MAINE REPORTS

120

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MARCH 9, 1921—DECEMBER 1, 1921

FREEMAN D. DEARTH

REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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

Justices of the Superior Courts

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

ATTORNEY GENERAL

RANSFORD W. SHAW

REPORTER OF DECISIONS

FREEMAN D. DEARTH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1921

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

HARRY B. BRADBURY

vs.

RHODE ISLAND INSURANCE COMPANY.

Knox. Opinion March 11, 1921.

The verdict of a jury upon questions of fact is conclusive and final when the testimony is not so strong to the contrary to show clearly error, or that they were influenced by prejudice, bias, passion or mistake. An arbitration invoked under the standard form of fire insurance policy, R. S., Chap. 53, Sec. 8, having failed by reason of the fault of one of the parties in not choosing disinterested referees, relieves the other party from being bound to enter into a new arbitration agreement.

Action on the case to recover for a fire loss—Verdict for plaintiff. Motion for new trial presented by defendant. The elements of defense were (a) that the fire was set by the plaintiff, his agents or employees, with criminal and fraudulent intent of causing the stock of merchandise to be destroyed so that the plaintiff might procure the insurance money provided for in his policies; (b) that the plaintiff filed a false and fraudulent proof of loss; (c) that the referees provided for by the terms of the policy, and by R. S., Chap. 53, Sec. 8, were legally and properly chosen, that the terms of the policy and the Statute as to hearing were complied with, and that the award of the referees, or a majority of them, was conclusive and final upon the parties as to the amount of loss or damage.

Held:

1. That the first and second elements of defense were wholly questions of fact and were for the determination of the jury, which determination is binding

upon this court when the testimony is not so strong to the contrary as to show that they were clearly wrong or were influenced by prejudice, bias, passion or mistake.

2. The third element of defense was a mixed question of law and fact. Under instructions which must be assumed to be correct, since no exceptions are presented, the jury found that the arbitration failed by reason of the defendant's fault in not choosing referees who were free from prejudice or bias, and were not disinterested.

The defendant has failed to sustain the well known burden laid upon it in order to have the verdict set aside.

On motion for a new trial by defendant. This is an action on the case to recover for loss by fire in a building in Rockland on December 30, 1917, damaging a stock of merchandise, consisting of boots, shoes, and rubbers, and fixtures. Before this action was brought an arbitration was held under the provisions of the standard form of policies which resulted in fixing the amount of the plaintiff's total loss of $2952.50. The defendant filed a plea of the general issue, and a brief statement alleging as special matters of defense; that the fire was set by the plaintiff or through his procurement; that the plaintiff knowingly filed a false proof of loss; that the plaintiff gave false testimony at the arbitration; that the referees were duly and fairly chosen, and that their findings were final and binding on the parties. The case was tried to a jury and a verdict for $4800 was returned for the plaintiff, and the defendant filed a motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

A. S. Littlefield, and M. A. Johnson, for plaintiff.

William H. Gulliver, for defendant.

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

PHILBROOK, J. This is an action on the case to recover for a fire loss. The property destroyed consisted of a stock of goods, fixtures, repair machinery and tools, and such other personal property as would ordinarily be contained in a retail boot and shoe store. Upon this property the defendant had issued two insurance policies, one for $300.00, dated Oct. 9, 1917, the other for $1000.00, dated Dec. 21, 1917, both of which were in force at the date of the fire. Policies

issued by other companies, in force at the time of the fire, with dates of issue, and amounts, are as follows:

Firemen's Insurance Company, June 15, 1917	$ 500.00
Imperial Assurance Company, June 15, 1917	1000.00
Insurance Company of Pennsylvania, Oct. 9, 1917	1000.00
American Eagle Insurance Company, Oct. 11, 1917	1000.00

The aggregate of these four policies together with those issued by defendant, is $4800. The $300 policy issued by defendant covered material used in shoe repairing business to the amount of $200.00, while the remaining $100.00 was upon cash register, machinery, motor, tools and implements used in such business. The $1000 policy issued by defendant was thus divided: $800 on stock of merchandise, and $200 on store furniture and fixtures. The four policies issued by the other companies were all on stock of merchandise. Thus it will be seen that the plaintiff claimed insurance from all his policies as follows:

On machinery in repair department	$ 100.00
On material " " "	200.00
On furniture and fixtures in store	200.00
On stock of merchandise	4300.00
Total	$4800.00

These figures become important by reason of the special findings returned by the jury.

The fire occurred Dec. 30, 1917. In his proof of loss the plaintiff claimed loss of $410 under the $300 policy and $6709.03 under the other policies. Thus it will be observed that the aggregate loss claimed was considerably more than the aggregate insurance under all the six policies. The plaintiff and the several insurance companies having failed to agree as to the amount of loss, a reference was invoked under the standard form of policy and the provisions of R. S., Chap. 53, Sec. 8. After hearing before those referees a finding was made by which the plaintiff was awarded the sums following:

On stock of merchandise, boots, shoes, etc	$2500.00
On store furniture and fixtures, etc	222.50
On stock of leather, soles, rubber heels, etc	75.00
On machinery, electric motor, etc	155.00
	$2952.50

The award was signed by two of the referees but the third declined so to do. Being dissatisfied by reason of the sums awarded, and by reason of what he claimed was improper conduct of the hearing, and by reason of what he claimed was bias or partisanship against him on the part of one or more of the referees, the plaintiff brought suits upon all his policies of insurance, including the two under consideration in the case at bar. The other suits abide the outcome of this one, under stipulations which do not here need enumeration or discussion.

Trial before a jury resulted in a general verdict for the plaintiff, with special report as to assessment of damages agreeably to the stipulations of the parties. The following special findings were also returned:

Was the stock of goods and merchandise in the Bradbury store, at the time of the fire, worth $4300.

Answer, yes.

Were the fixtures in the Bradbury store, at the time of the fire, worth $200.

Answer, yes.

Were the fixtures in the cobbler's shop in the Bradbury store, at the time of the fire, worth $100.

Answer, yes.

The defendant reserved numerous exceptions during the progress of the trial but no bill of exceptions appears in the record. The case is before us upon motion for new trial based upon the usual grounds.

The elements of the defense are as follows: (a) That the fire was set by the plaintiff, his agents or employees, with criminal and fraudulent intent of causing the stock of merchandise to be destroyed, so that the plaintiff might procure the insurance money provided for in his policies; (b) that the plaintiff filed a false and fraudulent proof of loss; (c) that the referees provided for by the terms of the policy, and by R. S., Chap. 53, Sec. 8, were legally and properly chosen, that the terms of the policy and the statute as to hearing were complied with, and that the award of the referees, or a majority of them, was conclusive and final upon the parties as to the amount of loss or damage. A record of somewhat extraordinary length discloses that these elements were presented and opposed with great zeal, power and skill, by learned, experienced and able counsel, and the jury

result is above indicated. The defendant now asks this court, without vision of witnesses or personal contact with the environment of the trial, to declare that the jury so palpably erred, through prejudice, bias, passion or mistake, that the verdict must be set aside. "Even though the evidence preponderates against the verdict, and even though the court might have arrived at a conclusion different from that reached by the jury, if there be evidence upon which the verdict may rest, the motion should be overruled unless the conclusion is warranted that the jury reached its verdict improperly, or was, in finding it, improperly influenced." *Clark* v. *Dillingham*, 116 Maine, 508; *Gregor* v. *Cady*, 82 Maine, 131; *Dickey* v. *Bartlett*, 114 Maine, 435; *Greenlaw* v. *Milliken*, 100 Maine, 440; *Prescott* v. *Black*, 115 Maine, 557; *Hubbard* v. *Marine Co.*, 105 Maine, 384. The burden of showing the verdict to be wrong rests upon the mover. *Clark* v. *Dillingham*, supra; *Sterns* v. *Hudson*, 113 Maine, 154; *Cobb* v. *Cogswell*, 111 Maine, 336. These principles are so familiar that citation of authorities ought not to be necessary, but in view of the growing frequency of motions for new trial, based alone upon the grounds of jury error, it seems necessary to reiterate them from time to time.

The first element relied upon by the defendant, is wholly a question of fact. The judgment of a jury upon a disputed fact is binding upon this court when the testimony is not so strong to the contrary as to show that they were clearly wrong or were influenced by prejudice, bias, passion or mistake, and where the evidence is of such a character that, after weighing it, they may have well concluded that the plaintiff's version was right. *Leavitt* v. *Seaney*, 113 Maine, 119. By that verdict he was exonerated from the charge of having, with criminal and fraudulent intent, caused the fire which destroyed his property. A careful examination of the evidence does not justify us in setting aside the verdict on this ground.

Likewise the second element relied upon by the defendant is wholly a question of fact. Here the jury not only returned a general verdict in favor of the plaintiff, but also made the special findings which militate in his favor, and we are not persuaded that we are justified in overturning the verdict on this ground.

The third element relied upon by the defendant presents a mixed question of law and fact. No exceptions to the charge of the learned justice in the court below were taken. We must therefore assume that they were correct, and the jury, applying the facts to the law thus

given, returned a verdict in favor of the plaintiff. Shall the verdict be disturbed on this ground. The plaintiff has been brought before this court by one of the allied defendants in *Bradbury* v. *Insurance Company of the State of Pennsylvania*, 118 Maine, 191, where the law governing the question of disinterested arbitrators was so fully and so recently discussed that it seems entirely unnecessary to repeat the discussion. The referees in that case and the ones at bar are the same. They were chosen to act with reference to the same fire in that case as they were in this. In the absence of the charge of the presiding Justice we must assume that the rules of law enunciated in the other case were given in this, since the trial of this case was begun only three months after the decision in the other case was announced. Applying the facts in this case to the law as found in the other, the jury decided that the arbitration failed by reason of the defendant's fault in not choosing referees who were free from prejudice or bias, and were not disinterested, and therefore the plaintiff was not bound to enter into a new arbitration agreement. We see no reason to disturb the verdict because of error in this finding.

Motion overruled.

UNIVERSITY OF MAINE *vs.* J. WESLEY PRATT.

Franklin. Opinion March 11, 1921.

An offer by letter, accepted by letter containing the request "I would be glad if you would send your check for $1,000 to bind the trade," followed by the reply "—I will mail you check for $1,000 in a few days," constitutes a completed contract, although the check was never sent.

On August 28, 1919 the defendant made a written offer to buy of the plaintiff the entire crop of apples at Highmoor Farm. The plaintiff through Charles D. Woods, director, accepted the offer by letter dated Sept. 2, 1919, the last sentence of which was "I would be glad if you would send your check for $1,000 to bind the trade." On Sept. 6 the defendant replied "I have your letter of Sept. 2nd confirming sale of apples—— I will mail you check for $1000 in a few days." The check was not sent.

The defendant argues that the acceptance by the plaintiff was conditional upon the payment of $1000 "to bind the trade" and that the payment not having been made no trade was bound, no contract was made and that he was legally justified in refusing to take and pay for the apples.

The plaintiff contends that the acceptance was absolute and that no condition or qualification can be spelled out of the language relating to advance payment.

Assuming however without deciding that Woods letter of Sept. 2nd was a qualified acceptance the defendant was not bound to assent to the qualification. He could have treated the letter as a rejection of his offer.

But treating the letter as a qualified acceptance he assented to the qualification, and by letter of Sept. 6th expressly promised to pay $1000 in a few days.

Instead of sending his check to bind the trade the defendant tendered his written promise to pay in a few days. The plaintiff accepted this modification of the condition.

Then the minds of the parties met and the contract was complete.

On report. This is an action to recover damages for a breach of contract. The defendant pleaded the general issue and under a brief statement set up the statute of frauds. The defendant by letter offered to buy the entire crop of apples at Highmoor Farm.

The plaintiff accepted the offer by letter closing with "I would be glad if you would send your check for $1000 to bind the trade." Defendant replied "I have your letter of Sept. 2nd confirming sale of apples—I will mail you check for $1000 in a few days." The check was not sent. By agreement of the parties the case was reported to the Law Court with a stipulation as to damages. Judgment for plaintiff for one thousand seven hundred twenty-eight dollars and thirty-two cents and interest from date of writ.

The case is fully stated in the opinion.

Elmer E. Richards, for plaintiff.

Frank W. Butler, for defendant.

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

DEASY, J. On report. On August 28, 1919 the defendant made a written offer to buy of the plaintiff the entire crop of apples at Highmoor Farm. The plaintiff through Charles D. Woods director, accepted the offer by letter dated Sept. 2, 1919, the last sentence of which was "I would be glad if you would send your check for $1000 to bind the trade." On Sept. 6 the defendant replied "I have your letter of Sept. 2nd confirming sale of apples . . . . I will mail you check for $1000 in a few days." The check was not sent.

The defendant argues that the acceptance by the plaintiff was conditional upon the payment of $1000 "to bind the trade" and that the payment not having been made no trade was bound, no contract was made and that he was legally justified in refusing to take and pay for the apples.

The plaintiff contends that the acceptance was absolute and that no condition or qualification can be spelled out of the language relating to advance payment.

Assuming however without deciding that Woods letter of Sept. 2nd was a qualified acceptance the defendant was not bound to assent to the qualification. He could have treated the letter as a rejection of his offer. *Jenness* v. *Iron Co.*, 53 Maine, 20; *Stock* v. *Towle*, 97 Maine, 408; *Furbish* v. *Chapman*, 118 Maine, 449.

But treating the letter as a qualified acceptance he assented to the qualification, and by letter of Sept. 6th expressly promised to pay $1000 in a few days. Then the minds of the parties met and the contract was complete.

Giving to the phrase "to bind the trade" all the meaning and force claimed for it by the defendant it falls far short of sustaining the defense.

Instead of sending his check to bind the trade the defendant tendered his written promise to pay in a few days. The plaintiff accepted this modification of the condition. From this time both parties evidently regarded the contract as closed.

It is urged that the defendant Pratt could not maintain an action on the contract without first paying or tendering $1000. This is true. But the defense that would defeat his action is not that he made no contract, but that he violated it in failing to make the advance payment as agreed.

The contract having been proved by letters which abundantly satisfy the statute of frauds it is unimportant that there was nothing paid "in earnest to bind the bargain." The damages are fixed by stipulation.

Judgment for plaintiff for one thousand seven hundred twenty-eight dollars and thirty-two cents and interest from date of writ.

EDITH M. HEFLER *vs.* HENRY L. HUNT.

Cumberland. Opinion March 11, 1921.

Provisions of R. S., Chap. 135, Sec. 9, requiring a person arrested to be brought before a magistrate for examination, and the warrant with return thereon delivered to the magistrate, are mandatory. An escaped prisoner must be re-arrested under "due process of law" and taken before the magistrate promptly, whether the escape is voluntary or not. Otherwise an officer fails to execute or complete the process to him directed, and is liable in damages in a civil action.

Action against a deputy sheriff to recover damages for false arrest and imprisonment

Held:

1. R. S., Chap. 135, Sec. 9, requiring that every person arrested for an offense shall be brought before the magistrate issuing the warrant, or some other in the same county, for examination; and further requiring that the warrant, with proper return thereon, signed by the officer serving it, shall be delivered to the magistrate, is mandatory; and the officer who fails to fully carry out the commands of the warrant, without justification, does so at his peril.
2. An escape is the departure of a prisoner from custody before he is discharged by due process of law.
3. A voluntary escape takes place when the prisoner has given to him, voluntarily, any liberty not authorized by law. The fact that the one granting the liberty was an officer superior to the one making the arrest makes the situation no different. The act of the superior officer is not due process of law.
4. The State must not be deprived of the right of re-arrest because of any escape from custody, when the person escaping is held under criminal process. Even though the officer consent to the arrest he is bound to retake the prisoner.
5. The warrant, by virtue of which the prisoner was arrested, still remains in force to all intents and purposes. It is process under which he may yet be arrested and held for examination.
6. The process directed to the officer by lawful authority must be executed with all possible expedition, promptly, fully and precisely. The time of execution is as essential as any other element. Much more should execution of process once begun be completed promptly, fully and precisely.

7. In the case at bar the defendant failed to so act as to be relieved from liability in a civil action of the nature of the case at bar.

On report. This is an action of trespass for false imprisonment. The plaintiff was arrested by the defendant, a deputy sheriff, on the 27th day of August, 1919, on a warrant issued by the Portland Municipal Court, and on the same day committed to jail in Cumberland County. The next morning, before court set, the sheriff, without the knowledge or consent of the defendant, one of his deputy sheriffs, permitted the prisoner to go at large. On the day of the arrest the defendant made return upon the warrant that he had arrested the plaintiff "and now have her before the court as within directed." On September 18th, a date subsequent to the date of the writ in this action, the defendant with the same warrant went to plaintiff's home and took her to the Municipal Court room, where she was tried and found not guilty. Plea, the general issue, and a brief statement. By agreement of the parties the case was reported to the Law Court to determine all questions of law and fact, and assess such damages as it shall determine. Judgment for plaintiff. Damages assessed at $100, together with taxable costs.

The case is fully stated in the opinion.

Samuel L. Bates, for plaintiff.

Harry E. Nixon, for defendant.

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

PHILBROOK, J. This is an action to recover damages for assault and false imprisonment. The case is before us on report for our determination of all questions of law and fact, and for our assessment of damages if the plaintiff should be found to be entitled to the same.

The defendant, a deputy sheriff, on the 27th of August, 1919, entered complaint before the Judge of the Municipal Court of Portland alleging that the plaintiff, on the 25th day of August, 1919, at said Portland, was an idle and disorderly person having no visible means of support, neglecting all lawful calling or employment. Upon this complaint, on the same 27th day of August, a warrant was issued commanding the proper officers to forthwith apprehend the plaintiff and bring her before said court to answer to the complaint thus made. Armed with this warrant the defendant repaired to 90 Wilmot Street,

in the City of Portland, where the plaintiff resided with her parents, and at about nine or ten o'clock in the forenoon, according to testimony of the plaintiff's mother, arrested the plaintiff, took her to and incarcerated her in the county jail. On the same 27th day of August the defendant made return upon his warrant that he had arrested the plaintiff "and now have her before the Court as within directed." This return was not true in fact. The defendant admitted that he signed his return upon the warrant at the jail and left the precept there. The plaintiff remained in the county jail until after seven o'clock in the evening of the day on which she was arrested, when, at the request of her mother, she was released by Sheriff Graham and taken by the mother to the parents' home on Wilmot Street. The following day the defendant learned that his prisoner had been released the night before and taken away by her mother, but according to his own testimony he did not go to her home to see whether she was there, nor did he make any such visit until September 18th, a date subsequent to the date of the writ in this action, at which time, without obtaining any new precept, he went to the plaintiff's home, took her to the Municipal Court room, where she was tried and found not guilty.

