation of the car by a member of the family competent to drive, who is permitted to take it for his exclusive pleasure or purpose.

Pratt v. *Cloutier*, 203.

This case comes up on motion and exceptions. One of the exceptions must be sustained. The justice, in his charge, with respect to the duty resting upon the employer to furnish a place for the employee to work in, stated the measure of duty as follows: "It is necessary for the defendant to furnish a safe, a reasonably safe place for his employees to work; he is bound to furnish a reasonably safe place." The whole charge is printed and made a part of the case, but a careful examination discloses no modification of the language or meaning of the rule as above given. Nor are we able to say from the record which is also made a part of the exceptions, that the evidence so strongly predominates in favor of the plaintiff as to make the inadvertence a case of harmless error.

Held:

1. There may be a marked distinction in the duty of being bound to furnish a reasonably safe place, and exercising reasonable care to do so.
2. A place may not be reasonably safe, and on account of not being so, may be the proximate cause of an injury, and yet if the employer has exercised reasonable care to make it reasonably safe he is not liable.
3. If the place is, as a matter of fact, reasonably safe, it is immaterial whether the employer exercises any care in selecting it.
4. It is only when the place is not reasonably safe, that the test of any care is invoked.
5. When the test of any care is invoked, it is not that the master is bound to furnish a reasonably safe place, but to exercise due care to do so.

Sheaf v. *Huff*, 469.

See *Respondeat Superior*.

See *Karahleos* v. *Dillingham*. 165,

See *Nicholas* v. *Folsom*, 176.

MASTER IN CHANCERY.

This case arises upon a motion and hearing to dissolve a temporary injunction obtained upon bond by the plaintiff against the defendant.

The injunction was dissolved and the sitting Justice appointed Donald B. Partridge as special master to hear the parties and assess the damages and costs sustained by the defendant by reason of the injunction. The master gave notice and heard the parties and found that the defendant was entitled to recover the sum of $269.52.

To the finding of the master, the plaintiff filed exceptions. At the February term of court, 1920, upon motion of the defendant for an acceptance of the report, the sitting Justice, after hearing, both parties being represented by counsel, ordered and decreed that the exceptions to the master's report be overruled, and the report affirmed, and further decreed that the damages and costs suffered and incurred by the defendant by reason of the temporary injunction be assessed and awarded to the defendant in the sum of $269.52, and in default of payment execution to issue.

The exceptions are based upon two theories: One, that the elements of damages considered by the master are not included in those contemplated by the statute; two, that no motion was made in accordance with the requirements of the statute for the assessment of damages.

Held:

1. That R. S., Chap. 82, Sec. 35, which provides in case a temporary injunction is dissolved upon the motion of the defendant that the plaintiff shall pay all damages and costs caused thereby, is broad enough to include every element of damage upon which the master passed.
2. That upon the second theory, the plaintiff could not stand by and take the changes of a favorable report of the master, and accept the advantage thereof, and decline to abide by the report if it was deemed by him to his advantage to do so. *Andrews* v. *Nalley*, 500.

MECHANIC'S LIEN.

See *Hahnel Bros. Co.* v. *Hanson & Son.*, 305.

MORTGAGEE.

Under R. S., Chap. 100, Sec. 9, giving to an owner of land a statutory action for wasteful trespass with double damages if trespass is also wilful, the word "owner" includes a mortgagee though not in possession.

Burrill Nat'l Bank v. *Edminister*, 367.

MOTIONS.

In a libel for divorce for desertion, a jury trial was had under R. S., Chap. 65, Sec. 8, and in answer to submitted questions the jury found the allegation of desertion to be true and that a divorce should be granted. The presiding Justice thereupon signed a decree of divorce, and the libelee then filed a general motion addressed to the Law Court asking that the verdict be set aside and a new trial granted.

Held:

That the court had no authority to entertain the motion. That the only remedy under the existing facts was by bill of exceptions.

Simpson, Libl't v. *Simpson*, 14.

Motion for new trail upon newly dicovered evidence can be supported only by evidence restricted to the allegations of the motion, to the exclusion of rebutting evidence. *White* v. *Andrews*, 414.

See *Exceptions*.

MOTION TO DISMISS.

Upon a motion to dismiss the court has no jurisdiction to determine any issue arising from a matter that is not apparent by an inspection of the writ. If no defects nor defenses appear on the face of the writ the motion to dismiss must be denied, regardless of the merits of the case. Such motion does not lie where to support or resist it proof is necessary dehors the writ.

Jewelry Company v. *Minsky*, 475.

See *Dismissal*.

MOTION TO SET ASIDE A VERDICT.

See *State* v. *Ward*, 482.

MOTIVE.

A motive is not an essential element in proof of guilt. A powerful motive may be found upon all the evidence to be inconsistent with guilt. On the other hand there may be ample proof of guilt within any evidence of motive.

State v. *Ward*, 482.

MUNICIPAL OFFICERS.

NEGLIGENCE.

NOTICE.

See *Tracey* v. *Insurance Co.*, 131.
See *Andover* v. *McAllister*, 153.

OPTION.

Time is the essence of an option, and an offer to pay money by telegram is neither payment nor tender. An acceptance and payment must concur on or before the designated hour, to meet the terms of the contract. *Ervin* v. *Colby*, 118.

ORDINANCE.

An ordinance of the City of Bangor provides that no person shall keep or occupy a shop, storehouse, building or place of business for the purchase, possession, storage, sale, barter of or trade in any junk, old metal, old rags, or second-hand articles of personal property or articles of any kind usually handled or dealt in by junk dealers, nor shall any person keep or store such articles in any building for any purpose or permit the same to remain in any building after notice to remove them. . . . .

Held:

That the ordinance should be viewed as a whole and in the light of the purpose for which it was enacted, and with the presumption that it was not the intent of the enacting body to exceed its authority;

That the last clause as set forth above should be construed under the rules of *ejusdem generis* and *a sociis noscitur* to mean that no person shall keep or store such articles in any building for any of the aforementioned purposes, viz: Storage, sale, barter or trade, and when so construed the ordinance as a whole becomes harmonious and the provision in question a valid one.

State v. *Brown*, 455.

OWNERSHIP OF STOLEN PROPERTY.

See *Indictment.*

PARENT AND CHILD.

The mere relation of parent and child imposes upon the parent no liability for the torts of the child committed without his knowledge or authority, although the parent when he authorizes his child to act as his agent or servant is liable for the torts committed in the course of such employment. Such liability does not grow out of the relation of parent and child, but out of the relation of master and servant or principal and agent, and must be based on rules of negligence.

Pratt v. *Cloutier*, 203.

PARTNERSHIP.

Whether a partnership exists or not is an inference of law from the established facts, and the relation is based upon some contract, express or implied, between the parties.

The mere fact of participation in profit and loss does not necessarily constitute a partnership; and essential element of a partnership is a community of interest in the subject matter of it; but community of interest alone does not make a partnership.

Such a community of interest involves a community of property as well as of profits, from which arises the right of each partner to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power, as all the partners could when acting together, with the right of the survivors, upon the death of a partner, to retain and dispose of the partnership effects for the settlement of its affairs. *The James Bailey Co.* v. *Darling*, 326.

See *Bankruptcy.*

PERPETUITIES.

The rule against Perpetuities only applies to the creation of future estates and in no way affects estates already vested.

When an immediate estate is given to survivors, or the enjoyment and possession of it is immediate on the death of the testator, the time to which the survivorship, which determines who shall take, will be construed to relate, is the death of the testator; and only when an intermediate estate intervenes or the contrary intent is clearly expressed is it held that the survivorship relates to the time of the termination of the intervening estate or the period of distribution.
Singhi v. *Dean*, 287.

The test as to whether the rule against perpetuities is being violated is the time of vesting and not the period of continuance.
Bancroft v. *Maine Sanatorium Ass'n*, 56.

PERSCRIPTIVE TITLE

In cases where a party seeks to sustain a prescriptive title to real estate, payment of taxes assessed upon land, by the party, may be offered to show the character of the occupation. But where, as in the case at bar, the trespass is upon land which the plaintiff claims to own by grant, such evidence is inapplicable and was properly excluded. *Baker* v. *Snow*, 72.

PLEADING AND PRACTICE

Under Sec 9, Chap. 100, R. S., only owner of the property injured can maintain an action, hence ownership is an essential allegation.
Benner v. *Benner*, 79.

In alleging ownership of real estate, "land of", or "property of", or "the buildings of" is the approved form of allegation. *Benner* v. *Benner*, 79.

To allege a removal of horse-stalls, cribs, cow-chain holders or partitions in buildings belonging to the plaintiff is not a sufficient allegation of ownership of the horse-stalls, etc., as they might have been fixtures that, as between landlord and tenant, the defendant had a lawful right to remove. *Benner* v. *Benner*, 79.

To break glass that is a part of a building is a separate and distinct cause of action under the statute above referred to, and the allegation that the glass was "in the windows in the barn" of the plaintiff is a sufficient allegation that the glass was a part of the building. *Benner* v. *Benner*, 79.

It is ordinarily true that where an allegation of a greater, properly includes all the elements of a lesser liability or breach of duty, judgment may be for either as the evidence warrants. *Burrill Nat'l Bank* v. *Edminister*, 367.

In an action on a bond containing two counts, one in the usual form declaring on the penal part, the second, containing in addition the breach of the conditions of the bond relied upon, and commencing in the usual manner, viz: "Also for that," without repeating the nature of the action, as, "In a plea of debt," Upon special demurrer assigning as grounds of demurrer that neither count contained the words, "whereby an action has accrued to the plaintiff," or any allegation equivalent thereto, and secondly that the second count was also defective because the nature of the action was not stated therein,

Held:

That in an action of debt on a bond or other instrument where the indebtedness is acknowledged in the instrument itself, it is not necessary to add to the counts in the usual form the allegation, *Per quod actio accrevit* or any words equivalent thereto;

That whether the words, "In a plea of....." be regarded as a part of the writ or the commencement of the declaration, it is not necessary to repeat it at the beginning of each count. In the one case, because they are not a part of the declaration or count; in the other, once stated, they are to be supplied or understood after the word "also" at the beginning of each count after the first. Every count is presumed to be intended as of the same nature as the action which the defendant is summoned to meet. This may be considered settled by long and well established practice in this State. *Clark* v. *Boyd*, 530.