In considering the rights of the plaintiff, or the liability of the defendant, we look to conditions as they existed at the date of the writ, which is September 11th, or a week before the day on which the plaintiff was re-arrested and brought before the Municipal Court for trial. From August 27th to September 11th the defendant had made no effort to comply with the command in the warrant directing him to bring his prisoner before the proper tribunal. He was equally indifferent to the mandatory provisions of R. S., Chap. 135, Sec. 9, requiring that every person arrested for an offense shall be brought before the magistrate issuing the warrant, or some other in the same county, for examination; and further requiring that the warrant, with a proper return thereon, signed by the officer serving it, shall be delivered to the magistrate.

In *Tubbs* v. *Tukey,* et al, 3 Cushing, 438, the Massachusetts Court has said that it is an established rule of law, in civil suits, that when an officer justifies under mesne process which is returnable, he must show that he has done all that it was his duty to do, and that he is a trespasser if he does not show that he returned the process. And in the same opinion the court declares that the same doctrine is applicable to the case of a warrant in a criminal process.

In a later case, *Brock* v. *Stimson*, 108 Mass., 520, the same court declared that "every man has the right to the enjoyment of his liberty and the use of his property, except so far as restrained by law; and whoever unlawfully interferes with the enjoyment of the one, or the use of the other is a trespasser. A man who seizes the property or arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, he may not perhaps in the strictest sense be said to become a trespasser *ab initio*, but he is often called such, for his whole justification fails, and he stands as if he had never had any authority to take the property, and therefore appears to have been a trespasser from the beginning. The same rule holds good in the case of an officer who, after arresting a person on criminal process, omits to perform the duty required by the law, of taking him before a court."

Realizing his failure to fully execute the precept upon which he had made the arrest, the defendant seeks to justify upon the ground that the prisoner had escaped. This requires consideration of the question as to what constitutes an escape, and the rights and duties of an officer when an escape occurs.

Considered in its broadest terms, an escape is the departure of a prisoner from custody before he is discharged by due process of law, I Bouvier, Rawle's Revision, Page 688. Liberty given to a prisoner, not authorized by law, is an escape. *Colby* v. *Sampson*, 5 Mass., 310. There may be actual, constructive, negligent, or voluntary escapes. It is unnecessary to discuss the elements which differentiate and describe these various escapes. It is sufficient to say, in view of the brief history of the case given above, that there was in this case a voluntary escape, since a voluntary escape takes place when the prisoner has given to him, voluntarily, any liberty not authorized by law. I Bouvier, supra. The fact that the one granting the liberty was the sheriff, an officer superior to the defendant, makes the situation no different. The act of the sheriff was not due process of law.

But what were the rights and duties of the arresting officer, when an escape occurs, the performance or non-performance of which would affect the question of liabilty when civil suit is brought for false imprisonment on the ground that the officer failed to bring his prisoner

before the proper magistrate. It is necessary to bear in mind that we are discussing the status and rights of the parties at the time when this suit was brought, not what occurred after the date of the writ. Nor are we discussing arrest or re-arrest as applied to civil cases, upon either mesne process or final process, as to which subject there is not complete harmony of views among the courts of this country or the English Courts.

The State must not be deprived of the right of re-arrest, because of any kind of escape from custody, when the person escaping is held under criminal process. Even though the officer consent to the escape, he is bound to retake the prisoner. *Chitty Cr. L.*, 61, Am. Ed., 1841; *Dickinson* v. *Brown*, 1 Esp. Rep., 218; Peake's N. P. Cas., 234, S. C.; *Kutt* v. *Jones*, 1 Niel Gow's N. P., Cas. 99; *Clark* v. *Cleveland* 6 Hill's Rep., 344. The warrant, by virtue of which the prisoner was arrested, still remains in force to all intents and purposes. It is process under which he may yet be arrested, and held for examination. *Clark* v. *Cleveland*, supra. Plainly, therefore, in the case at bar, it was not only the right, but it was the duty of the defendant to execute his warrant. Moreover, the process directed to the officer by lawful authority must be executed with all possible expedition, promptly, fully and precisely. The time of execution is as essential as any other element. *State* v. *Guthrie*, 90 Maine, 448. *A fortiori* should execution of process once begun be completed promptly, fully and precisely. That the escape could not have been excuse for delay is found by brief examination of the record and what it discloses regarding the physical and mental condition of the plaintiff. She is about thirty-three years old, but from very early childhood has been so lame that she has needed the assistance of a crutch in walking; is a deformed dwarf; is so deaf that when she testified in court the oath and interrogatories were necessarily reduced to writing. She has always been under the control of her mother. When arrested she was found at her parents' home, and the defendant was informed that she had been released at the request of her mother. Surely it could not require courage, diligence or experience as an officer to make search for this escaped prisoner, nor would there be probable difficulty in finding her, nor inability to comply with the command in the precept to bring her before the magistrate. The defendant chose to do none of these things but, on the contrary, to plainly neglect his legal duty until, after a delay of two weeks, this action was brought against him. His

subsequent zeal in bringing the plaintiff before the court does not deprive her from maintaining this action upon conditions as they existed at the date of the writ.

She is weak, physically and nervously, and, according to the testimony she suffered mentally at least as a result of the imprisonment. We are of opinion that she should recover damages in the sum of one hundred dollars.

Judgment for plaintiff.
Damages assessed at $100, together with taxable costs.

FRED G. HAMILTON et als., In Equity

vs.

THE PORTLAND PIER SITE DISTRICT et als.

Cumberland. Opinion March 11, 1921.

Where two or more municipal corporations or political bodies are wholly or partly coincident in territory, they are nevertheless regarded as separate bodies for the purposes of constitutional debt limitation unless the contrary is expressed in the constitution. The constututional requirement is met, if the municipality or district enjoying special benefits from a public improvement is required to bear the burden of a greater percentage of tax caused by such improvement than the state at large, provided such percentage is not disproportionate to the special benefits that will accrue to it. When a part of a statute which is unconstitutional and invalid is separable from, and independent of a valid and constitutional part, the former may be rejected and the latter may stand.

1. The Charter of the City of South Portland provides that "every such ordinance, order, resolution or vote (involving the appropriation or expenditure of money to an amount which may exceed three hundred dollars) shall be read twice with an interval of at least three days between the two readings before being finally passed." The act of the Legislature creating the Portland Pier Site District (Comprising the cities of Portland and South Portland) was accepted by the city council of South Portland, but was not read twice with an interval of three days.

Such procedure was not necessary. It is clear that the above quoted language of the City Charter has reference to the appropriation of the *City's* money, and not to that of an independent municipal corporation, though including in part the same territory.

2. Assuming without deciding that the debt of the City of South Portland plus its proportionate share of the proposed bond issue of the Portland Pier Site District will exceed five per cent of South Portland's valuation the constitution is not thereby contravened.

The bond issue creates a debt of another corporation. It is settled by numerous judicial authorities that where two or more municipal corporations or political bodies are wholly or partly coincident in territory, they are nevertheless regarded as separate bodies for the purposes of constitutional debt limitation unless the contrary is expressed in the constitution.

3. Under the constitution of Maine taxes upon tangible property must "be apportioned and assessed equally according to the just value thereof." It is obvious that a dollar of district property will bear a much larger share of the tax burden to be caused by the projected public wharves, than a dollar of property outside the district.

But charging upon a city, town or district enjoying special benefits from a public improvement a percentage of the tax burden caused thereby greater than that borne by the state at large but yet proportionate to such special benefits does not produce, but on the other hand, prevents inequality. When the benefit and burden are reasonably proportionate, the constitutional requirement is satisfied.

The popular conviction underlying the adoption of the constitutional amendment of 1919 is apparent. It was that Maine's advantageous geographical position and natural features if supplemented by adequate wharf and port facilities promise large growth in maritime commerce and that such growth will enhance the prosperity and promote the welfare of the state and its people. If this conviction is well founded it requires no argument to demonstrate that the Port of Portland will enjoy a much greater share of such growth and prosperity than will the state at large.

It is not clear and manifest that the act imposes upon the district a tax burden which is disproportionate to the special benefits that will accrue to it.

4. Section 8 of the act creating the Port of Portland authorizes the directors of the port to lease wharves that may be built in pursuance of the act "under such covenants and conditions as they may prescribe."

The act by its broad and general terms purports to authorize the directors to lease for private as well as public purposes.

In so far as the act authorizes leasing for private purposes it contravenes the constitution.

This however does not render the entire act void. The remainder stands unchallenged and the power to assess and collect taxes in furtherance of the valid portion remains in full force and virtue.

When as in this case a part of a statute which is unconstitutional and invalid is separable from, and independent of a valid and constitutional part, the former may be rejected and the latter may stand.

The petitioners have not shown that they are entitled to an injunction restraining the proposed bond issue by the Portland Pier Site District.

On report. This is a bill in equity brought by fourteen taxable inhabitants of the City of South Portland under the provisions of Par. 13 of Sec. 6 of Chap. 82 of the R. S., seeking to restrain the Portland State Pier Site District from issuing $325,000 in coupon bonds of the District. The petitioners contend that the issuance of such bonds is for the purpose of raising and paying out money for a purpose not authorized by law, hence illegal and void, for the following reasons: That the act creating the Portland State Pier Site District has never been properly or legally accepted by the City of South Portland; that the issuance of such bonds in such amount would create an obligation of the City of South Portland which added to its other debts and liabilities would carry it beyond its constitutional debt limitation, and that it would contravene the provisions of Section 8, Article 9 of the Constitution of the State, in causing unequal, unjust and double taxation. The cause was heard upon the bill, answer, and replication, and by agreement of parties, reported to the Law Court upon so much of the evidence as was legally admissible, the Law Court to determine all questions of law and fact and render judgment in accordance therewith. Bill dismissed.

The case is fully stated in the opinion.

W. R. & E. S. Anthoine, for plaintiffs.

Charles E. Gurney, and Frederic J. Laughlin, for defendants.

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

DEASY, J. Omitting unimportant details, the circumstances giving rise to this litigation are these: The constitution of Maine, as amended in 1919, provides that the credit of the State may be loaned and bonds issued "for the purposes of building and maintaining public wharves and for the establishment of adequate port facilities in the State of Maine." By Chapter 84, as amended by Chapter 123 of the Special Laws of 1919, "The Port of Portland" is established and the offices of "Directors of the Port of Portland" created. These

directors are empowered to secure land and rights and to lay out and build "such piers with buildings and appurtenances, docks, highways, waterways, railroad connections, storage yards and public warehouses as in the opinion of the directors may be desirable."

By Section 8 of said act the directors are empowered to lease said piers, etc., for a term not exceeding five years, and with the approval of the Governor and Council for a term not exceeding twenty years, the income to be paid into the treasury of the State of Maine.

By Section 15 of the same act the State Treasurer is authorized to issue bonds under the direction of the Governor and Council and with their approval to disburse the proceeds for the purpose of carrying out the provisions of the act. Chapter 123, however, contains this condition: "But no money shall be available from said bonds or the proceeds thereof until a site or location for said pier shall have been provided by the city of Portland or the city of South Portland, or both, or by a district created for such purpose." (Sec. 6.)

At the same session of the Legislature by special act, being Chapter 117, "The Portland State Pier Site District" was incorporated, comprising the territory and people within the limits of the City of Portland and the City of South Portland.

The district thus incorporated was authorized to issue its bonds in a sum not exceeding four hundred thousand dollars and with funds thereby obtained to acquire a site for the proposed State piers, and having so acquired it to "convey, transfer and set over the land so acquired to the Directors of the Port of Portland who shall hold it as the property of the State of Maine." Chap. 117, Sec. 6.

By the terms of the act it did not become effective until "accepted by the city council of each of said cities at special meetings thereof duly called and held for the purpose." Chap. 117, Sec. 12.

The act was accepted by the councils of both cities. Thereupon and for the purposes of the act the proper officers of the district voted to issue bonds of the district to the amount of $325,000 and to issue warrants to the assessors of each of said cities requiring them to assess sums necessary for interest and sinking fund.

Claiming said votes to be illegal and invalid, the petitioners, fourteen citizens, residents and taxable inhabitants of South Portland, have brought this proceeding which is a bill in equity praying that the district and its officers be enjoined from carrying the same into effect.

The objections raised to the legality of the votes are four-fold:

(1) That the vote of the city council of South Portland accepting the act incorporating the district is illegal and ineffectual.

(2) That the issuance of the bonds provided for in the vote will increase the indebtedness of the City of South Portland so that it will exceed the debt limit of five per cent prescribed by the constitution.

(3) That the project involves unequal taxation, contrary to the provisions of the constitution.

(4) That the proposed piers are not to be "public wharves," within the meaning of the constitutional amendment of 1919, and that the purpose is not such a public purpose as will warrant and justify taxation.

ACCEPTANCE BY THE CITY COUNCIL OF SOUTH PORTLAND.

The charter of the City of South Portland provides that "every such ordinance, order, resolution or vote (involving the appropriation or expenditure of money to an amount which may exceed three hundred dollars) shall be read twice with an interval of at least three days between the two readings before being finally passed, and the vote upon its final passage shall be taken by roll-call." Special act of 1895, Chapter 242.

The act creating the Portland Pier Site District was accepted by the South Portland city council unanimously by roll-call at a special meeting called for the purpose, but it was not read twice with an interval of three days. The petitioners contend that this omission is fatal to its validity.

A subordinate body created by the Legislature cannot dispense with or waive procedure established by legislative act. 28 Cyc., 332. Nor can it be presumed that the Legislature by the granting of the Pier Site Charter intended to repeal or alter the City Charter. 36 Cyc., 1094; *Starbird* v. *Brown*, 84 Maine, 238; *State* v. *Donovan*, 89 Maine. 452. If the vote accepting the Pier Site District charter were a vote involving "the appropriation or expenditure of money" within the purview of the city charter it would be ineffectual because lacking conformity to procedure ordained and made imperative by the Legislature.

But it is clear that the above quoted language of the city charter has reference to the appropriation of the *city's* money and not to that

of an independent municipal corporation, though including in part the same territory. The vote of acceptance conforms to all legislative requirements.

PRINCIPLES OF INTERPRETATION.

The other objections are based upon constitutional grounds. Certain canons of construction are so well established that they need only be referred to without prolonged discussion:—

The wisdom, reasonableness and expediency of statutes and whether they are required by the public welfare are subject to exclusive and final determination by the law making power. As to these matters the courts have no duty and no responsibility. *State* v. *Mayo*, 106 Maine, 68; *Dirken* v. *G. N. Paper Co.*, 110 Maine, 374; *Laughlin* v. *Portland*, 111 Maine, 490.

Legislative power is measured not by grant, but by limitation. It is absolute and all-embracing, except as expressly or by necessary implication limited by the constitution. *Sawyer* v. *Gilmore*, 109 Maine, 169; *Laughlin* v. *Portland*, supra.

The court will pronounce invalid only those "statutes that are clearly and conclusively shown to be in conflict with the organic law." *State* v. *Rogers*, 95 Maine, 98.

"If a statute is susceptible or two interpretations, and one of the interpretations will render the statute unconstitutional, and the other will not, the latter should be adopted." *State* v. *Intoxicating Liquors*, 80 Maine, 62.

FIVE PER CENT DEBT LIMIT.

The 34th amendment to the State Constitution provides that "no city or town (subject to an exception here immaterial) shall hereafter create any debt or liability which single or in the aggregate with previous debts or liabilities shall exceed five per centum of the last regular valuation of the said city or town." The petitioners allege that the debt of South Portland plus its share of the proposed district bond issue will exceed five per cent of the city's valuation. This allegation is disputed. Assuming without determining it to be true, however, the constitution is not clearly shown to be violated.

"Applying well known rules of constitutional construction to the language of amendment 1 (now XXXIV) above quoted it is obvious that it applies only to cities and towns. The language of the amend-

ment is clear, plain and unambiguous. It can apply to cities and towns only and not to any other forms of municipal or quasi municipal bodies." *Kennebec Water District* v. *Waterville,* 96 Maine, 254. The pertinency of this authority is challenged on the ground that the Kennebec charter did not provide for raising money by taxation. It is true that in the contemplation of the act interest and sinking fund were to be provided for by water rates. But in that case, as in the instant case, district bonds were to be issued. Such bonds constitute a debt. Whether or not a debt of the city was the problem solved in the Kennebec case and is the precise question involved in the present case.

This view is supported generally by the authorities. "Where two or more municipal corporations or political bodies are wholly or partly coincident in territory they are nevertheless regarded as separate bodies for the purposes of constitutional debt limitations unless the contrary is expressed in the constitution." Gray on Limitations of Taxing Power, Section 2148; *Wilson* v. *Sanitary District,* 133 Ill., 433,—27 N. E., 203; *Ex-parte Newport,* 141 Kentucky 329,—132 S. W., 580; *Vallely* v. *Park Commissioners,* 16 N. D. 25,—111 N. W., 615; *Hyde* v. *Ewert,* 16 S. D. 133,—91 N. W., 474; *Adams* v. *East River Institute,* 136 N. Y. 52; *Monroe County* v. *Harrell,* 147 Ind., 500,—46 N. E., 124.

UNEQUAL TAXATION.

In Maine taxes upon tangible property must "be apportioned and assessed equally according to the just value thereof." 36th Amendment to the Constitution of Maine. It is obvious that a dollar of district property will bear a much larger share of the tax burden to be caused by the projected public work than a dollar of property outside the district. The petitioners contend that this is unconstitutional because productive of inequality in tax apportionment.

But charging upon a city, town or district enjoying special benefits from a public improvement a percentage of the tax burden caused thereby greater than that borne by the State at large but yet proportionate to such special benefits does not produce, but on the other hand, prevents inequality. When the benefit and burden are reasonably proportionate, the constitutional requirement is satisfied. This view is supported by numerous authorities which we need only cite without quoting.

Walton v. *Greenwood,* 60 Maine, 356; (Town tax for site for county court house)

Sandy River Plantation v. *Lewis & Maxcy,* 109 Maine, 476; (Forestry district tax)

Merrick v. *Inhabitants of Amherst,* 12 Allen, 500; (Local taxation for establishing State agricultural college)

Holt v. *Somerville,* 127 Mass., 412; (Special assessment upon property benefitted by public park)

Hanscom v. *City of Lowell,* 165 Mass., 419; (City authorized to raise money to aid State textile school)

Miller v. *County Commissioners,* Md., 69 Atl., 118; (Tax imposed upon and for the benefit of certain counties and excluding certain other counties)

Maltby v. *Tautges,* Minn., 52 N. W., 858; (Highway district tax)

Arnold v. *Knoxville,* Tenn., 90 S. W., 469; (Improvement districts)

Stewart v. *Road & Bridge District,* Florida, 71 So., 50; (Bridge District)

Borrowdale v. *Comm'rs,* N. M., 163 Pacific, 721; (Road District)

Cook v. *Port of Portland,* 20 Ore., 580; (Local assessment for part expenses of improving port of Portland, Oregon).