A complaint under Public Laws of 1917, Chap. 219, Sec. 64, as amended by Public Laws of 1919, Chap. 180, alleging that A. "did, at Dead River Plantation, Somerset County, Maine, on the 16th day of October, A. D. 1919, have a loaded shotgun in his automobile upon the highways and fields in said Dead River Plantation against the peace of the State and contrary to the form of the statute in such case made and provided," must be held, upon general demurrer, to charge the offense with sufficient certainty and precision.

State v. *Longley*, 535.

An indictment under R. S., Chap. 126, Sec. 6, alleging that A. of etc., at etc., "on the first day of July, in the year of our Lord one thousand nine hundred and nineteen, being more than twenty-one years of age, did take indecent liberties with the sexual parts of one B, a female child under the age of sixteen years, against the peace of the State and contrary to the form of the statute in such case made and provided," must be held sufficient, upon motion in arrest of judgment, against the contentions:

1. That it does not allege that at the time of the commission of the alleged offense the respondent was twenty-one years or more of age.
2. That it does not allege that the child, with whom the offense is alleged to have been committed, was under the age of sixteen years at the time of the commission of the offense charged.
3. That it does not set out specific acts of the defendant which constitute the indecent liberties of which he is accused.

The indictment charges the offense in the language of the statute, and the language is sufficient to meet the tests of certainty and precision.

A general motion to set aside the verdict in a criminal case as against evidence, and to grant a new trial, is not cognizable by the Law Court; it should be presented to the presiding Justice; if overruled by him, an appeal may be taken in case of a felony to the Law Court. *State* v. *Farnham*, 541.

Demurrer to an indictment charging the respondent with wilfully and maliciously setting fire to a building belonging to another person. The claim is made that the indictment is fatally defective because it does not allege that the act was done without the consent of the owner. The statute is silent as to such allegation, but it alleges that the act must be, and the indictment declares that it was, done maliciously.

Held:

1. The word "maliciously," as used in criminal statutes, means that the act should be done voluntarily, unlawfully, and without excuse or justification.
2. Since the indictment alleges that the act was done maliciously, it is equivalent to saying that it was done without excuse or justification.
3. If done without excuse or justification it follows that it was done without consent.

PLAN.

See *Boundaries*.

POLICE POWER.

POSSESSORY TITLES TO WILD LAND.

PRESUMPTION.

The entry of a deposit of money in a bank, by one person in trust for another, raises a presumption that an irrevocable trust was intended, and, when supported by evidence showing a continuing intent, or when not refuted by the showing of a contrary intent, creates a trust which is completed and irrevocable, unless the donor reserved the power of revocation.

Cazallis v. *Ingraham*, 240.

The phrase "For value received" in a promissory note, which introduces the promise relied on, bespeaks that material cause moved the maker to give the note existence, and affords presumptive evidence of consideration.

Greeley v. *Greeley*, 264.

PROMISSORY NOTES.

See *Shaw, Admr.* v. *Bubier*, 83.

Fraud or infirmity in the inception of a promissory note may constitute a defense between the original parties, but as against an indorsee for value before maturity it is not a defense, unless it is shown that the plaintiff had actual knowledge of such fraud or infirmity at the time of the purchase of the note, or had knowledge of such facts that his action in taking the note amounts to bad faith.

Mechanics Savings Bank v. *Berry*, 404

An action upon a promissory note, dated November 9th, 1908, payable on or before six years from said date by G. L. Farrand to H. G. Hall, and by H. G. Hall before maturity endorsed in blank, and negotiated to the plaintiff bank.

At the time the note became due the maker, Farrand, had died, and Helen Farrand had been appointed administratrix of his estate. At the date of the maturity of the note, a notary public and cashier of the plaintiff bank made protest thereof, but did not make nor attempt to make any demand upon the administratrix of Farrand, the maker, the protest showing that he demanded said note at the said North National Bank, which was the endorsee. No place of payment was stated in the note.

The justice, without the intervention of a jury, found for the plaintiff, to which the defendant filed exceptions.

The only question was whether a demand was necessary upon the administratrix.

Held:

That such demand was necessary. *North National Bank* v. *Hall*, 463.

PROOF OF LOSS.

See *Brisson* v. *Insurance Co.*, 355.

PROXIMATE CAUSE.

The issue of proximate cause is one of fact, not of law, and was submitted to the jury, we must assume, under proper instructions. The jury found that the broken condition of the saw was the proximate cause of plaintiff's injury; it cannot be said that the finding is so manifestly wrong as to warrant the court in disturbing it. *Nicholas* v. *Folsom*, 176.

A place furnished by employer to employee to work in may not be reasonably safe, and on account of not being so, may be the proximate cause of an injury, and yet if the employer has exercised reasonable care to make it reasonably safe he is not liable. *Sheaf* v. *Huff*, 469.

PUNITIVE DAMAGES.

It is within the province of the jury to award punitive damages and to consider the wealth of the defendant in so doing. *Audibert* v. *Michaud*, 295.

REAL ACTION.

In a real action for the recovery of real estate, the alleged title to which is based upon a quitclaim deed, it is incumbent upon the plaintiff, in order to establish his line to prima facie prove where, upon the face of the earth, his line is located. *Everett* v. *Whitney*, 128.

See *Stewart* v. *Small*, 269.

REBUTTAL EVIDENCE.

Rebuttal evidence otherwise inadmissible may be admissible as effecting the credibility of a witness. *Audibert* v. *Michaud*, 295.

RECORDED DEEDS.

The question at issue is whether the defendant during such period claimed the lands under recorded deeds.

The defendant's claim has been under the following instruments recorded more than twenty years before the beginning of the action. (1) Tax deed from treasurer to Town of Wesley (admittedly invalid as a conveyance). (2) Release of right, title and interest of Town of Wesley to J. I. (3) Similar release J. I. to defendants. No question is raised as to the sufficiency of description.

Held:

That the instruments above described are "recorded deeds" within the purview of the statute. *Tibbetts* v. *Holway*, 90.

REMAINDER.

See *Carver* v. *Wright*, 185.

REMEDY.

See *Simpson, Libl't* v. *Simpson*, 14.

REPLEVIN.

An action of replevin to recover a certain lot of pressed hay which plaintiff claimed he purchased of defendant and took delivery of it in the barn, although he had paid no part of the consideration, and later the defendant sold the same hay to another person in the barn and received payment in full. The latter purchaser had no knowledge of the previous sale, and was, accordingly, an innocent purchaser for value. Arrangements were made by the latter purchaser and cars obtained for delivery of the hay at a railroad crossing and shipment therefrom; and the hay was delivered at the railroad crossing, and there deposited when it was replevined.

Held:

1. That at the time of the replevin the hay had been sold to the latter purchaser.
2. That the latter purchaser was a bona fide purchaser for value, without notice of the previous sale.
3. That the hay was delivered to the latter purchaser at the railroad crossing, and in defendant's possession when taken by the plaintiff.

Williams v. *Lancaster*, 461.

RESPONDEAT SUPERIOR.

Under the doctrine of *respondeat superior*, in order to hold one person responsible in damages for the negligence of another, it must be shown, among other things, that at the time and in respect to the very occurrence out of which the injury arose, the relation of master and servant existed between the defendant and the wrong-doer. There is nothing of the sort here. Even were the driver of the automobile at the time of the accident acting in the course of her employers' business, they would not be liable if she would not be liable were the action against her, and she had acted for herself instead of for them. For all that appears, the accident complained of may have been inevitable, or, if negligence were the proximate of efficient cause, such negligence may have been on the part of plaintiff himself. *Karahleos* v. *Dillingham*, 166.

RIGHTS OF TRUSTEE IN BANKRUPTCY.

While it is sometimes loosely said that the trustee steps into the shoes of the bankrupt and takes the property "in the same plight and condition that the bankrupt himself held it" this is true only with limitations. In case of fraud and unlawful preference the trustee in behalf of the creditors is given rights and remedies which the bankrupt did not possess. So too where the State law makes transfers void as to creditors. *Philoon* v. *Babbitt*, 172.

SCHOOL TEACHER.

The authority given by R. S., Chap. 16, Sec. 36, Par. III, to a Superintending School Committee, to vacate a contract, being an authority given to those who represent one party only, must be strictly pursued according to the provisions of the statute, to have that effect.

The statute in question authorizes the dismissal of a teacher upon two grounds: Unfitness to teach, and failure of practical success in the work of the school rendering the teacher's services unprofitable to the school; the first may be apparent either before or after the work of the school has begun; but failure of practical success in the work of the school can only become apparent after the work has actually begun.

The action of the committee in the instant case cannot be sustained. The fitness of the plaintiff to teach the school is conceded; she should have had the opportunity to show practical success in the school work.

Furthermore, the action of the committee can only be taken "after due notice and investigation." The statement in the record before the court is insufficient as notice to the plaintiff of the object of the meeting at which action was taken dismissing her.

Hopkins v. *Bucksport*, 437.

SEIZURE OF INTOXICATING LIQUORS.

A seizure by State authorities of intoxicating liquors while in the custody of the revenue officers of the United States, or their designated representative, as they are being transported in bond from the custom house in one customs district to the custom house in another district for rewarehousing, the duties not having been paid, and the rewarehousing not having been completed, constitutes an interference with the Federal authorities acting within their constitutional rights, and is illegal.

State v. *Intoxicating Liquors*, 1.

SET-OFF.

See *Sporie* v. *Fitts*, 362.

SINGLE DAMAGES.

See *Burrill Nat'l. Bank* v. *Edminister*, 367.

STATUTE OF FRAUDS.