The popular conviction underlying the adoption of the constitutional amendment of 1919 is apparent. It was that Maine's advantageous geographical position and natural features if supplemented by adequate wharf and port facilities promise large growth in maritime commerce and that such growth will enhance the prosperity and promote the welfare of the State and its people. If this conviction is well founded it requires no argument to demonstrate that the port of Portland will enjoy a much greater share of such growth and prosperity than will the State at large.

It is not clear and manifest that the act imposes upon the district a tax burden which is disproportionate to the special benefits that will accrue to it.

ARE THE PROPOSED WHARVES TO BE PUBLIC?

Under the constitution taxes may be imposed for public uses only. "Taxation by the very meaning of the term implies the raising of money for public purposes and excludes the raising if for private objects and purposes." *Allen* v. *Jay,* 60 Maine, 127; *Perkins* v.

Milford, 59 Maine, 318; *State* v. *Telegraph Co.,* 73 Maine, 526; *Laughlin* v. *Portland,* 111 Maine, 490.

The constitutional amendment of 1919 in authorizing the use of State funds for wharves, limits such use to the building and maintenance of "public wharves."

As thus implied and as determined by judicial authorities, wharves though commonly public may be private.

"Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use; or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a reasonable compensation as wharfage; and whether they are the one of the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure." *Dutton* v. *Strong,* 1 Black U. S., 33; *Weems S. B. Co.* v. *Peoples S. B. Co.,* U. S. S. Co., 53 L. Ed., 1024; 30 A. & E. Ency., 472; 40 Cyc., 901.

What test must be applied to determine the public character of a wharf?

Not the meeting or displacing of tidal or public waters. *Wetmore* v. *Gas Light Co.,* 42 N. Y., 384. Not merely ownership by, nor leasing for the benefit of the State.

A wharf that is a public utility under R. S., Chap. 55, Sec. 15 is a public wharf, but Chapter 55 makes compensation for use an essential element. A wharf is likewise public if it is open to free public use.

Moreover a wharf which supplies the connecting link between a highway and a line of common carriers by water is entitled to be classed as public, notwithstanding that it may be devoted exclusively to the business of such carriers.

But as determined by numerous authorities, some of which are above cited, a wharf may be private. The owner or lessee may "have the right to the exclusive enjoyment of the structure and to exclude all other persons from its use." (*Dutton* v. *Strong,* supra).

The Directors of the Port of Portland are by Sec. 8 of Chap. 84 empowered to lease wharves without limitation as to purpose; the

statute by its broad unqualified terms authorizes or attempts to authorize leases to private persons for their own exclusive business or other purposes.

If the statute were susceptible of two interpretations we should adopt the interpretation which sustains rather than that which defeats it.

If the statute were ambiguous we might read into it a legislative intent not clearly found within its four corners.

But the language of Section 8 of the act is plain, clear, unambiguous and unqualified. It authorizes the directors to lease "under such covenants and conditions as they may prescribe." It purports to authorize leasing for private as well as public uses.

In so far as Section 8 authorizes leasing for private purposes it contravenes the constitution. This however does not render the entire act void.

It cannot be questioned that the primary intent of Section 8 is to authorize leasing for public purposes. A reading of the entire act makes this intention manifest.

Where an unconstitutional and invalid portion of a statute is separable from and independent of a part which is valid the former may be rejected and the latter may stand.

Packard v. *Lewiston*, 55 Maine, 456; *Cole* v. *County Commissioners*, 78 Maine, 538; *Vial* v. *Penniman*, U. S., 26 L. Ed., 602; *Supervisors* v. *Stanley*, U. S., 26 L. Ed., 1044.

This principle plainly and clearly applies to the facts in this case. The directors cannot lease wharves for private uses. They have power to lease for public purposes, and in furtherance of such powers bonds may be issued and taxes assessed and collected.

The bill in equity therefore should not be sustained.

Bill dismissed.

GEORGE B. MERRILL

vs.

INHABITANTS OF THE TOWN OF HARPSWELL

Cumberland. Opinion March 11, 1921.

The right to construct and maintain a bridge with a draw, suited to the purposes of navigation, implies the right on the part of the municipal officers to employ all the necessary and proper means for the execution of that purpose, including plans and specifications for the construction of the proposed bridge.

This is an action of assumpsit in which the plaintiff seeks to recover of the town of Harpswell, the sum of $1,287.96 for services performed in drawing plans and specifications for the construction of a bridge from Bailey's Island to Orr's Island, in the town of Harpswell.

The court found as a matter of law, that the selectmen of the town of Harpswell were without authority in directing the plaintiff to prepare the plans and specifications, which he did prepare and that, therefore, the town could not be held for payment.

Judgment was rendered for the defendant to which exceptions were taken.

Held:

That the selectmen were authorized to employ the plaintiff for furnishing plans and specifications for the construction of the proposed bridge.

On exceptions. This is an action of assumpsit to recover for services rendered in preparing plans and specifications for the construction of a proposed bridge between Orr's Island and Bailey's Island in the town of Harpswell. Defendant claimed that the municipal officers were not legally authorized to contract with the plaintiff to furnish or render the services sued for and that the town was not liable. The case was tried by the presiding Justice without the intervention of a jury, subject to exceptions in matters of law, who found for the defendant as a matter of law, and the plaintiff excepted. Exceptions sustained.

Case stated in the opinion.

E. H. Wilson, for plaintiff.

Emery G. Wilson, for defendant.

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

SPEAR, J. This case comes up on the following exceptions. This is an action of assumpsit, commenced November 15, 1919, entered at the January term, 1920, and tried by the Justice, without the intervention of a jury, at the May term, 1920, subject to exceptions in matters of law.

The Ad damnum is Two Thousand Dollars ($2000.00)

The plea is the general issue.

The Justice found as follows:

"It was enacted in Chapter 356 of the Private and Special Laws of 1883 that—

'Authority is hereby given to lay out, construct and maintain a bridge, with a draw, suited to the purposes of navigation, across and over the tide-waters separating Orr's Island from Bailey's Island in the Town of Harpswell.'

On February 23, 1912, the selectmen of Harpswell made return of the laying out of a way connecting the southerly extremity of an existing way on Orr's Island with the northerly extremity of an existing way on Bailey's Island. This return makes no mention of a bridge, a draw, or of any contemplated adaptation to the requirements of navigation.

At the annual town meeting of 1912 in Harpswell it was voted—

'To accept the road and way for a bridge as laid out by the Selectmen from Orr's Island to Bailey's Island.'

At a special town meeting in Harpswell, held on April 2, 1912, acting upon an article in the warrant of the following tenor—

'To see if the Town will vote to construct a bridge between Orr's and Bailey's Island on the way as laid out by the Selectmen, and accepted by the Town at the annual meeting March 4, 1912, determine kind and cost of same and manner in which the money will be provided to build the bridge'—. . . . it was voted . . . .

'To accept proposition as per motion of C. S. Thomas read at the meeting, being the same as drawn up by Mr. Gulliver and as follows: VOTED that the Town proceed to construct a bridge with necessary approaches and abutments thereto, between Orr's Island and Bailey's Island on the town way as laid out by the Selectmen and accepted by the Town March 4th, 1912, and that the Selectmen be and they

hereby are authorized and directed to procure plans, specifications and estimates for the same, to advertise for bids and to enter into contract therefor in the name and in behalf of the town with authority to reject any or all bids; and the Selectmen are hereby constituted a committee with the power to build the bridge and its approaches as herein provided.'

The record of this vote contains further provisions relating to the method of financing the proposition, but which are immaterial to the determination of the matters in issue.

Subsequently, at the request of the selectmen of Harpswell, the plaintiff prepared and submitted plans and specifications for a bridge from Orr's Island to Bailey's Island, which plans and specifications were used by the selectmen in connection with the advertising for bids for construction, which bids were opened on December 13, 1913, in the presence of the entire Board of Selectmen and the plaintiff.

The case does not show that any building contract was ever made, or that any bridge has ever been constructed.

It is a well settled rule of law that whoever contracts with persons assuming to act in behalf of a municipality, does so at his peril and is bound to ascertain the authority of such persons to act for and bind the municipality which they assume to represent.

In the present case I hold, as a matter or law, that inasmuch as the contemplated bridge was to cross tide waters, authority for its construction must come from the Legislature, and that in exercising the authority granted, the town must follow strictly the legislative provisions conferring it.

In the case at bar, authority was granted to 'lay out, construct and maintain a bridge, with a draw, suited to the purposes of navigation,' but the first step taken in pursuance of the legislative authority, as the case shows, was the laying out of a 'way,' and, if it were to be granted that the laying out of a way should be held to be equivalent in law to the laying out of a bridge, it nowhere appears that such a bridge was laid out as was authorized by the Legislature, namely, 'A bridge, with a draw, suited to the purposes of navigation.' Indeed, the first appearance of this essential element in the proceedings is disclosed in the testimony of the plaintiff, who says that he provided for a draw in the plans which he drew.

I hold, therefore, as a matter or law, that the selectmen were acting without authority in directing the plaintiff to prepare the plans and

specifications which he undoubtedly did prepare, and that, therefore, the town cannot be held for payment.

I, therefore, find for the defendant.

To WHICH FINDING of law the plaintiff takes exceptions and prays that his exceptions may be allowed. The evidence in the case is made a part of the exceptions."

Upon an inspection of the finding of the Justice, his decision seems to be based upon the following conclusion, that "It nowhere appears that such a bridge was laid out as was authorized by the Legislature, namely, "a bridge with a draw, suited to the purposes of navigation."

We recognize the well settled rule of law invoked by the Justice as the basis of his decision, that whoever contracts with a municipality or with the selectmen or agents of a municipality, does so at his peril and is bound to ascertain the authority upon which such municipality, its selectmen or agent assume to act.

We further note with approval, his finding that in as much as the contemplated bridge was to cross tide waters, authority for its construction must come from the Legislature and that in exercising the authority granted, the town must follow strictly the legislative provisions conferring it. As we understand the theory of the finding, it was because the town did not follow strictly the legislative provisions, that it was without authority to bind the inhabitants of the town, in procuring a contract for the execution of the plans and specifications for the building of the bridge.

We are inclined to the opinion that the interpretation of the authority of the selectmen under the wording of the statute may be too narrow. The statute conferring authority upon the town to build the bridge may be divided into two parts, first, authority to lay out the bridge; second, authority to construct and maintain a bridge with a draw, suited to the purposes of navigation. Although the language employed was unfortunate, yet the meaning is clear when read in connection with the purpose of the act, as may be done under *Moore* v. *Maine Central R. R.*, 106 Maine, 297.

A way includes a bridge. R. S., Chap. 1, Sec. 6, Paragraph 6. Hence, to lay out a bridge, is to lay out the way for the location of the bridge. *Inhabitants of Wells* v. *County Commissioner*, 79 Maine, 522. From the evidence, it appears that the selectmen laid out a way connecting Orr's Island with Bailey's Island which, read in connection with the act of the Legislature, and the purpose for which the way

was laid out, must be construed to include the contemplated bridge over the tide water to connect these two land points. In fact, the laying out of the way for any other purpose than the building of a bridge would be nugatory, as legislation would be useless and unnecessary for any other purpose.

Furthermore, it is shown by the action of the town, that they understood this to be the purpose and acted upon it at the following March meeting, in voting "to accept the road and way for a bridge as laid out by the Selectmen from Orr's Island to Bailey's Island." The town required no act of the Legislature to enable them to locate the way over the land, hence, establishing a way across the water for the location of the bridge, was the first necessary step to be taken, in carrying into effect the provision of the statute for the construction of the bridge.

Accordingly, we are of the opinion that the language of the statute. "Authority is hereby given to lay out a bridge," contemplated merely the location of the way, over which the bridge was to be built and that, when the way was located, this clause of the statute was fulfilled and exhausted.

Having done this, then the next step in accomplishing the purpose of the statute was to proceed to construct a bridge with a draw, suited to the purposes of navigation.

Under the language of the statute, the right, "to construct a bridge with a draw," is subsequent and independent of laying out the way.

The town, however, in the plainest language is authorized to construct a bridge and draw with the limitation that "it must be suited to the purposes of navigation." This limitation, in view of the Federal Law, is a very important one and requires that the Federal Law shall be read into our statute, in order to give the limitation its legal effect.

The Federal Law retains complete supervision over navigable waters and all structures thereon, with the proviso, "That such structures may be built under authority of the Legislature of a State, across rivers and other water ways, the navigable portions of which lie wholly within limits of a single State, provided the locations and plans thereof, are submitted to, and approved by the Chief Engineer and by the Secretary of War, before construction is commenced" and provided further, "that when plans for any bridge or other structure have been approved, it shall not be lawful to deviate from such plans

without approval of the Chief of Engineers and the Secretary of War." United States Compiled Statutes, 1916, Annotated Vol. 10, Page 12,256, Section 9971.

In view of this Federal statute, it must be concluded that out State Legislature granted permission for the construction of the bridge in question, with a full knowledge of the Federal statute and in contemplation of its application, expressed in the limitation that it must "be suited to the purposes of navigation."

Accordingly, while the town was authorized to lay out a way and construct a bridge thereon, by authority of the State Legislature, yet such authority was limited by the proviso above referred to, and the proviso clearly requires, as a condition precedent to the building of a bridge or any other structure over tide waters, the presentation to, and approval of the location and plans, thereof, by the Chief of Engineers and the Secretary of War.

In other words, the State statute is permitted to authorize the construction of a bridge over tide waters within the State by a Federal statute, upon a proviso. Under the proviso, the State statute may permit such construction. The proviso then takes effect and requires the plans and specifications, provided in the Federal statute.

The right to construct and maintain a bridge with a draw, suited to the purposes of navigation, implies the authority on the part of the municipal officers to employ all the necessary and proper means for the execution of that right, hence to obtain plans and specifications.

Accordingly, in view of the interpretation of the State statute, permitting the building of structures over tide waters, in subordination to the Federal statute, we are of the opinion that it was not necessary for the selectmen, in laying out the way for the bridge in question, and preparing for the construction thereof, to specify that they laid out a way for a bridge, "with a draw, suited to the purposes of navigation," as such specification, in view of the Federal statute, would merely become surplusage.

Our conclusion, therefore, is that under Chapter 356 of the Private and Special Laws of 1883, the selectmen of Harpswell were authorized to employ the plaintiff for furnishing plans and specifications for the construction of the proposed bridge.

Exceptions sustained.

LIZZIE DULAC, Petitioner

vs.

DUMBARTON WOOLEN MILLS

AND

AETNA LIFE INSURANCE COMPANY, Appellant.

Penobscot. Opinion March 11, 1921,

An employee after finishing her work and in leaving the building to return to her home, there being two exits from the floor where she worked to the street, and a stairway leading to the basement from which there was an exit by a back way to her home, takes a freight elevator not used by employees for the purpose of exit with knowledge of employer, to reach which it was necessary to go through a door into another room and pass through an alley way, the elevator being in an extension built onto the main building, and is injured, such injury is not the result of an accident "arising out of and in the course of his employment." The accident must be due to a risk which the employee is exposed "while employed and because employed by employer," and must occur while employee is doing the duty which he is employed to perform, all of which the burden is on the petitioner to show.

This case comes up on an appeal from the finding of the chairman of the Industrial Commission in favor of the petitioner.

The essential facts as found by him are as follows:—

The only question raised in the case is whether or not the injury to the petitioner is due to an accident arising out of and in the course of her employment.

The facts brought out in the evidence which was introduced at the hearing were briefly as follows:—

Lizzie Dulac was, on the 28th day of August, 1919, an employee of the Dumbarton Mills at Dexter, Maine. Her work was in what was known as the card room of the mill. On the day in question she had finished her work and was leaving the building to return to her home. There were two exits from the floor of the mill where the card room was located, which went out to the street level. There was also a stairway leading from the card room to the basement of the mill, one floor below the card room. By going to the basement floor Mrs. Dulac could go to her home a back way which was shorter than by going out on the street level from the card room floor. Besides the

stairway leading from the card room floor to the basement floor, there was an elevator used to carry freight between the basement and the other two floors of the mill. On the particular night in question, Mrs. Dulac, instead of going down the stairway to the basement, took the elevator. The injury occurred in the basement as she was getting out of the elevator.

The elevator was installed and used for the purpose of carrying freight to the mill. The evidence shows that it was used some by individual workman in going up and down, and by the plaintiff, as she says a maximum of eighteen times during her eight years' employment.

There is no evidence that the respondent or any of its agents knew of the plaintiff's personal use of the elevator. On the day of the injury, she was alone on the elevator and attempting to operate it herself, and was injured as the testimony unquestionably shows by her own ignorance of how to operate. But the manner of the accident is not material. Her act is not barred by Section 8.

Under these admitted facts and circumstances was she injured in an accident 'arising out of and in the course of her employment?'

Held:

1. That the relationship of the plaintiff and defendant are contractual. Their common law relations of master and servant are allowed to be changed by the consent of the parties. By formal written notice, they are authorized, but not compelled, to modify their rights and their remedy as prescribed by the common law, R. S., Chap. 50, Secs. 6 and 7.
2. That among other things, the employee agrees that his right to recover shall occur from an accident 'arising out of or in the course of his employment.'
3. That the burden of proof is on him to establish these facts.
4. That the accident must have been due to a risk to which the employee was exposed 'while employed, and because employed by the defendant.'
5. That an injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform.
6. That the use of the elevator was no part of the work, duty or privilege of the petitioner's nor incidental to her work.
7. That the accident did not occur in the course of the plaintiff's employment.

On appeal. This case went to the Law Court on an appeal from a decision of the chairman of the Industrial Accident Commission in favor of the petitioner. The petitioner for several years had worked in the card room of the Dumbarton Woolen Mills at Dexter, Maine, and on the 28th day of August, 1919, having completed her work for the day, on leaving the mill to return to her home, her work being on the second floor, she took a freight elevator, operating the same herself, from the second, or card room floor, to the basement floor. On

leaving the elevator she was caught between the floor of the elevator and the gate and was injured. The elevator was a freight elevator used to carry freight from floor to floor, and not used to the knowledge of employer as a passenger elevator. There were two exits from the second floor to the street, and a stairway leading from the second floor to the basement floor from which there was an exit by a back way. The only question involved was as to whether the accident resulting in the injury arose out of and in the course of the employment of petitioner. Appeal sustained. Decree reversed. Petition dismissed.

The case is fully stated in the opinion.

W. B. Pierce, for petitioner.

Andrews & Nelson, and W. T. Gardiner, for respondents.

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

SPEAR, J. This case comes up on appeal from the finding of the chairman of the Industrial Commission in favor of the petitioner.

The essential facts as found by him are as follows:—

"The only question raised in the case is whether or not the injury to the petitioner is due to an accident arising out of and in the course of her employment."

The facts brought out in the evidence which was introduced at the hearing were briefly as follows:

Lizzie Dulac was, on the 28th day of August, 1919, an employee of the Dumbarton Woolen Mills at Dexter, Maine. Her work was in what was known as the card room of the Mill. On the day in question she had finished her work and was leaving the building to return to her home. There were two exits from the floor of the Mill where the card room was located, which went out to the street level. There was also a stairway leading from the card room to the basement of the Mill, one floor below the card room. By going to the basement floor Mrs. Dulac could go to her home a back way which was shorter than by going out on the street level from the card room floor. Besides the stairway leading from the card room floor to the basement floor, there was an elevator used to carry freight between the basement and the other two floors of the Mill. On the particular night in question, Mrs. Dulac, instead of going down the stairway to the basement, took the elevator. The injury occurred in the basement as she was

getting out of the elevator. The respondents contend that in using the elevator Mrs. Dulac placed herself outside of the provisions of the Workmen's Compensation Act in that the use of the elevator was forbidden to employees except in handling freight, and further, that no part of Mrs. Dulac's work required the use of the elevator in any way.

The elevator was installed and used for the purpose of carrying freight to the mill, with a landing on the same floor as the card room where the petitioner worked but not in or near that room. To reach the elevator shaft from the card room, it was necessary to go through a door into another room and pass up a short alley-way, into the elevator building which constituted an ell on the mill building. The elevator consisted merely of a platform 7 or 8 feet square with two sides and a beam across. It is too evident for controversy that this crude elevator, situated as it was, was not intended for passenger purposes. Although the evidence shows that it was used some by individual workmen in going up and down, and by the plaintiff, as she says a maximun of eighteen times during her eight year's employment.

There is no evidence that the respondent or any of its agents knew of the plaintiff's personal use of the elevator. On the day of the injury, she was alone on the elevator and attempting to operate it herself, and was injured as the testimony unquestionably shows by her own ignorance of how to operate. But the manner of the accident is not material. Her act is not barred by Section 8.

Under these admitted facts and circumstances was she injured in an accident "arising out of and in the course of her employment?"

(1) What part of her employment did this accident arise out of? Undoubtedly her entrance and departure from the building and premises in coming to her work or going to her house was a part of her employment. But if there were several regular avenues of approach and departure designed for these express purposes, has an employee a right to take a forbidden and hazardous way instead of the safe and regular way and hold the employer liable? While the evidence may warrant the conclusion that this elevator was used occasionally by the employees, in moving between the floors, yet it would be puerile to claim that the plaintiff, who had been in the mill eight years, did not know that this elevator was installed and used for freight and not personal service. She knew there were several avenues of approach and departure, designed for these express purposes.

A mathematical calculation, based upon her own testimony, will show that, if she worked three hundred days a year, she used these regular avenues of entrance and exit, about two thousand four hundred times, while using the elevator, giving the maximum to her own testimony, only eighteen times. The average use of the elevator would be once in 133 days.

Under this analysis of facts, according to the highest claim of the plaintiff, there is no evidence, whatever, that she used the elevator, on the day of the accident, with the impression that it was the regular, usual or accustomed way for her to go from her work room to the street. The evidence is also conclusive that the employer would not have permitted her to have attempted to operate the elevator had he known she had, or intended to do so. He had notices posted against the use of it by any employee.

It was a dangerous machine. He knew it. The law of self preservation was ample incentive to forbid and prevent its use. The conclusion is therefore inevitable both from the undisputed testimony and the overwhelming circumstances, that this elevator was not intended for personal use nor as a means of ingress or egress from the factory. Her own testimony is conclusion upon this point. She says:

Q. Did anybody ever see you riding in that elevator?

A. I don't think so.

Q. And you never did that (used it) when anybody was around to see you, did you?

A. No.

She then says she never saw any one go down on the elevator.

ON DIRECT EXAMINATION

Q. When people got through work at night, have you seen them go down in the elevator?

A. No.

Again on direct

Q. I will ask you again. Did you ever go down on the elevator before.

A. Yes, three or four times she had gone down that way.

Q. When people got through work at night have you seen them go down in the elevator?

A. No.

Q. Do you understand what Mr. Cloutier (interpreter) says?

A. Yes.

There can be no misunderstanding upon the important fact that she never saw any operator use the elevator for exit, and that no one ever saw her use it for that purpose.

In corroboration, if corroboration is needed, Leach, for five years overseer of the card room, in which Mrs. Dulac worked, says:

Q. Did you ever see Mrs. Dulac on the freight elevator?

A. No.

In regard to the use of the elevator, he says:—

Q. Is it in sight all the time?

A. No, you have to go through a little door and into this elevator building, and there is a little passageway of four or five feet, before you get to the elevator.

Q. What direction do you give to your employees in regard to using the elevator?

A. Don't give any because we don't have to use it.

Q. It isn't used by your room?

A. My room doesn't use it, nobody that works there uses it. From a fair analysis and statement of evidence, the following facts are established beyond any question.

1. That the plaintiff was never seen to use the elevator, and never saw any other person use it for the purpose of leaving the building.

2. That she knew of no permission by usage by seeing it used by a single other person for the purpose of exit.

3. That her employer had no knowledge that she ever used it, or intended to use it.

4. That it was a freight conveyor and not intended for use by the employees.

5. That the plaintiff knew this as well as the employer, or any any other operative knew it.

The chairman of the commission however, notwithstanding the above facts, proven by the evidence of the plaintiff herself, and supported by all the other testimony, holds, as we understand his finding, that the only defense to the claim must be found in Section 8, by showing a wilful intent to cause the accident. There was no wilful intent within the meaning of the statute. It requires neither argument nor citation to establish that fact.

Accordingly the only ground upon which the finding of the chairman could be based is that it was the habit of the employees to to use the elevator for the purpose of exit, and that the plaintiff had a right to do as the others did, upon the implied consent of the employer. But it is evident that for one to invoke the use of a particular usage, as this was, as a reason or excuse for changing contractual relations, it must first be shown that such usage is known to the party invoking it. Such knowledge is absolutely negatived by the plaintiff's own testimony.

In *Norton* v. *University,* 106 Maine, 436, it is said; In the first place it was not claimed to be other than a local usage and as such it could have no effect unless known to both parties so that they might be presumed to have contracted with reference to it. If not known to the parties, their rights and liabilities could in no event be affected by it. The burden rests upon the plaintiff to prove such knowledge.

In *Stevens* v. *Reeves,* 9 Pick., 197, it is said with reference to invoking the custom that an operative in a factory should give two weeks' notice of an intention to quit; In order to make this a part of the contract, as the usage supposed is a particular one, and not a general custom, it should here appear that the defendant knew the usage, when he entered upon the work or before he left it. This is required in order to give effect to a particular usage, so as to operate upon a contract.

That the use of the elevator in question, if used by the employees, was a particular one, not a general custom, needs no discussion. *Bodfish* v. *Fox,* 23 Maine, 90. See also *Norton* v. *University of Maine,* 106 Maine, Page 440.

That the relationship of the plaintiff and defendant are contractual needs no discussion. Their common law relations of master and servant are allowed to be changed by the consent of the parties. By formal written notice, they are authorized, but not compelled, to modify their rights and their remedy as prescribed by the common law, R. S., Chap. 50, Secs. 6 and 7.

Among other things the employee agrees that his right to recover shall occur from an accident "arising out of or in the course of his employment." This is clearly a contractual right. The burden of proof is on him to establish these facts. *Westman's Case,* 118 Maine, 135; *Mailman's Case,* 118 Maine, 172.

The plaintiff, in the present case, does not bring her contention within the doctrine of the English case, *McGuire* v. *Gabbott*, 10 N. C. C. A., 356, when a hoist in which the petitioner was ascending, gave way, in which the court say: "But it was habitually used by the foreman in charge of the building and by the men every morning when they came." The usage was known to all and also a means of conveyance employed by the defendant.

Nor do the facts bring it within the rule of the *Von Ette's Case*, 223 Mass., 56, where the men were working, by night, in a compositor's room, poorly ventilated with a temperature at times of one hundred and ten degrees. The plaintiff went out upon an adjoining roof for air, fell from the roof and was killed. In holding that the accident arose out of his employment, the court say, upon the question of usage; "There was ample evidence of a general practice of the men who worked in the composing room to go out upon the roof to get fresh air and cool off on hot nights and that such practice was known to the employer."

The court say upon these facts: "The question whether the injury arose out of and in the cause of his employment is one of some difficulty. A majority of the court are unable to say that the finding of the board was wrong. The accident happened upon the premises of the employer and although, in view of the practice which might have been found to exist under which the men went upon the roof for fresh air, that the act of the deceased, in going there a warm night, was not necessarily outside of his employment, but could have been found to have been incidental thereto."

This case, by a divided court, clearly turns upon the fact of a "practice found to exist" and known to the decedent and employer alike. Hence, their contractual relations were modified in respect of the scope of employment.

But no such relation is found in the case at bar.

In Mailman's case the court define the phrase "arising out of and in the cause of the employment:" "But these elements must appear. The accident must have arisen out of and in the course of the employment. In other words, it must have been due to a risk to which the deceased was exposed while employed, and because employed by the defendant." It will be seen from this definition, which is the best we have yet observed, that there are two distinct elements of proof, namely, risk while employed, and risk

because employed. See *Westman's Case*, 118 Maine, 139. Let us pass the first element "while employed" and apply the test of the second, "because employed." In Westman's case the second element is further defined as follows: "An injury is received in course of the employment when it comes while the workman is doing the duty which he is employed to perform," this is quoted from *McNicol's Case*, 215 Mass., 497.

Can it be said under the evidence and circumstances that the plaintiff was injured "because employed," or while she was doing the duty which she "was employed to perform?"

On the contrary the plaintiff's own evidence proves that the use of the elevator was no part of her work, duty or privilege; that it was not incidental to her work; that she never saw an employer use it, nor does she know that any person ever saw her use it for the purpose of exit; that it had no connection with the room in which she worked, that it was situated entirely apart from it "in a little building built on" and could be reached only by going through "a little door" and "into the elevator building" and through "a little alleyway, four or five feet before you get to the elevator;" that she had no occasion to use the elevator for exit as there was "a good easy flight of stairs" leading from the card room directly to the floor below, and that there were two regular exits from her room directly to the street,—on the street level.

The admitted facts in this case take it out of the realm of uncertainty or even conjecture. They negative any causal relation between the plaintiff's employment and her use of the elevator. As seen, it was neither a part of nor in contemplation of her employment. The reverse, rather is true.

We are therefore, of the opinion that the accident did not occur in the course of the plaintiff's employment.

Under the conceded facts, we are of the opinion, also, that the plaintiff's case cannot be regarded as an injury "arising out of her employment." Westman's case lays down this rule: "The great weight of authority sustains the view that these words "arising out of" mean that there must be some causal connection between the condition under which the employee worked, and the injury which he received. Under this test, if the injury can be seen to have followed as a natural incident to the work, and to have been contemplated, by a reasonable person familiar with the whole situa-

tion as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from his employment."

Again it is said: "It might with safety be said that, in order for the accident to arise out of the employment, the employment must be the proximate cause of the accident."

Recalling, without restating the facts, can it be said that there is any causal connection between the conditions under which the plaintiff worked and her injury? That her injury was the result of the exposure occasioned by the nature of her employment? If so what was it? She had no occasion to use the elevator. She was not authorized to use it, whether she knew it or not, it was against the rule. She had no knowledge of any usage, or implied consent of the employer, as it or its agents never saw or knew her to use it.

Not only was her use of the elevator, not a natural incident to her work to have been contemplated, but an unexpected incident, not reasonably to have been contemplated. She never was known by any person, her employer, its agent or other employee, as her evidence proves, to use it for the purpose of exit. There was no incident or fact upon which the employer could base even a conjecture, much less a "contemplation," that she ever had or ever would use the elevator as she did. Accordingly we are unable to find any evidence whatever that her injury can "fairly be traced to the employment as a contributing, proximate cause."

As much as we regret the misfortune of this case, it is yet a matter of legal interpretation which the court is bound to recognize regardless of the parties involved.

Recognizing the force of the statute that the finding of the chairman shall be final in the absence of fraud, we are nevertheless, of the opinion that, upon the undisputed facts in the case at bar, there was no adequate evidence for the finding and consequently, as a matter of law it should be set aside.

Appeals sustained.
Decree reversed.
Petition dismissed.

STATE *vs.* ELWOOD VERRILL.

Cumberland. Opinion March 11, 1921.

The interpretation of "Whoever knowingly goes away without stopping and making himself known, after causing injury to any person or property," Sec. 38, Chap. 26, R. S., given by the presiding justice in his charge, adopted as the opinion of the court as clear, succinct, and correct.

This case comes up on the following exceptions, the verdict being guilty.

This was a criminal proceeding against the respondent, who was indicted at the January 1920 term of the Superior Court. The indictment is as follows: The grand jurors for said State upon their oath present that Elwood Verrill of Durham, in the County of Androscoggin, on the sixth day of December, A. D. 1919, at Portland in the County of Cumberland, while then and there operating a certain motor vehicle, to wit, an automobile, did go away without stopping and making himself known, after causing injury, as said Elwood Verrill well knew, to the person of one Arthur Abbott.

Said respondent was arraigned and pleaded not guilty. After the judge's charge, the attorney for the respondent, excepted to certain parts of the charge as appears from the record as follows:

"Respondent, by his counsel, objects to the meaning of the word "Cause" as stated by the court in his charge. Also as what is the meaning of "make himself known!"

The charge of the Justice, as well as the evidence in the case, is to be made part of the exceptions.

Held:

That the charge of Justice Sanborn clearly, succinctly and correctly defines the setting and meaning of the words to the interpretation of which the exceptions are taken.

On exceptions. The respondent was indicted at the January 1920 term of the Superior Court in Cumberland County for a violation of Sec. 38, of Chap. 26, of the R. S., in that on the sixth day of December, 1919, at Portland, while operating an automobile, after causing injury to one Arthur Abbott, "did go away without stopping and making himself known." At the same term of court the respondent was found guilty by a jury.

After the charge by the presiding Justice to the jury, counsel for the respondent took exceptions to the interpretations given by the Justice in his charge to the word "cause" and the words "make himself known." Exceptions overruled.

Case stated in the opinion.

C. L. Beedy, County Attorney, and *C. F. Robinson,* for the State.

William H. Looney, for the respondent.

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

SPEAR, J. This case comes up on the following exceptions, the verdict being guilty.

This was a criminal proceeding against the respondent, who was indicted at the January 1920 term of the Superior Court. The indictment is as follows: The grand jurors for said State upon their oath present that Elwood Verrill of Durham, in the County of Androscoggin, on the sixth day of December, A. D., 1919, at Portland in the County of Cumberland, while then and there operating a certain motor vehicle, to wit, an automobile, did go away without stopping and making himself known, after causing injury, as said Elwood Verrill well knew, to the person of one Arthur Abbott.

Said respondent was arraigned on the eighteenth day of the term being January 26th, 1920, and pleaded not guilty. After the trial, on the same day, he was found guilty by the jury.

After the judge's charge, William H. Looney, attorney for the respondent, excepted to certain parts of the charge as appears from the record as follows:

"MR. LOONEY (Passing paper to court); I have excepted to what the court said about the two words in the statute. I did not make it out completely, but you will see what I mean.

"I merely want to protect my client.

"(The paper which Mr. Looney passed to the court contained the following: "Respondent, by his counsel, objects to the meaning the word "cause" as stated by the court in his charge. Also as what is the meaning of "make himself known," W. H. Looney, attorney for respondent.)"

"THE COURT. Mr. Reporter, for the purpose of the record, and to preserve the rights of the respondent, the respondent excepts to that portion of the instructions in which the meaning of the word "cause" was set forth, and also to that part of the instruction in which the meaning of "make himself known" was set forth. That is the exceptions.

The charge of the Judge, as well as the evidence in the case to be made part of the exceptions, and can be referred to by either party.

To all which rulings and instructions, Elwood Verrill excepts and prays that his exceptions may be allowed."

The charge of Justice Sanborn so clearly, succinctly and correctly defines the setting and meaning of the words, to the interpretation of which the exceptions are taken, that we adopt it as the opinion of the court, as follows, to wit:

Sec. 38 of Chap. 26 of the R. S., which section, however, has been amended in other particulars, but so far as the considerations involved in this indictment are concerned it is at present as found in the Revised Statutes, reads in part: "Whoever knowingly goes away without stopping and making himself known, after causing injury to any person or property." Those are the words that set up and define the offense. "Whoever knowingly goes away without stopping and making himself known, after causing injury to any person or property." And in this connection, it is proper to say that this section is a section having to do with motor vehicles and applies only to persons in control of or operating motor vehicles.

So, it is necessary for the State to show you that this respondent, on the occasion to which the testimony relates, first, caused an injury to some person or property, and next, that after causing such injury he knowingly went away without stopping and making himself known.

Now, just a word as to the first element here—causing an injury to some person or property. The word "cause" is a word the meaning of which is well known. It needs no elaboration and no definition. To illustrate what we mean, we may make this inquiry: According to the testimony a boy was injured, received injuries which resulted in his death—what was the cause of the injury? If you had been asked—if you were an acquaintance of the family

and were visiting at some point, some distant point, and the circumstances of this family were brought up, and suggestion was made that this boy had deceased, and you were asked what was the cause of his death—knowing what you know now from the testimony, having heard the testimony, what would you say was the cause of his death? Apply the word in the sense that you would apply it in answer to that inquiry. It does not mean, Gentlemen: Who was legally responsible for the death? This trial is not for the purpose of determining the legal liability, the civil liability, which might follow as a consequence of this injury. The word "cause" in the statute is not used in that sense, but in the ordinary sense of the word. In that ordinary sense of the word, as we ordinarily use the word, what was the cause of the death of this boy?

Having passed upon that question and finding, if you do find from the testimony here and are satisfied beyond a reasonable doubt, that the collision between the automobile and the person of the boy, the automobile being operated by this respondent, was the cause of the injury—if you so find—then pass to the question of what was the conduct of this respondent, and say whether or not the State has shown you by its testimony, and you can find beyond a reasonable doubt, that he went away without stopping and making himself known.

Those acts are not in the alternative—stopping or making himself known; he must have done both. He must have stopped and made himself known.

In the light of the testimony here in regard to the matter of stoping, perhaps instructions are unnecessary.