In an action to recover for an alleged breach of an agreement for the sale and purchase of certain lodging house furniture under which agreement it is alleged that the defendant also agreed to obtain from the owner of the house a lease of the premises for a term of years and assign the lease to the plaintiff, and where the breach alleged is the failure to obtain and assign the lease.

Held:

That the agreement in this case was not one of agency where one has agreed to purchase land or obtain a lease for another and in the principal's name, nor where an agent has agreed to purchase an interest in real estate and convey or assign it to his principal, but a contract between two principals, the agreement to obtain the lease being clearly a part of the consideration for the purchase of the furniture.

An agreement to assign a lease is a contract concerning an interest in lands and must be in writing.

Inderlied v. *Campbell*, 303.

STATUTE OF LIMITATIONS.

The plaintiff relies on the following letter to toll the statute of limitations:

Oct. 25.

Dear Sir:

All sick with new desese. Bee down the first of the week and fix it up with you.

M. A. BUBIER.

Held:

That the letter, which was found by the presiding Justice to refer to the note in suit, is not a sufficient acknowledgment, from which the law will imply a promise to pay, to remove the bar of the statute of limitations.

Shaw, Admr. v. *Bubier*, 83.

STOCKHOLDERS.

The respective rights of common and preferred stock are fixed by a contract which is commonly set forth in the corporate by-laws, within wide limitations any preferential rights provided for in the by-laws will be given effect to by courts.

Where nothing to the contrary appears the creation of preferred stock prima facie implies that the preferential rights of the stockholders are given in lieu of and to the exclusion of equality in participation which would otherwise exist. *Stone* v. *U. S. Envelope Co.*, 394.

The petitioner in 1919, not being then a stockholder in the Ventura Consolidated Oil Fields, wished to obtain a list of the stockholders in that corporation for the purpose of attempting to sell them other stock. For this purpose he purchased five shares of stock through one Prescott, a compiler of and dealer in stockholders' lists. He then demanded the privilege of examining the books. This being denied, he began his petition for writ of mandamus to enable him to examine books and obtain a list of stockholders. It is not contended that he desired the list because of any stock ownership. He acquired a nominal stockholding for the purpose, and only for the purpose of securing the list.

A single Justice before whom the case was heard ordered the peremptory writ to issue. The case is brought up on exceptions.

Held:

That the writ of mandamus is not a writ of right. It is a prerogative writ issued at the discretion of the court when equity requires it.

Held:

Further that the court will protect the interests of the smallest stockholder, but it will not exercise its extraordinary power of compelling by mandamus the production of corporate records for inspection at the mere behest of one who acquires a nominal stock interest for the sole purpose of advertising other goods or stocks. *Shea* v. *Sweetser*, 400.

SURVIVORSHIP.

When an immediate estate is given to survivors, or the enjoyment and possession of it is immediate on the death of the testator, the time to which the survivorship, which determines who shall take, will be construed to relate, is the death of the testator; and only when an intermediate estate intervenes or the contrary intent is clearly expressed is it held that the survivorship relates to the time of the termination of the intervening estate or the period of distribution. *Singhi* v. *Dean*, 287.

TENURE OF OFFICE.

Where the length of duration of a term of office is fixed by law, and a definite time determined when the first term is to begin, the period of time to be included in each successive term begins at the fixed and definite time of expiration of each preceding term, and a holding over beyond such fixed time of expiration, does not effect, prolong or change, the time of expiration of any succeeding term.
Bowen v. *City of Portland*, 282.

TESTIMONY.

Weight and credibility of testimony are questions for the jury.
State v. *Ward*, 482.

TOWN RECORDS.

The identification of town records need not necessarily be made by an officer of the town. It is sufficient if the identity be proved by any competent witness who knows the facts. *Audibert* v. *Michaud*, 295.

TOWNS.

See *Libel*.

TRESPASS.

In an action of trover brought to recover the value of a bull moose, lawfully killed by the plaintiff in the Province of New Brunswick and transported thence to Bangor, Maine, where it was seized by the defendant, a duly commissioned and qualified game warden, the court having ordered judgment for defendant and the plaintiff having excepted, it is

Held:

1. That transportation having ceased at the time of the seizure, no question under the Interstate Commerce Act, as to the right to interfere with property in transit, is involved.
2. That Chap. 131 of the Public Laws of 1919, prohibiting the having in possession except during the last ten days of November, any bull moose, "whenever or wherever taken, caught or killed," includes the having in possession of a bull moose lawfully killed in New Brunswick and afterwards brought into this State.
3. That the phrase "wherever taken, caught or killed" is unlimited, and was intended to include moose brought into this State from another jurisdiction.

The legislative purpose was to prevent evasion of the law on the part of those, especially along the border, who might claim that a moose found in their possession had been killed in another jurisdiction, although in fact killed in this State, thus rendering the enforcement of the law more difficult.

4. The act in question, in so far as it relates to imported game, is a valid exercise of the police power of the State and is not in violation of the Constitution.