What was it necessary for him to do in order to make himself known? Here, again, you have a common ordinary expression, with which you are familiar. It involves no unusual words. It involves no terms with which you are unfamiliar. "To make one's self known" is to "disclose one's identity," to show or make known to some person or persons in the vicinity who one is, what his name is, and where he may be found. You are to say on the testimony here whether this respondent did in that sense make himself known.

We have a statute which requires all automobiles to be registered and all automobiles to have a registry number, and there

are laws requiring number-plates to be carried, but it would not be a compliance with this statute here, which requires the person, the operator, to make himself known, if indeed he were to have furnished some person with the number of his car; and that for the reason that the operator may not be the owner of the car, and that may not be sufficient for the purpose of ascertaining who was the person who may be wanted. So, then, it would not be a sufficient compliance with this law to furnish the number. The statute requires the person to make himself known—not to furnish information from which the owner of the automobile may be known.

This must be done knowingly. That means this: It sometimes happens that automobiles, in passing a point, even when they are not driven at an unreasonable rate of speed, may cause some injury, and the operator not be aware of it—have no knowledge or intimation that he has caused injury. If such be the case, and he goes away without stopping and making himself known, he is not violating this statute. He must be aware that there has been harm done; it must be present in his mind that there has been an injury, and then, with that in his mind, he must deliberately go away without making himself known.

Now, you are to say on the testimony which you have heard whether or not the State has satisfied you beyond a reasonable doubt that all these things were done. If any one element is missing, it is your duty to acquit. If they are all made out, and you are satisfied of the truth of all of them beyond a reasonable doubt, it is your duty to convict, and that notwithstanding your sympathy for the unfortunate situation of the young man. Nor are you to be moved to a conviction by your sympathy for the family of the unfortunate victim of this accident. We are to do our work here in the light of what we find the facts to be.

Exceptions overruled.

UNION SAFE DEPOSIT AND TRUST COMPANY, Trustees, In Equity.

vs.

FRANCES J. BENNETT, et als.

Cumberland. Opinion March 11, 1921.

Construction of wills. Trust estate. The principles enunciated in, Union Safe Deposit and Trust Company vs. Frank W. Dudley et als., 104 Maine, 297, affirmed as rules of interpretation in the distribution of estates.

The will of Llewellyn Scott Wyman was construed by this court in an opinion rendered August 6, 1908, entitled "*Union Safe Deposit and Trust Company* vs. *Frank W. Dudley,* et als," and reported in 104 Maine, page 297, and it was therein determined to whom and in what proportions the income of the trust fund provided for in the fourth item of the will was payable, and the court therein determined "that from and after Augustus' " death (meaning the death of Augustus Palmer Dudley) and until some further change in the beneficiaries results, the net income of the said trust fund is to be paid, 17-36 to Frank Wyman Dudley, 17-36 to Abbie Malcolm, 1-36 to the issue of Edwin R. Dudley by right of representation, and 1-36 to the issue of Augustus Palmer Dudley by right of representation.

Since the rendering of this opinion, Abbie Malcolm and Frank Wyman Dudley have both deceased. Frank died without issue.

Held:

That the principles enunciated in the opinion in the 104 Maine are the rules of interpretation to be applied to the distribution of the estate of Frank Wyman Dudley under Paragraph 5, item 4, of the will.

In equity. On report. Bill in equity to determine in what proportions the income of a trust estate created under the fourth item of the will of Llewellyn Scott Wyman, allowed, June 5, 1905, in the Probate Court for Cumberland County, in Paragraphs 3, 4, 5, and 6, shall be paid to the issue of the beneficiaries, all of whom now deceased, named in said paragraphs. The cause was heard on bill and answers on the 2nd day of April, 1920, and by agreement of the parties, reported to the Law Court. Bill sustained with costs. Decree in accordance with the opinion.

Case stated in the opinion.

Seth L. and Sydney B. Larrabee, for complainant.

Noble, Davis & Stone, for Frances J. Bennett, defendant.

Albert D. Jones, for Archibald W. Dudley, and Una Gladys Dudley, defendants.

Sturgis & Chaplin, for Grace D. Wood and Janey D. Tainter, defendants.

Aron L. Squires, for Sarah P. Barnes, Thomas J. J. Malcolm and Archibald W. Malcolm, defendants.

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

SPEAR, J. The will of Llewellyn Scott Wyman was construed by this court in an opinion rendered August 6, 1908, entitled "*Union Safe Deposit and Trust Company* vs. *Frank W. Dudley,* et als," and reported in 104 Maine, Page 297, and it was therein determined to whom and in what proportions the income of the trust fund provided for in the fourth item of the will was payable, and the court therein determined "that from and after Augustus'" death (meaning the death of Augustus Palmer Dudley) and until some further change in the beneficiaries results, the net income of the said trust fund is to be paid, 17-36 to Frank Wyman Dudley, 17-36 to Abbie Malcolm, 1-36 to the issue of Edwin R. Dudley by right of representation, and 1-36 to the issue of Augustus Palmer Dudley by right of representation."

Since the rendering of this opinion, Abbie Malcolm and Frank Wyman Dudley have both deceased, the former on January 5, 1910, and the latter on July 15, 1917, and the parties now interested in the distribution of the income of the trust fund are as follows: Janey D. Tainter and Grace D. Wood, issue of Augustus P. Dudley; Archie W. Dudley and Una Gladys Dudley, issue of Edwin R. Dudley; Frances J. Bennett, Sarah P. Barnes, T. J. J. Malcolm and Archibald W. Malcolm, issue of Abbie Malcolm; all being issue of the body of Frances J. Dudley, who was the mother of Augustus, Edwin, Abbie and Frank. Frank Wyman Dudley died without issue.

The question now to be determined is in what proportions the income of the trust fund provided for in the fourth item of the will is now payable to these several parties.

In the decision above referred to it is specifically held:

1. That the true interpretation of the words "the lawful issue, if any, of the body," as used in this will means lineal descendants taking by right of representation.

2. That the language of the will gives Augustus (and if Augustus, all of the others) a vested interest in the net income of the trust fund.

3. That it was the intention of the testator to dispose of the entire income of the trust fund for the whole period of the trust.

4. That the gift of the share of the income to a life beneficiary was absolute, the words, "quarterly during his natural life," being a direction as to manner and time of payment only.

5. That Augustus acquired "the additional one-twelfth at the death of his mother under the express provision of the will, except for which he would not have been entitled to it. The language of Paragraph 4 is broad enough to include that one-twelfth so acquired and should be so construed."

The above five principles extracted from the opinion in 104 Maine are the rules of interpretation which were applied to the distribution of the estate of Augustus Palmer Dudley under Paragraph 4, item 4, of the will.

It will be further seen by an examination of the opinion that the rule of interpretation applied to Paragraph 4, also, applies to the other three paragraphs where it is said "like provisions, mutatis mutandis, are made for the disposal of the shares of Frank Wyman Dudley and Abbie Malcolm in the event of their death."

The court saying this after considering the respective shares of Frances and Augustus, previously deceased. Accordingly the same rule of interpretation applies alike to Paragraphs 3, 4, 5, and 6 of the will.

It will now be observed that in each of the four paragraphs of the will, is found an alternative, to meet the contingency of the decease of all of the original beneficiaries. It is evident that this could take effect only in the paragraph in which the survivor of the four original beneficiaries is specifically named.

As Frank Wyman Dudley was such survivor, the clause of Paragraph 5, relating to the contingency was the only one to take effect, and became operative for the first and only time upon his death. Paragraphs 3, 4, 5 and 6 are necessarily in the alternative and

Frank, dying last, is the sole survivor of the four original beneficiaries and the contingency takes effect. Paragraph 5, thereby comes immediately effective and operates upon the share vested in Frank at the time of his decease, which included the three previous accretions thereto received through the previous deaths of Frances, Augustus and Abbie.

Under the opinion in 104 Maine, "like provisions, mutatis mutandis," are made for the disposal of the shares of Frank Wyman Dudley and Abbie Malcolm in the event of their death, the court saying this after previously considering the respective shares of Frances and Augustus.

Accordingly, the additional interests and accretions in the income of the trust fund received by Abbie after the death of Augustus and by Frank after the death of Augustus and Abbie, vested in them respectively and became part of their shares under the will, never to be divested, in the same manner as the additional "one twelfth" interest, construed to belong to Augustus, on the death of his mother, Frances, vested in Augustus and became a part of his share of said income.

We think that the above interpretation of Paragraph 5, relating to the estate of Frank Wyman Dudley is in accordance with the rules of interpretation laid down in 104 Maine and also carries out the intention of the original testator.

Under the above rules of interpretation, the principles applied to the shares of the various beneficiaries as changes in these beneficiaries have taken place, bring about the following mathematical result, which we have adopted from the brief of Sturgis and Chaplin, which is as follows:

Commencing with the shares of Frank Wyman Dudley and Abbie Malcolm, the issue of Edwin R. Dudley and the issue of Augustus Palmer Dudley as determined by the court in the opinion aforesaid, we are confronted with a change in the beneficiaries, resulting from the death of Abbie Malcolm on January 5th, 1910. Abbie Malcolm's share at the date of her death was 17-36. In accordance with the provisions of Paragraph 6 of item 4 of the will her share passed in equal shares to the survivor or survivors of her mother and brothers and to the lawful issue of the body of those of her mother and brothers who were deceased. Frank Wyman Dudley was the only survivor and, therefore, received

one-third of Abbie Malcolm's 17-36 or 17-108; another one-third or 17-108 passed to the lawful issue of the body of Augustus Palmer Dudley and the other one-third or 17-108 passed to the lawful issue of the body of Frances Jane Dudley. The lawful issue of the body of Frances Jane Dudley consisted of four groups, to wit: Frank Wyman Dudley, the issue of Augustus P. Dudley, the issue of Edwin R. Dudley, and the issue of Abbie Malcolm, and consequently the 17-108 passing from Abbie Malcolm to the issue of the body of Frances Jane Dudley passed as follows: One-fourth or 17-432 to Frank Wyman Dudley, one-fourth or 17-432 to the issue of Augustus P. Dudley, one-fourth or 17-432 to the issue of Edwin R. Dudley, and one-fourth or 17-432 to the issue of Abbie Malcolm, so that from and after the death of Abbie Malcolm, Frank Wyman Dudley was entitled to 289-432, consisting of the 17-36 to which he was entitled prior to the death of Abbie Malcolm, the 17-108 which he received direct from Abbie Malcolm and the 17-432 which he received as one of the four groups of the lawful issue of the body of Frances Jane Dudley; the issue of Augustus P. Dudley were entitled to 97-432, consisting of the 1-36 which they already had prior to the death of Abbie Malcolm, the 17-108 which they received from Abbie Malcolm, as lawful issue of the body of Augustus Palmer Dudley, and the 17-432 which passed to them as one of the four groups of the lawful issue of the body of Frances Jane Dudley; the issue of Edwin R. Dudley were entitled to receive 29-432, consisting of the 1-36 which they already had at the death of Abbie Malcolm and the 17-432 which passed to them from Abbie Malcolm as one of the four groups of lawful issue of the body of Frances Jane Dudley; and the issue of Abbie Malcolm were entitled to receive the 17-432 which passed to them from Abbie Malcolm as one of the four groups of the lawful issue of the body of Frances Jane Dudley.

Upon the death of Frank Wyman Dudley, his share consisting of 289-432, passed under the alternative provision of Paragraph 5 of item 4 of the will as follows: One-third or 289-1296 to the lawful issue of the body of Frances Jane Dudley, one-third or 289-1296 to the lawful issue of the body of Augustus Palmer Dudley, and one-third or 289-1296 to the lawful issue of the body of Abbie Malcolm. The first third or 289-1296 passing to the lawful issue of the body of Frances Jane Dudley passed on as follows: One-

third or 289-3888 to the issue of Augustus P. Dudley, one-third or 289-3888 to the issue of Edwin R. Dudley, and one-third or 289-3888 to the issue of Abbie Malcolm, these being the three remaining groups of the lawful issue of the body of Frances Jane Dudley, so that from and after the death of Frank Wyman Dudley, the issue of Augustus P. Dudley, that is, Janey D. Tainter and Grace D. Wood, were entitled to receive 2029-3888, consisting of the 97-432 which they already had prior to the death of Frank Wyman Dudley, plus the 289-1296 which passed to them direct from Frank Wyman Dudley as lawful issue of the body of Augustus Palmer Dudley and the 289-3888 which passed to them from Frank Wyman Dudley as one of the three remaining groups of the lawful issue of the body of Frances Jane Dudley; the issue of Edwin R. Dudley, that is Archie W. Dudley and Una Gladys Dudley, were entitled to receive 550-3888, consisting of the 29-432 which they already had prior to the death of Frank Wyman Dudley, plus the 289-3888 which passed to them from Frank Wyman Dudley as one of the three remaining groups of the lawful issue of the body of Frances Jane Dudley; and the issue of Abbie Malcolm, that is Frances J. Bennett, Sarah P. Barnes, T. J. J. Malcolm and Archibald W. Malcolm, were entitled to receive 1309-3888, consisting of the 17-432 which they already had prior to the death of Frank Wyman Dudley, plus 289-1296 which passed to them direct from Frank Wyman Dudley as lawful issue of the body of Abbie Malcolm, plus 289-3888 which passed to them from Frank Wyman Dudley as one of the three remaining groups of the lawful issue of the body of Frances Jane Dudley.

Bill sustained with costs.
Reasonable counsel fees to be allowed as determined by the court below.
Decree in accordance with this opinion.

GEORGE MACDONALD.

vs.

POCAHONTAS COAL & FUEL COMPANY, Employer

AND

EMPLOYER'S LIABILITY ASSURANCE CORP., Insurer.

Cumberland. Opinion March 15, 1921.

Appellate Court should be called upon to exercise its power of review in cases of continuance, only when the Chairman of the Industrial Accident Commission has abused his discretion. "Dependency" is predicated upon the question of whether the claimants are wholly or partly dependent on the earnings of the employee for support "at the time of the injury." Claimant may be "wholly" or "partially" dependent upon the earnings of the employee for support at the time of the injury. It must be shown not what part of the earnings were paid to the claimant, but what part was actually used by the claimant for actual and lawful support.

This is an appeal from the decision of the chairman of the Industrial Accident Commission confirmed by a sitting Justice of the Supreme Judicial Court in accordance with the provisions of R. S., Chap. 50, by which decision, compensation at the rate of $9.60 per week for a period of three hundred weeks was awarded the claimant for the death of his minor son, Walter MacDonald.

Walter was injured in the course of his employment on February 24, 1920 and died as a result of his injuries on March 8th following.

The case comes up on the three following acts and rulings of the chairman, by reason of which, the respondents claim they have been aggrieved.

(1) The chairman, upon his own motion, and against objections continued the hearing of the case after the evidence was in and both parties had rested from April 15, 1920 to April 28, 1920. He therefore failed to observe the mandate of the statute and his decision based on both hearings is void.

(2) The chairman failed to note the generally recognized meaning of the word "dependent" in defining the claimant "partial dependent."

(3) The chairman failed to take into consideration, in fixing the amount of compensation, the money paid over to claimant by the deceased for the purchase of and maintenance of an automobile, which claimants admits was not a necessity. He also failed to take into consideration an excessive charge for repairs on claimant's house.

Held:

1. That it should be only upon the conclusion that his discretion has been abused, that the Appellate Court should be called upon to exercise its power of review in case of a continuance.
2. That "dependency" must first be defined and then the degree established in case of partial dependency.
3. That the question of dependency does not rest on the amount the deceased contributed to his father during the past year or two years.
4. That under the language of the statute, except in the cases specifically defined, "dependency" is predicated upon the question of whether the claimants are wholly or partly dependent on the earnings of the employee for support "at the time of the injury."
5. That, "the time of the injury," therefore, becomes an important limitation.
6. That in determining "dependency," it becomes immaterial how much or how little the deceased may have contributed to the claimant in the past. It matters not how dependent the claimant may have been in the past, for the statute upon which his entire right wholly depends requires him to sustain the burden of proof that he was dependent for support "at the time of the injury."
7. That the claimant may be "wholly or partially dependent upon the earnings of the employee for support at the time of the injury."
8. That there is sufficient evidence to establish partial dependency.
9. That, it must be shown, not what part of the earnings were paid to the claimant, but what part was actually used by the claimant for actual and lawful support.
10. That the appeal be sustained and the decree modified by substituting the sum of $2.91 in place of $9.60 as the weekly compensation awarded.

On appeal by defendant from the decision of the chairman of the Industrial Accident Commission, confirmed by a sitting Justice of the Supreme Judicial Court in accordance with the provisions of R. S., Chap. 50, commonly known as the Workmen's Compensation Act.

Appeal sustained and decree modified.

The case is fully stated in the opinion.

Samuel L. Bates, for plaintiff.

Robert Payson, for defendant.

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

SPEAR, J. This is an appeal from the decision of the chairman of the Industrial Accident Commission confirmed by a sitting Justice of the Supreme Judicial Court in accordance with the provisions of R. S., Chap. 50, by which decision, compensation at the rate of $9.60 per week for a period of three hundred weeks was awarded the claimant for the death of his minor son, Walter MacDonald.

Walter was injured in the course of his employment on February 24, 1920 and died as a result of his injuries on March 8th, following.

It may be well in view of the issues raised in this case, to briefly review the method and effect of the procedure in bringing these accident cases before the Law Court.

Section 34, which prescribes the procedure provides, first, that the Justice of the Supreme Judicial Court, sitting as in chancery, shall render a decree in accordance with the finding of the commissioner and notify all parties. This decree is merely perfunctory. The Justice rendering it, passes neither upon the facts nor the law. The effect of the decree and all proceedings in relation to it, are to be the same as though rendered in a suit in equity, duly heard and determined by the court, except there shall be no appeal upon the questions of fact found by the commission or its chairman, nor if the decree is based upon a memorandum of agreement approved by the commission.

Notwithstanding there shall be no appeal upon questions of fact found by the commission or its chairman, and that his decision in the absence of fraud, upon all questions of fact shall be final, our court has, nevertheless held, that the finding of the commission or its chairman upon questions of fact is reviewable upon the appeal to the Law Court, to the extent of ascertaining whether or not there is any palpable evidence upon which the decision can be sustained. *Mailman's Case*, 118 Maine, 172. *Westman's Case*, id., 133.

While the statute was intended by the legislature to submit the final decision of all questions of fact to the commission or its chairman, it is nevertheless obvious, that it equally intended to leave all question of law, raised by the pleadings, subject to the

revision of the Law Court, as it is therein provided, as follows: "Upon any appeal therefrom, the procedure shall be the same as appeals in equity procedure and the Law Court may, after consideration, reverse or modify any decree made by the Justice, based upon an erroneous ruling or finding of law."

The present case comes up on the three following acts and rulings of the chairman, by reason of which, the respondents claim they have been aggrieved.

(1) The chairman, upon his own motion, and against objection, continued the hearing of the case after the evidence was in and both parties had rested from April 15, 1920 to April 28, 1920. He, therefore failed to observe the mandate of the statute and his decision based on both hearings is void.

(2) The chairman failed to note the generally recognized meaning of the word "dependent," in defining the claimant "partially dependent."

(3) The chairman failed to take into consideration, in fixing the amount of compensation, the money paid over to claimant by the deceased for the purchase and maintenance of an automobile, which claimant admits was not a necessity. He also failed to take into consideration an excessive charge for repairs on claimant's house.

The respondent claims that the continuance at the volition of the chairman was in contravention of the command of the statute, requiring "a speedy, efficient and inexpensive" method of procedure.

But we are of the opinion that what constitutes a "speedy, efficient and inexpensive procedure" under the statute, is a question of fact addressed to the discretion of the chairman. It should be only upon the conclusion that his discretion has been abused, that the Appellate Court should be called upon to exercise its power of review.

We discover nothing under the statute, which removes the present case from the application of the rule laid down in *Atkins* v. *Field*, 89 Maine, 281.

The first objection must be overruled.

The second objection regarding the meaning of "dependency" presents a mixed question of law and fact. Under this objection,

we come to the question as to who are to be adjudicated dependents within the meaning of the Workmen's Compensation Act. We find the definition as to certain persons in Section 1, Paragraph 8, to be as follows: "Dependents," shall mean members of the employee's family or next of kin, who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury." Then the paragraph proceeds to specify those classes which shall be presumed to be wholly dependent for support upon a deceased employee. But the claimant's case does not come within either of these specifications.

After defining the status of those who are conclusively presumed to be wholly dependent, the statute then proceeds further and provides for those who may be partially dependent, and how entire or partial dependency may be ascertained: "In all cases, questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may have been at the time of the injury;" and then proceeds to prescribe in what proportions the compensation shall be divided in case of partial dependency.

Excepting the cases enumerated in the statute, where "dependency" is defined as conclusive, a state of dependency must first be found as a condition precedent to holding the respondent liable for the payment of any sum, whatever, for the support of the claimant; for if there is no dependency, there is no support contemplated by the statute. Dependency, having been found, the statute then proceeds to prescribe a method of determining the degree, as the dependency may be total or partial.

This interpretation is confirmed by the language of Section 12, which provides as follows: "If the employee leaves dependents only partially dependent upon his earnings for support at the time of his injury, the employer shall pay such dependents for a period of three hundred weeks from the date of the injury, a weekly compensation equal to the same proportion of the weekly payments herein provided for the benefit of persons wholly dependent as the amount contributed annually by the employee to such partial dependents, bears to the annual earnings of the deceased, at the time of the injury.

From this quotation, it will be seen that the ratio of the computation, herein prescribed, is predicated upon the premise of "the benefit of persons wholly dependent."

Accordingly, "wholly dependent" must first be defined and then the degree established in case of partial dependency. Dependent is defined as follows: Webster's Dictionary:

"Relying on, or subject to something else for support; Not able to exist or sustain itself; not self-sustaining.

Worcester's Dictionary:

"Having dependence; deriving support from; relying upon for means of subsistence."

1. Words & Phrases (New Series) 1299

"For a parent to be 'dependent' on a child for support within Rem. & Bal. Code, Sec. 194, giving dependent parents a right of action for wrongful death of an adult child, it must appear that there is a substantial degree of dependency, need on the part of the parent, and a recognition of it on the part of the child, and an occasional contribution from a son to a parent does not establish a condition of dependency. *Bortle* v. *Northern Pacific Ry. Co.*, 111 Pac., 788, 789, 60 Wash., 552, Ann. Cas., 1912B, 731. But the statute will not be so strictly construed as to say that it means wholly dependent or that the parent must have no means of support or livelihood other than the deceased. Neither a father, 46 years old, who has successfully carried on a teaming business, is practically out of debt, and who could probably find employment, except for a depression in business conditions, nor his wife are 'dependent' within the statute. *Kanton* v. *Kelley*, 118 Pac., 890, 891, 65 Wash., 614 (citing *Bortle* v. *Northern Pac. Ry. Co.*, 111 Pac., 788, 60 Wash., 552, Ann. Cas., 1912B, 731.)"

The chairman of the commission, however, with reference as to what constituted dependency, ruled as follows: "The question of dependency rests on the amount the deceased contributed to his father during the past year or two years, and therefore his own earning capacity would have to do with, and his condition during the past year."

The finding as the evidence shows, was based upon this ruling. To this ruling a specific objection was taken. The ruling was clearly wrong. It ignores the statute with reference to the distinction to be made between the facts necessary to establish the dependency at the time of the injury, in the first instance, and the facts necessary for fixing the amount of compensation to be paid, after a state of dependency has once been found.

Under the language of the statute, except in the cases specifically defined, "dependency" is predicated upon the question of whether the claimants are wholly or partly dependent on the earnings of the employee for support "at the time of the injury." The "time of the injury" therefore, becomes an important limitation.

In determining "dependency," accordingly, it becomes immaterial how much or how little the deceased may have contributed to the claimant in the past. It matters not how dependent the claimant may have been in the past, for the statute upon which his entire right wholly depends requires him to sustain the burden of proof that he was dependent for support "at the time of the injury."

The statute which defines "dependency" repeats in every specification, whether in the case of a wife, husband or child, that it shall be determined in accordance with the fact, as the fact may have been "at the time of the injury," and, hence, admits no interpretation of its clear declaration that "dependency" is based upon the status of the claimant at the time of the injury of the person upon whose death his claim is based.

The second objection must be sustained.

Walter Murphy's Case, 218 Mass., 278, cited by the chairman is in no way in conflict with the above conclusions. Dependency was assumed and the only questions stated by the court is "whether the father is entitled to $4.00 a week minimum compensation, or some fraction thereof." The discussions seems to have turned upon whether the amount which Walter earned, should be turned in to the support of the whole family, upon which the court say: "Whether it is wise to distinguish as to the support of the individual members of a family in a case like this, as the insurer suggests, is for the legislature."

The case, therefore, has no bearing upon the time to which the determination of dependency under our statute, at least, must be referred.

Notwithstanding the objections are sustained, the court is nevertheless authorized under the equity powers of the statute to proceed to a determination of the case upon the evidence found in the report.

There are two distinct questions to be considered.

(1) Was the claimant "wholly or partially dependent upon the earnings of the employee for support at the time of the injury?"

(2) If so, but only if so, what compensation should be awarded under the act as gauged by his contribution to the family support?

Under the first proposition, we think there is sufficient evidence to establish partial dependency. It will serve no purpose to discuss the evidence in support of this conclusion. We, therefore, proceed directly to the question as to what compensation should be awarded under the law and the evidence.

This brings us to the distinction between evidence, admissable to prove "dependency" and evidence to show the proportional amount to which the claimant is entitled, when having been found wholly or partially dependent, "at the time of the injury."

In determining the question of dependency, the status of the claimant in society, and his reasonable needs and expectations, should be considered.

Upon this point, the following quotation from *Gherardi* v. *Connecticut Co.*, 103 Atl., 668, is pertinent and reasonable: "But this much may be said broadly and generally that no one, not belonging to the enumerated classes of persons conclusively presumed to be dependent, is entitled to be regarded as a dependent or partial dependent whose financial resources at his command or within his power to command by the exercise of such efforts on his part as he reasonably ought to exert in view of the existing conditions, are sufficient to sustain himself and family in a manner befitting his class and position in life without being supplemented by the outside assistance which has been received or some measure of it. . . . But as it is no purpose of the law to give aid and comfort to slackers in respect of their obligations as members of society, so it is that a claim of dependency will meet defeat if it appear that the claimant by the expenditure of such efforts as, under all circumstances, ought fairly and reasonably to be expected of him is of ability to be self and family supporting according to the proper measure of such support."

We think this quotation expresses a sound and reasonable ground upon which the claimant, under the language and spirit of our statute, may be regarded as wholly or partially dependent.

The intent of the statute was not to burden the industries of the State, but as said in *Harry Scott's Case*, 117 Maine, Page 444, "To transfer the burdens resulting from industrial accidents, regardless of who may be at fault, from the individual to the industry and finally distribute it upon society as a whole, by compell-

ing the industry, in which the accident occurs, through the employer, to contribute to the support of those who are actually and lawfully dependent upon the deceased for their sustenance during his lifetime."

From this quotation, it will be seen that the purpose of the distribution, authorized by the statute was to aid those "actually and lawfully dependent" and not for the purpose of enabling a claimant to live in a manner inconsistent with his position in life, his method of living and his earnings.

The claimant, according to the spirit and purpose of this statute, must show that he was actually and lawfully dependent or partially dependent, as the case may be, and unable to support his family, without assistance at the time of the injury of the person upon whose earnings he relies.

Applying these rules to the case at bar, we come to the following state of facts, with respect to the use the claimant was making of his money at the time his son was injured: (1) He owned an equity in a house, the exact value of which is not given, but which is in the neighborhood of $800. This is too great to be ignored. (2) During the last year he "painted and papered inside of the house and painted part of the outside. Painted the inside from top to bottom." (3) His daughter took music lessons each week costing $52 per year, exclusive of car fares. (4) Claimant went to town two or three nights a week for amusements. (5) Claimant's wife went to town a couple of nights a week for amusements. (6) Claimant bought an automobile for which he paid $200 down, and was obligated to a payment of $40 per month, and admits that such automobile was not necessary. The buying of this automobile was a part of the arrangement under which deceased turned over his earnings to the family purse.

The plaintiff's property rights and the uses which he was making of his money at the time of his son's death as above expressed, we think are fairly and reasonably deducible from the testimony.

In determining the amount of compensation under the above conclusions of fact, the respondents do not argue the matter of the music lessons and trips to town for amusement and $200 paid on the auto, but are content to leave these matters to the judgment of the court. As suggested by defendant's counsel, these items may be more valuable in their bearing upon the extent of partial dependency than in fixing the amount of compensation.

For the purposes of this case and without intent to make a precedent in any other case, we omit the determination of whether or not music lessons and amusements come within the meaning of the word "support" as used in the statute.

The respondents, however, do strenuously contend that the allowance of $250 for paint and repairs on the claimant's house is excessive and cannot be considered as a contribution to support, upon which the claimant was "actually and lawfully dependent." They contend as follows: "This is 16 2-3% of the value of the house ($1500) as given in the printed case. Such a percentage should cover taxes, repairs and a reasonable return on the investment, and we submit is altogether too much to charge to repairs alone. Take 10% as a fair annual outlay for repairs, and we believe this is liberal, we should have a saving in this item of $100 per year or $1.92 per week.

Ignoring the amount already paid in on the automobile, but considering the $40 per month due thereon, we have a weekly charge of $9.32 for this item, without considering in any way the cost of maintenance of the automobile. Spending money, or $2 per week, has already been deducted."

We are of the opinion that the above contentions are sound and should be sustained.

The sum of these items is $13.15, and therefore of the $18 paid in weekly by the son, the father was actually receiving $4.85 of it towards his support. Upon this basis, this compensation should therefore be 485-1800 of what a person wholly dependent upon the deceased would have received. Such a person would have received $10.80 per week and so the claimant in this case is entitled to receive $2.91 per week instead of $9.60 as allowed.

It will be noted by reading Paragraph 8 of Section 1, that the dependents are those who are "dependent upon the earnings of the employee." Therefore, it must be shown, not what part of the earnings were paid to the claimant, but what part was actually used by the claimant for actual and lawful support.

Appealed sustained.
Decree modified by substituting the sum of $2.91 in place of $9.60 as the weekly compensation awarded.

ALBERT E. WHITE, Petitioner

vs.

EASTERN MANUFACTURING COMPANY, Employer

AND

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurer.

Penobscot. Opinion March 15, 1921.

An employee, who also was a member of a fire department, while on duty for his employer, in leaving the mill where he was at work in answer to a fire alarm, jumped over a flight of five or six steps receiving an injury to his ankle on striking the ground, but such injury was not the result of an accident arising "out of" and "in the course of" his employment for his employer in the mill. When leaping over the steps, which was the proximate cause of the accident, he was in the employment of the fire department, and not in the employment of mill owner. The risk was due to the call of the fire department, and did not arise because the employee was "doing the duty which he was employed to perform."

This comes before the Law Court on an appeal from a decision of the chairman of the Industrial Accident Commission of Maine rendered and filed in the office of said commission October 27, 1920.

STATEMENT OF FACTS.

On August 3, 1920, the claimant was employed as a cleaner by the Eastern Manufacturing Company at their mill in South Brewer, Maine. He was also a member of the Volunteer fire department of South Brewer and received from that organization a salary of sixty-five dollars per year, dependent upon his attendance at fires. It was the custom of the Eastern Manufacturing Company to allow their employees who belonged to the Municipal Fire Department to leave their work for the purpose of attending fires and no deduction was made from their wages for time so lost. At 11 A. M., August 3, 1920, the city fire alarm sounded and the claimant left his work inside his employer's building and started for the fire. He ran down a platform and on reaching a flight of five or six steps at the end, jumped entirely over the steps, receiving a slight injury to his ankle on striking the ground. He

continued to the fire, but was incapacitated for his work at the Eastern Manufacturing Company for the next thirteen days. His petition requested compensation for an injury arising out of and in the course of his employment. Hearing was held on the same and the commissioner awarded compensation for a period of three days commencing ten days after the accident.

At the hearing, there was no conflict of testimony or dispute as to the manner in which the accident occurred and the injury received.

Held:

1. That upon the foregoing statement of facts, and finding of the chairman, the only question presented upon the appeal is whether or not upon the indisputed facts, as a matter of law, the accident arose "out of" and "in the course of" the employment.
2. That there is no doubt, whatever, that when an accident occurs to an employee conducting himself properly upon the premises of the employer, while coming to or departing from his work, such accident falls within the provisions of the statute.
3. That under the terms of the statute and the rules of evidence, it is encumbent upon the claimant for compensation, to assume the burden of proof that his injury occurred:

(a) By accident.

(b) That the accident arose out of the employment.

(c) That the accident arose in the course of the employment.

4. That accidents arising out of the employment are those in which it is possible to trace the injury to the nature of the employee's work or to the risk to which the employer's business exposes the employee.
5. That in order for the accident to "arise out of" the employment, the employment must have been the proximate cause of the accident.
6. That in the present case, the accident of which the petitioner complains did not arise "out of" *of* his employment.
7. That the accident did not "arise out of" his employment because there was no casual connection between the petitioner's work—what he was doing at the time of the accident—and the injury which he received. Not his employment in the mill, but his employment in the fire department in which he was engaged, when leaping over the steps, was the proximate cause of the accident.
8. That an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform.
9. That the risk did not arise in the present case, because the petitioner was "doing the duty which he was employed to perform." The risk was due to the call of the fire department.
10. That accordingly, the risk to which the petitioner was exposed in going to the fire was not at all "because he was employed" by the defendant, but because he was employed by the fire department.

11. That we discover no rule of law or reason, in view of which it can be said that the accident and injury for which the petitioner claims compensation, "arose in the course of his employment."
12. That the Compensation Act should receive a liberal construction so that its beneficient purpose may be reasonably accomplished, but its provisions cannot be justly or legally extended to the degree of making the employer an insurer of his workmen against all misfortunes.

On appeal. This case came before the Law Court on an appeal from a decision of the chairman of the Industrial Accident Commission of this State. On August 3, 1920, the petitioner was employed as a cleaner by the Eastern Manufacturing Company at their mill in South Brewer, Maine. He was also a member of the Volunteer Fire Department of South Brewer and received from that organization a salary of sixty-five dollars a year, dependent upon his attendance at fires. It was the custom of the Eastern Manufacturing Company to allow their employees who belonged to the fire department to leave their work for the purpose of attending fires and no deduction was made from their wages for time so lost. On August 3, 1920, the city fire alarm sounded and the claimant left his work inside his employer's building and started for the fire. He ran down a platform and on reaching a flight of five or six steps at the end, jumped entirely over the steps, receiving an injury to his ankle on striking the ground. The petition requested compensation for an injury arising out of and in the course of his employment. A hearing was held on the petition and the chairman of the commission awarded compensation for a period of three days commencing ten days after the accident, from which decision respondents appealed.

The case is fully stated in the opinion.

Albert E. White, pro se, for plaintiff.

Andrews & Nelson, and W. T. Gardiner, for defendants.

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

SPEAR, J. This case comes before the Law Court on an appeal from a decision of the chairman of the Industrial Accident Commission of Maine rendered and filed in the office of said commission October 27, 1920.

STATEMENT OF FACTS.

On August 3, 1920, the claimant was employed as a cleaner by the Eastern Manufacturing Company at their mill in South Brewer, Maine. He was also a member of the Volunteer Fire Department of South Brewer and received from that organization a salary of sixty-five dollars per year, dependent upon his attendance at fires. It was the custom of the Eastern Manufacturing Company to allow their employees who belonged to the Municipal Fire Department to leave their work for the purpose of attending fires and no deduction was made from their wages for time so lost. At 11 A. M., August 3, 1920, the city fire alarm sounded and the claimant left his work inside his employer's building and started for the fire. He ran down a platform and on reaching a flight of five or six steps at the end, jumped entirely over the steps, receiving a slight injury to his ankle on striking the ground. He continued to the fire, but was incapacitated for his work at the Eastern Manufacturing Company for the next thirteen days. His petition requested compensation for an injury arising out of and in the course of his employment. Hearing was held on the same and the commissioner awarded compensation for a period of three days commencing ten days after the accident.

At the hearing before the chairman of the Industrial Accident Commission, there was no conflict of testimony or dispute as to the manner in which the accident occurred and the injury was received.

The decision of the chairman in favor of the petitioner is based upon the following finding in which it is said: "Universally compensation has been awarded an employee, injured accidentally while going to his work or leaving his work if he be still on the company's premises and conducting himself in a proper manner. In the case at bar, Mr. White was leaving his work, as he had a right to do. Under such circumstances, he was still on the company's premises. Had he been injured similarly on the way out to lunch or at the close of the day, there can be no doubt he would have been entitled to compensation."

Upon the foregoing statement of facts, and finding of the chairman, the only question presented upon the appeal is whether or not upon the undisputed facts, as a matter of law, the accident arose "out of" and "in the course of" the employment.

There is no doubt, whatever, that when an accident occurs to an employee, conducting himself properly, upon the premises of the employer, while coming to or departing from his work, such accident falls within the provisions of the statute, as it is absolutely necessary that an employee must come and go in order to engage in an employment at all. Consequently, an accident happening to him under such conditions both arises "out of" and "in the course of" his employment. But that is not the case at bar.