5. The plaintiff's claim, however, that he has been deprived of his property by the defendant without any judicial determination of his legal right thereto and therefore without due process of law must be upheld. A warrant for the arrest of the plaintiff should have been obtained by the defendant within a reasonable time after seizure. The seizure was made on October 15, 1919, and no warrant has ever been issued. This makes the warden a trespasser ab initio. He is holding the property without legal authority or justification.

Woods v. *Perkins*, 257.

See *Burrill Nat'l Bank* v. *Edminister*, 367.

TRESPASS QUARE CLAUSUM.

See *Arizona C. M. Co.* v. *Iron Cap C. Co.*, 213.
See *Burrill Nat'l Bank* v. *Edminister*, 367.

TROVER.

See *Woods* v. *Perkins*, 257.

TRUST FUNDS

A bill in equity by beneficiaries under a testamentary trust, alleging that a deceased trustee sold real estate of the trust, mingled the proceeds with his own property, and later transferred all his property, both real and personal, to the defendant, cannot be maintained, after the death of the trustee, who was entitled to the income of said trust estate for life, to reach such proceeds in the hands of defendant, it being admitted by plaintiffs that said proceeds cannot be followed in kind, or be identified or susceptible of identification.

Sawyer v. *Sawyer*, 87.

TRUSTS.

The mere fact of the entry of a deposit of money in a bank, by one person in trust for another, would not effectuate an indisputable gift in the form of an irrevocable trust without limitation or condition, which the beneficiary might termi-

nate at will, and which extrinsic evidence could not control. But such deposit would raise a presumption that an irrevocable trust was intended, and, if supported by evidence showing a continuing intent, or not refuted by the showing of a contrary intent, create a completed and irrevocable trust, unless the donor reserved the power of revocation. *Cazallis* v. *Ingraham*, 240.

VALUABLE CONSIDERATION.

A promissory note given by the maker to the payee, upon the promise of the latter to the former that she would hold herself in readiness to come to his home in his last days, whenever he might request, is supported by a valuable consideration. *Greeley* v. *Greeley*, 264.

See *Williams* v. *Lancaster*, 461.

VERDICT AGAINST EVIDENCE.

See *Brisson* v. *Insurance Co.*, 355.

VERDICT WRONG.

See *Williams* v. *Sweet*, 228.
See Stewart v. *Small*, 269.

VESTED REMAINDER.

A vested estate in remainder is alienable by deed to the same extent as are vested estates in possession. Annie Stanley Ostrom's estate was a vested remainder. It was subject to alienation at will. It follows that her assignments, the forms not being questioned, were effectual to transfer to the plaintiff all her interest derived under the will. *Insurance Company* v. *Dearborn*, 168.

A testator devised "unto my son, A., all my real estate and personal property (of whatever description and wherever found), during his natural life, and at his death said property to be equally divided between my children." Four children, including the life tenant, survived the testator; one daughter died before the decease of the testator, leaving three children.

It is held, that the four children living at the death of the testator took vested interests in his estate, subject to the life estate of the son.

There is no legal inconsistency in a life tenant holding a vested interest in a remainder to take effect at his death.

WAIVER.

WILFUL TRESPASS.

In an action under R. S., Chap. 100, Sec. 9 for trespass alleged to be wilful, if a trespass is shown without evidence of wilfulness, a verdict for single damages rendered upon appropriate instructions will not be set aside on motion.

It is ordinarily true that where an allegation of a greater, properly includes all the elements of a lesser liability or breach of duty, judgment may be for either as the evidence warrants. *Burrill Nat'l Bank* v. *Edminister*, 367

WILLS.

A bequest or devise made expressly on a contingency which does not happen, is not effective.

Lothrop, Admr. v. *Woodford's Congregational Parish et als.*, 42.

At common law a will was not invalidated because drawn by Judge of Probate in the county where the testator was then residing.

Clark, Appellant from Decree of Judge of Probate, 150.

Section 20, Chapter 67, R. S., should be construed strictly It is therefore held to apply only to such papers and documents as by their nature or because they are connected with the administration of an estate already pending, are required, in the ordinary course, to be passed upon by a Judge of Probate. It is not such papers as he may be, but such papers as he is by law required to pass upon.

Clark, Appellant from Decree of Judge of Probate, 150.

A Judge of Probate is not required by law to pass upon all documents drafted as wills, only such as are presented to him for probate of testators who die resident in his county.

Clark, Appellant from Decree of Judge of Probate, 150.

To hold that the statute prohibits Judges of Probate from drafting all papers falling within any of the classes of papers or documents that may in the course of the administration of estates come before him, would prohibit him from drafting any promissory notes

Clark, Appellant from Decree of Judge of Probate, 150.

The probate of the will of the late Gertrude Archambeau is protested on grounds that may be classified under three heads: (1) That the instrument was not her will, but was obtained by the fraud and undue influence of her husband, (2) that it was not executed in accordance with the requirements of the statutes and laws of this State; (3) that it was not a completed instrument.

Held:

That the burden of proving fraud or undue influence is on the contestants and there is no substantial evidence of either in this case.

WITNESSES.