In *Westman's Case*, 118 Maine, 133, it was decided that under the terms of the statute and the rules of evidence, it was incumbent upon the claimant for compensation, to assume the burden of proof that his injury occurred:

(a) By accident.

(b) That the accident arose out of the employment.

(c) That the accident arose in the course of the employment.

Then the opinion proceeds to differentiate between the meaning of the phrases "arise out of" and "in the course of" as follows: "Even if there be an accident which occurred 'in the course of' the employment, if it did not 'arise out of' the employment, there can be no recovery; and even though there be an accident which 'arose out of' the employment, if it did not arise 'in the course of' the employment, there can be no recovery."

Under the above distinction, an accident must both "arise out of" and be "in the course of" the employment.

The petitioner was employed to do certain work in the mill of the respondents. He was engaged in this work when the fire alarm sounded. At that moment, he ceased to work for the respondents and started on the run from the mill to begin work in pay of the fire department. The work in the fire department was no part of and had no connection with his duties of employment in the mill.

It is perfectly evident that at some point and some moment his employment ended with the mill and commenced with the fire department. By no process of reasoning, can the point of separation between these two employments be fixed, except at the time he left his employment for the respondent and began his employment for the fire company. He could not be working for both at the same time.

The fact that he was upon the premises when the accident occurred can have no bearing upon the question unless the accident arose out of or in the course of his employment.

The interpretation of the phrases "out of" and "in the course of" have been fully reviewed in *Westman's Case,* 118 Maine, 133 and *Mailman's Case,* 118 Maine, 172.

In the former case, the court say: "The great weight of authority sustained the view, that these words, 'arise out of' mean, that there must be some causal connection between the conditions under which the employee worked and the injury he received. . . . It excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment."

"The accidents arising out of the employment are those in which it is possible to trace the injury to the nature of the employee's work or to the risk to which the employer's business exposes the employee."

It might with safety be said that in order for the accident to "arise out of" the employment, the employment must have been the proximate cause of the accident.

In Westman's Case, it is said: "An injury is received 'in the course of' the employment, when it comes while the workman is doing the duty which he is employed to perform."

In *Mailman's Case,* 118 Maine, 172, the court say: "Both of these elements must appear. The accident must have arisen 'out of' and 'in the course of' the employment. In other words, it must have been due to a risk to which the deceased was exposed 'while employed' and 'because employed.' "

We are of the opinion that in the present case, the accident of which the petitioner complains did not arise "out of" nor "in the course of" his employment.

It did not "arise out of" because when the petitioner dropped his broom in the mill, he left his work for the time being, for the respondents and, whe nhe started for the fire, began his work, for the time being, for the fire department. He was responding to the call of a different employer and on his way to engage in the new employment. His work in the mill did not at all require him to leave the mill at the time he started for the fire. It was because

of the fire, and not because of his work in the mill, that he proceeded to leave the building. He happened to be in the mill when the alarm sounded, and hence had to leave the mill; not however, in doing a mill duty, but a fireman's duty.

The accident did not "arise out of" his employment, because there was no causal connection between the petitioner's work—what he was doing at the time of the accident—and the injury which he received. Not his employment in the mill, but his employment in the fire department in which he was engaged, when leaping over the steps, was the proximate cause of the accident.

Nor do we think the risk arose "in the course of" the employment. Westman's Case states the rule under this head, as follows: "An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform."

The risk did not arise in the present case, because the petitioner was 'doing the duty which he was employed to perform.' The risk was due to the call of the fire department. It would have been precisely the same, under the contract with the fire department, had he been working in any other employment whatever it might have been. His work in the fire department had no connection with his work in the mill. Wherever he was, or whatever he was doing, at the sound of the alarm, it was his duty to drop his employment and forthwith assume his duties as a fireman. He happened to be in the mill at the time, but, upon the alarm, his duty by contract began with the fire department.

Accordingly, the risk to which the petitioner was exposed in going to the fire was not at all 'because he was employed' by the defendant, but because he was employed by the fire department, in the important duty which that connection imposed upon him of at once leaving his regular work to engage in the fire department work in protecting the community against the ravages of fire.

Analogous to the case at bar is *Pierce* v. *Boyer-Van Kuram Lumber & Coal Co.*, 99 Neb., 321 L. R. A., 1916D, 970, in which it is said: "There is no doubt under the many authorities cited by both parties that if the workman abandons his employment, even for a short time, and engages in play, or some occupation entirely foreign to his employment, he is not entitled to compensation for an acci-

dent by which he is injured while so doing." See also *Urban* v. *Topping Bros.*, 172 N. Y. Supp., 432. *Inland Steel Co.* v. *Lambert*, Ind., 118 N. E., 162. *Rocheford's Case*, 234 Mass., 93, 124 N. E., 891. The rule seems to be well stated by the Associate Legal Member of the Maine Industrial Accident in *Doughty* v. *Sargent Dennison Co.*, in a decision rendered March 18, 1920 as follows: "Clearly, Compensation is not recoverable where an employee is injured while doing something solely for his own benefit; where, although the injury arises from the risk of the occupation, it is received while the employee has turned aside from the employment for his own purpose." See also cases cited under the above decision.

We discover no rule of law or reason, in view of which it can be said that the accident and the injury for which the petitioner claims compensation, arose "out of" and "in the course of" his employment. This case is of little consequence in the amount involved ($6.43) either to the employer or to the employee, but is important in arriving at a proper interpretation of the statute applicable to such a case.

In arriving at the above conclusion, we do not lose sight of the well settled rule that the Compensation Act should receive a liberal construction so that its beneficient purpose may be reasonably accomplished. Its provisions, however, cannot be justly or legally extended to the degree of making the employer an insurer of his workmen against all misfortunes, however received, while they happen to be upon his premises. Such was not the intent of the statute.

The employer has rights as well as the employed. Their rights stand upon an equality in the eye of the law. Perversion of the law, either to benefit the employee or protect the employer, has the tendency only to bring the law into contempt. This Compensation Act, therefore should be administered with great care and caution, with judicial discretion and impartial purpose, striving only to discover the spirit and the letter of the law, and to apply them without fear or favor.

Appeal sustained.
Compensation denied.

JOSEPH ADELARD PARADIS *vs.* MAXIME BEAULIEU.

Androscoggin. Opinion March 15, 1921.

How far, an officer having made an arrest, may go in his search of the person of the respondent and his removal from the person, the possession of personal effects, is a question of fact for the jury depending upon the law, the facts and circumstances of the particular case, in which, the alleged search and justification are involved.

This is an action for assault and battery. The plaintiff recovered a verdict of one hundred dollars and the case comes before the Law Court on the defendant's motion for a new trial.

The defendant pleads the general issue and justifies under the following brief statement:—That the defendant was a duly qualified officer of the police department of the city of Lewiston. That by virtue of his authority as such officer, he arrested the plaintiff for the crime of intoxication and searched him. That the plaintiff resisted and assaulted the defendant while making the search, and that the defendant used only so much force as was reasonably necessary to make the search.

To the above plea, the plaintiff replied denying the right of the defendant under the facts and circumstances of the case to search the plaintiff's watch pocket for the purpose of taking his money. Upon this issue is raised a question of law and fact.

How far, an officer having made an arrest, may go in his search of the person of the respondent and his removal from the person, the possession of personal effects, is a question of fact for the jury depending upon the law, the facts and circumstances of the particular case, in which, the alleged search and justification are involved.

In the absence of any exceptions to the charge, the presumption is, that the questions of law and fact are properly presented to the jury.

Accordingly, in the present case, we are unable to discover any ground upon which the defendant can complain of the verdict rendered.

The facts show that the plaintiff was charged with intoxication and that his money could not reasonably be regarded as any fruits of his crime or instrument through which it was committed; that he was well known to the defendant, there was no need to search for purposes of identification; that he could not have anything on his person with which he might effect an escape, because both his arms were cut off; that there was no necessity, in view of his physical condition to search the plaintiff for weapons, with which he could injure himself, a fellow prisoner or the officer.

Upon the presumption, that the jury was properly instructed in the rules of law applicable to the case, the verdict cannot be regarded as erroneous.

On motion by defendant for new trial. This is an action for assault and battery. The plaintiff recovered a verdict of one hundred dollars. The defendant plead the general issue and a brief statement of justification. Motion overruled.

The case is fully stated in the opinion.

Clifford & Clifford, for plaintiff.

Ralph W. Crockett, for defendant.

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

SPEAR, J. This is an action for assault and battery. The plaintiff recovered a verdict of one hundred dollars and the case comes before the Law Court on the defendant's motion for a new trial.

The defendant pleads the general issue and justifies under the following brief statement:—

"On the day mentioned in the plaintiff's writ, to wit, the eighth day of August, 1919, the defendant was and for a long time prior thereto had been, and still is, a duly chosen and duly qualified constable of said city of Lewiston, and a duly appointed and duly qualified inspector on the police department of said Lewiston; that on the said eighth day of August by virtue of his authority as such constable and inspector he arrested the plaintiff in said Lewiston for the crime of intoxication and searched him; that the plaintiff did then and there resist and assault said defendant while making said arrest and search, and that the said defendant used only so much force in making such arrest and search as was reasonably necessary, which was the alleged assault."

To the above plea, the plaintiff replied, first, raising the question of whether the plaintiff was intoxicated; second, under the facts and circumstances of the case, the right of the defendant to search the plaintiff's watch pocket for the purpose of taking his money; third, the use of excessive force in conducting the search.

The evidence clearly shows that the assault alleged to have been made by the respondent, while he was under arrest, upon the officer was in resistance to the attempt and the consummated purpose of the officer to take the respondent's money from his watch pocket.

To resist this assault of the respondent, the officer claimed the right to use such a degree of force as was reasonably necessary to overcome the prisoner, and that, therefore, the force thus used

could not be called excessive, though of sufficient violence to enable him to complete his search and to take the respondent's money.

Upon this issue, is raised a question of law and fact: Had the officer under the facts in this case, in his search of the respondent's person, the right to take from him the possession of his money? If he had, then, the officer had the right to use sufficient force to accomplish his purpose. If he had not, then, the respondent was justified in making resistance and the use of force by the officer to overcome such resistance would be unjustified and excessive, and render the officer a trespasser ab initio.

How far an officer, having made an arrest, may go in his search of the person of the respondent and his removal, from the person, of the possession of personal effects, is a question of fact for the jury depending upon the law, the facts and circumstances of the particular case, in which the alleged search and justification are involved.

In the absence of any exceptions to the charge, the presumption is, that the questions of law and fact were properly presented to the jury.

Accordingly, in the present case, we are unable to discover any ground, upon which the defendant can complain of the verdict rendered.

The facts show that the plaintiff was charged with intoxication and that his money could not reasonably be regarded as "any fruits of his crime" or instrument through which it was committed; that he was well known to the defendant, and there was no need to search for purposes of identification; that he could not have anything on his person with which he might effect an escape, because both his arms were cut off; that there was no necessity, in view of his physical condition, to search the plaintiff for weapons, with which, he could injure himself, a fellow prisoner or the officer.

Upon the presumption, that the jury was properly instructed in the rules of law applicable to the case, the verdict cannot be regarded as erroneous.

Motion overruled.

MATHIAS GAUTHIER'S CASE.

Penobscot. Opinion March 25, 1921.

Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute would be to impair the obligation of contracts, and thus to contravene both the State and Federal Constitutions. The Industrial Accident Commission while primarily an administrative body exercises certain judicial functions. Its findings must be based on evidence. The statute so commands, but this would be true if there were no such statutory mandate.

WORKMEN'S COMPENSATION CASE.

The accident to the petitioner occurred April 23rd, 1918. Soon after this an agreement as to compensation was made and filed with the Industrial Accident Commission but not approved.

Compensation was paid until Jan. 19, 1920 and then suspended. The pending petition was filed more than two years after the accident occurred. The commissioner's decree was in favor of the petitioner awarding compensation according to the rule established by Chapter 238 of the Laws of 1919.

Held That:—

(1) The claim is not barred by limitation.

(2) The petition does not conform to the statute, but the petitioner not having been prejudiced or misled by any failure or omission in the petition, the decree is not to be reversed for this reason.

(3) Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute would be to impair the obligation of contracts, and thus to contravene both the State and Federal Constitutions.

The accident to the petitioner occurred before the passage of the Workmen's Compensation Act of 1919. The commissioner having applied the statute of 1919 in determining compensation, his decree would be modified by the court to conform to the law in force at the time of the accident, were it not that for a further reason the decree must be reversed.

(4) The Industrial Accident Commission while primarily an administrative body exercises certain judicial functions. Its findings must be based on evidence. The statute so commands, but this would be true if there were no such statutory mandate.

In this case the commissioner's decree is expressly based in part upon recitals of alleged facts that do not appear in evidence.

Findings of the commission on questions of fact are final and conclusive. It should go without saying that such final findings must be founded upon evidence produced under such circumstances as to give to both parties a full opportunity for explanation and refutation.

(5) When a new or modified decree involves the weighing of conflicting testimony it becomes necessary to remand the case to the Industrial Accident Commission, upon which tribunal the statute casts the responsibility of weighing evidence and of determining facts upon such evidence.

On appeal from a decision of the chairman of the Industrial Accident Commission. On April 23, 1918, Mathias Gauthier, petitioner, while in the employment of the Penobscot Chemical Fibre Company, respondent, suffered a broken leg by accident arising out of and in the course of such employment. Under an agreement compensation was paid from date of injury to Jan. 20, 1919. Petitioner returned to work, but his injury grew no better, and on Jan. 19, 1920, his leg was amputated. On Oct. 13, 1920, the chairman of the Industrial Accident Commission, upon a new petition, dated May 31, 1920, decreed compensation of $11.15 per week from Oct. 2, 1919 to Jan. 19, 1920, less certain payments, for total incapacity, and decreed specific compensation at the same rate for 150 weeks beginning Jan. 19, 1920, for loss of the leg. From which findings respondent appealed. Appeal sustained. Decree reversed. Case to be recommitted for further proceedings.

The case is fully stated in the opinion.

George H. Morse, for petitioner.

Andrews & Nelson, Eben F. Littlefield, and W. T. Gardiner, for respondents.

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

DEASY, J. The record shows that on April 23rd, 1918 the petitioner Mathias Gauthier of Old Town suffered a broken leg as the result of an accident arising out of and in the course of his employment by Penobscot Chemical Fibre Company.

Under an agreement filed with, but not approved by, the Industrial Accident Commission, compensation was paid from the date

of the injury to Jan. 20, 1919. Then payment of compensation was discontinued, such discontinuance being impliedly approved by decree signed by Chairman Dutton dated May 17, 1919.

The petitioner returned to work, but his condition apparently grew worse and on Jan. 19, 1920 his leg was amputated.

The petition now under consideration is dated May 31, 1920. Upon this petition Chairman Thayer by decree dated Oct. 13, 1920, ordered payment of compensation for total incapacity of $11.15 per week from Oct. 2, 1919 to Jan. 19, 1920, less certain payments, and, for loss of the leg, specific compensation at the same rate for 150 weeks beginning Jan. 19, 1920. This weekly allowance is, conforming to the act of 1919, on the basis of three-fifths of the petitioner's average weekly wage.

From a decree of a Justice of the Supreme Judicial Court, rendered in accordance with the chairman's decision, an appeal is taken. The grounds of appeal urged before this court are these:—

1. That the claim is barred by limitation. Except that under Section 17 certain conditions precedent are required to be performed within periods therein limited, no breach of which conditions is in this case complained of, the only limitations affecting petitions under the Workmen's Compensation Law are found in Sections 36 and 39.

Section 36 applies only to reviews in cases wherein agreements have been approved or decrees fixing compensation entered. In the pending case no agreement has been approved and no decree has been entered "fixing compensation" except the decree of May 31, 1920 which is the subject of this appeal.

Section 39 relates to original petitions which under Section 39 may be filed by either employee or employer. Section 39 provides in effect that in the absence of an agreement between the parties, an original petition must be filed within two years.

An agreement may however be filed within the same period. If approved no original petition is necessary or appropriate. The remedy if any needed by reason of changed conditions or otherwise must be by application for review. If refused approval or if unapproved, (as in this case) an original petition is obviously the appropriate remedy, and no time is limited for its filing. Doubtless a limitation was deemed by the Legislature unnecessary in view of the mutuality of the right to invoke the remedy.

2. That the petition is defective in form, not being sufficient "to apprise respondent of the nature of the claim made therein."

This point is well taken. The petition should give the defendant, howsoever informally, the information within the contemplation of R. S., Chap. 50, Sec. 30. In this case the petition does not conform to the requirements of Section 30.

However the case was apparently fully heard. The defendants asked no further time or opportunity for investigation or for the production of further evidence. It not appearing that the petitioner acted contumaciously, or that the defendants were misled or prejudiced by any fault or omission in the petition we should not for this reason alone reverse the decree.

3. That the chairman erroneously applied to the case Chapter 238 of the laws of 1919, and thus awarded larger compensation than was provided by the law in force when the accident occurred.

It is contended that Chapter 238 of the laws of 1919 by its terms applies to all injuries by industrial accidents occurring after Jan. 1, 1916, this being necessarily implied from Section 49 which expressly negatives its application to accidents of earlier dates, and further that by Section 50 the Workmen's Compensation Statute in force in 1918 was wholly repealed without any clause saving rights previously accrued.

For these reasons it is claimed that Chapter 238 of the Laws of 1919 must be held to be retroactive.

If such be the intention of the act it cannot under the plain provisions of both the Federal and State Constitutions be given that effect so far as concerns rights and obligations which accrued before its passage. Our Workmen's Compensation Law is elective. Rights and obligations under it are contractual.

Mailman's Case, 118 Maine, 172.

Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute would clearly be to impair the obligation of contracts.

The procedure may be changed if a substantially equivalent remedy remains; but contractual rights that have become vested remain unaffected by the repeal of an old, or the enactment of a new statute.

A few of the many cases through which this principle of constitutional construction has become embedded in the law are,—

Proprietors v. *Laboree,* 2 Maine, 275; *Palmer* v. *Hixon,* 74 Maine, 448; *Phinney* v. *Phinney,* 81 Maine, 450; *Sturges* v. *Crowninshield,* (U. S.) 4 Wheaton, 122; *McCracken* v. *Hayward,* (U. S.) 2 How., 608.

To the point that the repeal of a statute does not destroy or impair, but preserves and protects vested contractual rights based upon it, see *Steamship Co.* v. *Joliffe,* (U. S.) 2 Wall., 450; *Maine* v. *Bank,* 68 Maine, 515; *Swan* v. *Kemp,* (Md.) 55 At., 441; *K. of A.* v. *Logsdon,* (Ind.), 108 N. E., 592.