A witness testifying in a cause on trial may be impeached by offering in evidence his testimony at a former trial of the same cause, for the avowed purpose of contradicting his statements at the present trial, which former testimony tends to so contradict said witness, without first calling his attention to his former testimony. To exclude said former testimony upon the ground that it is necessary, before introducing evidence of said witness' former statements tending to contradict him, to first call the attention of said witness to such former statements and inquire of him in regard to same, is erroneous, and exceptions will lie. *Currier* v. *Bangor R. & Electric Co.*, 313.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

Under R. S., Chap. 50, Sec. 26, if the injured employee claims compensation under the Workmen's Compensation Act, and the same is awarded, the employer having paid the compensation or become liable therefor, succeeds to the rights of the injured employee to recover damages against the person responsible for the injury. No assignment is required by the terms of the law; but the employer, upon paying the award or becoming liable therefor, is at once vested with the injured employee's right of action against the wrong-doer. The injured employee cannot receive directly both payment from the third party and compensation from his employer. In proceeding, however, against the wrong-doer the employer is not limited in his recovery to the amount paid by

him; Section 26 permits the employer by an action against the wrong-doer to reimburse himself and, also, to recover for the injured employee a sum over and above the amount for which the employer was absolutely liable, if the evidence should permit such recovery.

The liability of such wrong-doer to pay damages in respect to the injury is not affected by the election of the injured employee to receive compensation under the act.

By Section 1, Paragraph 1 of the Workmen's Compensation Act of Maine, the term "employer", if the employer is insured, "includes the insurer unless the contrary intent is apparent from the context or it is inconsistent with the purposes of this act." No contrary intent appears from the context of Section 26, nor is such construction inconsistent with said section or the act. It is accordingly held that the instant action was rightly brought in the name of the injured employee for the benefit of the insurance company which paid the compensation awarded. The liability of the defendant is the same whether the action is for the benefit of the injured employee or the insurer.

The action being in form an action at common law to recover damages for personal injuries caused by the negligence of defendant's servant, it is held that the action can be maintained without either an amendment to the declaration, alleging payment by the insurance company for whose benefit the action is brought, or evidence of payments by the insurance company in compliance with the Workmen's Compensation Act. *Donahue* v. *Thorndike & Hix*, 21.

Appeal from decision of the Industrial Accident Commission. The claimant, an employe of the American Railway Express Company, on January 6, 1919, sustained an accidental injury to his right foot while in the course of his employment in consequence of which so much of the foot as lay forward of the plane of the front surface of the tibia or shin bone was amputated. The ankle joint retains its motion and the heel support is the same as before the accident. The claimant has lost the toes and instep but not the heel, and walks upon what remains with the aid of a specially constructed boot having a steel support running up the front of the tibia.

The Commission decided that this constituted "the loss of a foot" under R. S., Chap. 50, Sec. 16.

Held:

1. That this accident occurred before the amendment of Public Laws 1919, Chap. 28, was passed and at a time when loss of a member was construed to mean loss by severance and not by incapacity, a distinction being drawn between loss and loss of use.
2. Applying this rule it is obvious that the loss of two-thirds of a foot, as in this case, is not the loss of a foot. The words mean the loss of an entire foot and not of a fractional part thereof.
3. This construction is strengthened by a study of other portions of the statute which shows that when the Legislature intended to make the loss of a part equal to the loss of the whole it expressly so provided.

Allen C. McLean's Case, 322.

See *Emile Thibeault's Case*, 336.

Held:

That in petitions to the Industrial Accident Commission the nature of the petitioner's claim and the matter in dispute should be set out in the petition; that while the Industrial Accident Commission is authorized to provide printed blanks for such petitions it may not dispense with a plain requirement of the statutes.

When an employee has entered into an agreement with his employer or the insurance carrier and it has been duly approved by the labor commissioner, such agreement within the limits of its terms has the binding effect of a judgment between the parties and may not be modified, or reviewed or additional compensation given except under Section 36 of the Compensation Act, except, of course, in cases of fraud.

The loss of a "trifle" more than two-thirds of the distal phalange of a finger is not the same as the loss of the whole phalange under the Compensation Act of Maine, especially when some of the function of that phalange is still preserved. It is the loss of the whole phalange, rather than of a part, that under the statute is equivalent to the loss of half the finger.

In this case it not appearing whether the agreement referred to was approved by the labor commissioner, or that provisions of the Act it covered, the case should be recommitted to the Industrial Accident Commission, where the petition may be amended, and if not barred by the terms of the agreement, or if the agreement was not duly approved, the petitioner may recover such compensation as the facts warrant. *Maxwell's Case*, 504.

This is an appeal by J. B. Ham Company, an employer, and Royal Indemnity Company, its insurance carrier, from a decision of the chairman of the Industrial Accident Commission ordering them to pay to Elizabeth Patrick, dependent widow of Joseph Patrick, a deceased employee of said J. B. Ham Company, weekly compensation of $11.80 to the maximum of $3,500 provided for by the Workmen's Compensation Act.

Held:

1. That the burden of proof was amply sustained within the rule laid down in Mailman's Case, 118 Maine, 172, is clearly shown in the record. And Mailman's Case is decisive of this case, and is authority for a change of burden of proof or proceeding had the same been required. There, as here, there was dispute as to the circumstances, and much was left for the Commission to settle from inferences to be drawn from the facts proved or admitted.
2. The chairman found from facts proved and inferences from facts proved, that the decedent's death was due to personal injury by accident arising out of and in the course of his employment.
3. It is the settled law that even where a workman dies from pre-existing disease, if the disease is aggravated or accelerated under certain circumstances

which can be said to be accidental, his death results from injury by accident. Acceleration or aggravation of a pre-existing disease is an injury caused by accident.

4. That Patrick was suffering from diseased arteries pre-disposing him to cerebral hemorrhage is of no consequence in the case. That he might have died, or would have died, in his bed of cerebral hemorrhage, in a year or a week is immaterial.

The question before the Commission was whether the work that he was doing on the afternoon of October 13th, 1919, caused the cerebral hemorrhage to then occur. If so we think it was an accident arising out of and in the course of his employment.

This was a question of fact. The Industrial Accident Commission through its chairman has decided this question of fact in favor of the claimant. The finding is, we believe, supported by rational and natural inferences from proved facts, and we do not feel authorized to disturb the finding.

Patrick v. *J. B. Ham Company*, 510.

This is an appeal from the decree of a single Justice in conformity with the decision of the late chairman of Industrial Accident Commission, denying compensation to Bessie M. Smith claiming as dependent widow of Warren H. Smith.

The chairman considered but two of the defenses raised by the respondents, to wit, the first and fourth, and holding thereunder in the order named.

(a) That the petitioner had not proved her marriage to the decedent, or that she was a dependent widow of Warren H. Smith, and

(b) That no claim for compensation under the laws of the State of Maine had been made by the petitioner or by any person in her behalf upon the respondents within one year from the time of the injury.

Held:

1. As to the question of proof of marriage, the burden of proof, and the character of testimony necessary to prove marriage in a case coming under the act, we think the finding of the chairman is erroneous.

In the progress of the case and in his deliberations thereon, upon the question of marriage, he was dealing with a question of law. He rejects the marriage certificate unless substantiated by testimony. Such testimony of its authenticity was not produced, but the certificate of marriage was admissible nevertheless, without authentication. What its probative value might be was a question for him to consider with all the other evidence in the case upon the issue involved.

2. Cohabitation, as husband and wife, is evidence from which the law presumes lawful marriage. So also where the presumption may be repelled, it will fix upon the party, who thus holds himself out to the world in the character of a husband, liabilities as it respects others, which attach to this relation.

3. It is a general rule that in all civil personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage.

4. The proof of marriage, as of other issues, is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances from which its existence may be inferred. Evidence of the former kind, or what is equivalent to it, is required upon the trial of indictments for polygamy and adultery and in actions of criminal conversation; but in all other cases, any other satisfactory evidence is sufficient.

5. It is competent to show their conversation, addressing each other as man and wife. Their cohabitation also as man and wife is presumed to be lawful till the contrary appears.

6. That act does not require the claim for compensation to be in writing, or that it should be made in unequivocal language or terms. It does require that claim for compensation shall be made within one year after the accident. Such claim may be made orally, by a claimant or some person in his behalf, may be made in writing, and the terms will meet the requirements of the act if the employer is thereby apprised that compensation is claimed, and is put upon his notice that a claimant seeks the benefit of the act. And, too, the notice of a claim for compensation may be waived, and was waived in this case by the defendant through its manager and superintendent, Mr. Cline, who immediately after the accident corresponded with petitioner, offering counsel and assistance and seeking to take charge of the proceedings and expenses of enforceing the claim for compensation.

7. A statutory or even a constitutional provision made for one's benefit is not so sacred that he may not waive it, and having once waived it he is estopped from thereafter claiming it.

8. Our conclusion therefore is that the appeal should be sustained, the decree reversed, and that the petitioner is entitled to receive compensation at the rate of ten dollars per week for a period of three hundred weeks from the date of the injury, the maximum amount fixed by Section 12 of the Act.

Smith v. *Boiler Co.*, 552.

WRIT OF ENTRY.

An estate upon condition does not terminate upon its breach, unless and entry be made by one authorized to take advantage of the condition.

The statute (R. S., Chap. 109, Sec. 4), dispensing with proof of actual entry under a demandant's title, contemplates only a case where the party already has acquired a title, and otherwise entry would be requisite to perfect the remedy.

Clifford v. *Railroad Co.*, 577.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES

CONSTITUTION OF MAINE

STATUTES OF THE UNITED STATES

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

On page 230 strike out the name "Deasy" as one of the sitting Justices.

In the eleventh line in the opinion on page 384, insert "plaintiff" in place of "defendant."

In the tenth line on page 416, insert "*Parsons* v. *Railway*, 96 Me. 503" in place of "*Palmer* v. *Railway*, 92 Me. 399."

In the fourth line from bottom on page 473, insert "State" in place of "Stuart."