In the following cases arising under Workmen's Compensation Laws the principle has been applied to facts in effect parallel to those in the case at bar. *Schmidt* v. *Baking Co.,* (Conn.), 96 Atl., 963; *Collwell* v. *Bedford Co.,* (Ind.) 126 N. E., 439; *Baur* v. *Court of Common Pleas,* (N. J.) 95 Atl., 627.

Two cases are cited which at first blush might seem to be at variance with our conclusion.

Talbot v. *Ind. Commission* (Wash.) 183 Pac., 84; *Carlson* v. *Dist. Court,* (Minn.), 154 N. W., 661.

But in neither of these cases is the effect of the constitutional limitation passed upon, or so far as appears, presented for the consideration of the court.

The learned counsel for the petitioner submits these cases, but with commendable frankness, admits that the judicial authorities almost if not quite universally sustain the principle of constitutional construction which we have adopted.

The error which we have pointed out is one of law which the court might correct by modifying the decree. For another reason however, the decree must be reversed.

4. That the decree is based in part upon alleged facts, recited in the commission's findings, which do not appear in evidence.

That the amputation of Gauthier's leg was a necessary result of the accident is disputed. This important issue is found in favor of the petitioner. The decree runs thus:

"In view of the fact that Mr. Gauthier consulted several of the leading physicians and surgeons in Bangor and vicinity, all of whom advised amputation, and the further fact that two representatives of the insurance company had discussed the matter with

the commission and one at least acquiesced in the amputation, and in view also of the testimony of Drs. Simmons and Marquis, it is found that the amputation was necessary, and that it became necessary as a direct result of the accident to Mr. Gauthier, April 23, 1918."

Drs. Simmons and Marquis testified at the hearing. Counsel for the defendants cross-examined them and had the opportunity of disputing and refuting their testimony. But the other considerations "in view of" which the finding is made, are not supported by any evidence in the case.

The Industrial Accident Commission while primarily an administrative body exercises certain judicial functions. *Reck* v. *Whittlesberger*, (Mich.), 148 N. W., 247.

In the exercise of these functions it acts judicially. While it determines finally the trustworthiness and weight of testimony its findings must be based on evidence. This would be true even if there were no express statutory mandate.

Moreover the statute requires that the merits of the controversy be decided "from the evidence thus furnished" R. S., Chap. 50, Sec. 34.

From the commission's findings of fact there is in the absence of fraud, no appeal.

It should go without saying that such final findings must be grounded upon evidence presented under such circumstances as to afford full opportunity for comment, explanation and refutation. In re *Sponatski*, 220 Mass., 528; *Reck* v. *Whittlesberger* supra; *Int. Harvester Co.*, v. *Ind. Commission*, (Wis.), 147 N. W., 56; *Pacific Co.* v. *Pillsbury*, (Cal.), 153 Pac., 24; *Westman's Case*, 118 Maine, 133; *Mailman's Case*, 118 Maine, 172.

It is true that our statute authorizes certain medical testimony to be taken ex parte. R. S., Chap. 50, Sec. 21. But it is not to be made the foundation of a decree until it is "produced in evidence" so that either party may have an opportunity to explain or contradict it.

If it were the duty of this court to decide the facts, we might say that the testimony of Drs. Simmons and Marquis is sufficient to justify the finding.

But the trier of facts may not regard this evidence as sufficient. Thus a situation is created which is not provided for by the statute.

Section 34 says that,—"the law court may after consideration reverse or modify any decree made by a justice based upon an erroneous ruling or finding of law."

Authority to re-commit to the commission is not expressly given by statute, but is under some circumstances necessarily implied. *McKenna's Case,* 117 Maine, 181; *Maxwell's Case,* 119 Maine, 506.

The law may determine the extent and limits of a required modification; and likewise the precise terms of a new decree made necessary by a reversal. In such cases there need be no recommitment. But when a new or modified decree involves the weighing of conflicting testimony, it becomes necessary to remand the case to that tribunal upon which the statute casts the responsibility of weighing evidence, and of determining facts upon such evidence.

In the pending case the commission's application of the law of 1919 requires a modification, the precise extent of which may be determined as a matter of law. But whether the elimination of the extrinsic matters upon which the decree is in part founded, leaves enough competent evidence to sustain the petitioner's burden of proof, depends upon conflicting testimony the preponderance of which, to give effect to the statute, must be determined by the commission. *Laciones Case,* 227 Mass., 272.

We do not need to say that if further evidence is to be produced a recommittal is essential. *McKenna's Case, supra.*

The decree must be reversed and the case recommitted.

Commission to make new decree based on legal evidence in present record, or if deemed necessary, to hold further hearing. If new decree is for petitioner compensation to be assessed in accordance with law prevailing at date of accident.

Appeal sustained.
Decree reversed.
Case to be recommitted for further proceedings.

MAJOR SHINK'S CASE.

Kennebec. Opinion March 25, 1921.

The prevailing law, at the date of the accident, governs, in cases under the Workmen's Compensation Act.

An industrial accident occurred in 1918. The commissioner applied the Act of 1919 to the case and made an award for which under the law prevailing at the date of the accident there was no authority. Gauthier's Case is decisive of this.

On appeal from a decree by the chairman of the Industrial Accident Commission. On May 2, 1919, Major Shink, the petitioner, while in the employment of Augustus Carey & Co., at Waterville, was injured. For such injury, the petitioner was paid as compensation for loss of time two hundred and fifty dollars, and a bill of $35 for medical services rendered to petitioner as a result of such injury was paid by the insurer. On February 19, 1920, a further operation was performed upon the thumb of petitioner and the distal phalange of the thumb of the left hand was removed. At the hearing on the petition the only question involved was as to whether respondents were liable for the bill of forty-seven dollars for performing the operation on February 19, 1920. The chairman of the Industrial Accident Commission decreed that said bill of $47 should be paid by respondents from which finding an appeal was taken. Appeal sustained. Decree reversed.

Petitioner was not represented by counsel.

Andrews & Nelson, and W. T. Gardiner, for respondents.

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

DEASY, J. In *Mathias Gauthier's Case,* supra it was determined by this court that, under the Workmen's Compensation Law, when an industrial accident occurs to an employee the rights and obligations of the parties become vested and fixed, and that such rights and obligations cannot be either destroyed or enlarged by subsequent legislation. This principle is based upon the plain mandates

of both the State and Federal constitutions. It is decisive of this case. The commission invokes Chapter 238 of the laws of 1919 as creating a liability on the part of the defendants to pay the expenses of a surgical operation for which admittedly there was no liability under the law in force at the date of the accident.

In accordance with the principle above stated this ruling must be reversed.

Appeal sustained.
Decree reversed.

ANNIE M. GRAY *vs.* ST. CROIX PAPER COMPANY

AND

AETNA LIFE INSURANCE COMPANY.

Washington. Opinion March 25, 1921.

Under the Workmen's Compensation Law, the amount of compensation is determined by the statute in force at the date of the accident.

The commissioner found as a fact that the death of the petitioner's husband from tuberculosis, was due to an industrial accident which he suffered twenty months before. This finding being supported by some evidence is not subject to review by this court.

The amount of the commissioner's award is however based upon the statute of 1919. This is error. For reasons set forth in Gauthier's case the amount of compensation is determined by the statute in force at the date of the accident.

To determine the correct award, no disputed question of fact is to be passed upon.

The decree must be modified to conform to the statute in force in 1918 when the accident occurred.

On appeal from a decree by the chairman of the Industrial Accident Commission. On August 28, 1918, Herbert Gray while in

the employment of the St. Croix Paper Company, at Woodland, Maine, received an injury by accident arising out of and in the course of his employment. By agreement he was paid compensation at the rate of ten dollars per week for eighty-one weeks. On May 3, 1920, he died of tuberculosis alleged to have been caused by the accident, leaving a widow, Annie M. Gray, the petitioner. On a hearing on the petition the commissioner awarded compensation in the sum of $13.88 per week, for a period of three hundred weeks from October 2, 1918. Appeal sustained. Decree modified.

The case is stated in the opinion.

Reed V. Jewett, for plaintiff.

LeRoy L. Hight, for defendants.

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

DEASY, J. In August, 1918, Herbert Gray fractured his ankle in an accident arising out of and in the course of his employment by the St. Croix Paper Co.

By agreement duly approved the defendants paid him compensation at the rate of ten dollars per week for eighty-one weeks. On May 3rd, 1920 Mr. Gray died of tuberculosis alleged to have been caused by the fracture.

The chairman of the Industrial Accident Commission found as a fact "that the death of Herbert Gray, husband of the petitioner, on May 3rd, 1920 was the direct result of the injury sustained by him August 28, 1918 while in the employ of the St. Croix Paper Company."

It has again and again been decided and is conceded that this court has no authority to review the Industrial Accident Commission's finding of fact in the absence of fraud and provided such findings are supported by any legal evidence. *Westman's Case,* 118 Maine, 133; *Mailman's Case,* 118 Maine, 172.

But the defendants contend that there is no evidence supporting the finding of fact above quoted.

The only evidence on this issue is the testimony of Dr. W. H. Bunker of Calais, Mr. Gray's attending physician. Dr. Bunker testified that in his opinion the tuberculosis causing death in 1920 was the result of the accident in 1918.

The defendants urge that the doctor's lack of training and experience in the pathological conditions involved in this case is so apparent, his examinations so superficial and his deductions so unscientific that no weight can be given to his opinion, and that a finding of causal relation based upon his testimony is a finding without evidence.

The doctor is a general practitioner and not a specialist. But he has been engaged in practice for eleven years. He treated Mr. Gray for about a year and a half. He made some examination of the injured ankle having an X-ray photograph taken to facilitate the examination. He treated the fracture and his treatment is not criticised. According to his testimony he discovered that the bones were not uniting, made an incision, found the ankle joint destroyed and amputated the leg. In Jan. 1919 the symptoms of the patient suggested to the mind of the doctor a tubercular condition of the bones. Considerably later he had an analysis of the sputum made at the state laboratory.

The doctor was subjected to a searching cross examination. His testimony was shaken, but not destroyed, weakened but not annihilated, torpedoed but not sunk. We cannot say that there was no testimony supporting the chairman's finding.

The defendant's second reason of appeal is that the commissioner, in awarding compensation for an injury by an industrial accident which occurred in 1918, applied the provisions of Chapter 238 of the Public Laws of 1919. The appeal so far as it is based on this ground must be sustained. *Gauthier's Case*, supra.

The petitioner is entitled to ten dollars per week, the maximum weekly compensation allowable under the law in force in 1918 when the accident occurred. She is so entitled for three hundred weeks, less eighty-one weeks for which compensation was paid during Mr. Gray's life.

The decree must be modified so as to require payment of ten dollars per week instead of the amount allowed by the chairman, such payments to begin as of May 3, 1920 and continue for two hundred and nineteen weeks.

Appeal sustained.
Decree modified as
stated in opinion.

STATE *vs.* MICHAEL X. MOCKUS.

Oxford. Opinion March 26, 1921.

Rights of religious freedom and freedom of speech are to be exercised within constitutional limitations. The constitutional limitations of religious freedom are non-disturbance of the public peace and non-obstruction of others in their religious worship, while the constitutional limitation of free speech is only responsibility for that liberty. Public contumely and ridicule of a prevalent religion not only offends against the sensibilities of the believers, but likewise threatens public peace and order by diminishing the power of moral precepts.

The respondent was indicted for blasphemy as defined in R. S., Chap. 126, Sec. 30. Upon his arraignment, he entered a general plea of not guilty; upon trial, he was found guilty and his case is now before us upon his bill of exceptions.

The first exception relates to the exclusion of a certain book officially known as "Senate Document No. 190," which was a report of an ex-President of the United States upon conditions in the Philippine Islands. The book was excluded on the ground that it was neither pertinent nor relevant to the issue. The ruling was correct.

His main contention relates to the refusal to give certain requested instructions. The first and second of those instructions relate to religious freedom and freedom of speech, both of which are guaranteed by the constitution of this State. The third and fourth instructions are a challenge to the constitutional right of the Legislature to enact the statute under which the indictment was found. The fifth relates to the elements which constitute disturbance of the public peace. The sixth relates to an instruction which was upon a question of fact. The seventh and eighth relate to the elements which constitute blasphemy. The ninth, tenth and eleventh relate to matters pertaining to criminal pleading. The twelfth is a request to return verdict of not guilty.

Held:

1. The constitutional rights of religious freedom and freedom of speech are to be exercised within constitutional limitations. The constitutional limitations of religious freedom are non-disturbance of the public peace and non-obstruction of others in their religious worship, while the constitutional limitation of free speech is only responsibility for that liberty. These are broad, far reaching limitations and they travel on equal footsteps with constitutional liberty in whatever paths that liberty may desire to travel.

2. Public contumely and ridicule of a prevalent religion not only offends against the sensibilities of the believers, but likewise threatens public peace and order by diminishing the power of moral precepts. It is not necessary that an actual breach of the peace should occur for the use of words tending to excite or incite a breach of the peace is indictable.
3. The statute in question has stood as the law of this State for a century. It found its basis in the Colonial government of Massachusetts in 1646 and the provincial government in 1697. Its constitutionality had never before been challenged in this State. In considering the act in its relations to the constitutional declaration of rights, that declaration is to be expounded with reference to the whole spirit and character of the constitution as a system of government, to be gathered from all its constituent parts, and from the existing laws, the known prevailing principles, and other circumstances of the times in which it was made and adopted. Acting upon this view, because it is based upon sound principles and supported by convincing logic, we have no hesitation in saying that the statute under consideration in no manner conflicts with our State constitutional guaranty of religious freedom or freedom of speech. The constitutional guaranty found in the Federal constitution has no application to the case at bar for by that guaranty it is only provided that Congress shall make no law restraining religious freedom or freedom of speech. The Federal declaration not only restrains Congress from enacting any statute restraining religious freedom or freedom of speech, but, by necessary implication, leaves that matter to be dealt with by the sovereign power of the several States.
4. The fifth instruction, while proper in form, was given in the charge of the presiding Justice although not in the precise words in which it was presented by the respondent. This, the court was not bound to do.
5. The sixth instruction, in part at least, requested an instruction as to a matter of fact. A bill of exceptions, to be available must show clearly and distinctly that the ruling excepted to was upon a point of law and not upon a question of fact; nor upon a question in which law and fact were so blended as to render it impossible to tell on which the adverse ruling was based, and requests for ruling must be free from this ambiguity or the withholding of them will not be error.
6. The seventh and eighth instructions were fully covered by the charge of the presiding Justice although in language other than that in which the requests were made.
7. By the ninth, tenth and eleventh instructions, the respondent complained because the indictment did not charge that the acts complaint of were done wilfully, maliciously or feloniously, although the charge was made in the words of the statute. No attempt was made to take advantage of any irregularity of the indictment by demurrer. It is too late to attempt such advantage by requested instructions and exceptions thereto after a general plea of not guilty and full trial upon the issues of fact. Having thus pleaded, and gone to trial on that plea, all objections to matters of form in the indictment are waived as they may be raised by motion in arrest of judgment.

8. The refusal to direct a verdict in favor of the respondent was correct. Under most careful and complete instructions as to the law governing the case, the jury returned a verdict that the words uttered by the respondent was uttered contumeliously, in a blasphemous manner, and with unlawful intent to expose the holy subjects mentioned in the statute to contempt and ridicule, thus sustaining the view of the presiding Justice upon which he based his refusal to direct a verdict.

On exceptions by respondent. At the October term 1919, of the Supreme Judicial Court in Oxford County, Michael X. Mockus of Chicago in the State of Illinois, was indicted for blasphemy under Sec. 30, Chap. 126, of the R. S. The respondent at the invitation of a society of Lithuanians in Rumford Falls, delivered three lectures on the 6th, 8th and 10th days of September, 1919. These lectures were delivered in the Lithuanian language to a large audience in each case accompanied by pictures thrown upon a screen, representing usually Biblical subjects, including the Annunciation, the Crucifixion, and the picture of God as he appeared in the vision of Ezekiel. As these pictures were thrown upon the screen the respondent commented upon them, in a manner alleged to be blasphemous. The jury found the respondent guilty and the case was taken to the Law Court on exceptions by respondent to the refusal of the presiding Justice to give certain instructions, and to the exclusion of certain documentary evidence. Exceptions overruled.

The case is fully stated in the opinion.

Frederick R. Dyer, County Attorney, for the State.

Frank A. Morey, for respondent.

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

PHILBROOK, J. The respondent was indicted for a violation of the provisions of R. S., Chap. 126, Sec. 30, which declares that "Whoever blasphemes the holy name of God by cursing, or contumeliously reproaching God, His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost or the Holy Scriptures as contained in the canonical books of the Old or New Testament, or by exposing them to contempt and ridicule, shall be punished" etc. Upon his arraignment he pleaded not guilty. Trial by jury followed, and he was found guilty. The case is before

us upon his bill of exceptions, it being stipulated that the indictment, all evidence, and the charge of the presiding Justice are to be printed as part of the exceptions.

The respondent, on the occasion when it is claimed that the offence was committed, was engaged in giving lectures in the town of Rumford, the lectures being illustrated by pictures thrown upon a screen in a darkened room. Quoting from the charge of the presiding Justice; "The State finds no fault whatever with the character of those plates. It is not said that those plates were of indecent subjects, or that they were of such a character as to lead to the slightest foundation for a prosecution of this kind. On the contrary it is freely stated that they were of the highest order, some of them being reproductions of the finest works of art; but the State does complain of the comments which it alleges the respondent made in connection with the exhibition of those pictures. These objectionable expressions, as alleged, group themselves in this indictment under two or three different heads. They pertain particularly to the pictures shown of the Annunciation, of the Crucifixion, and the picture which has been described as a Dove."

The indictment contains eight counts. Each count charges that the respondent "did blaspheme the holy name of God by cursing and contumeliously reproaching God, His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost, and the Holy Scriptures as contained in the Canonical books of the Old and New Testament, and by exposing them to contempt and ridicule, in that in a public address made by him, the said Michael X. Mockus, then and there, in the presence and hearing of divers persons there assembled, did pronounce, publish and proclaim the following blasphemous words, that is to say;" etc. Under each count thus begun the State gave specifications of the words then and there alleged to have been spoken in the Lithuanian language, and a translation of those words into the English language. It is a most embarrassing task to spread those words upon this printed page but it must be done in order to make our findings applicable and justifiable. The specifications, numbered to correspond with the several counts, are as follows, given only in the English language:

1. "Mary (meaning the Virgin Mary) had a beau. When her beau called one evening (both being young) he seduced her.

He brought her a flower and put her in a family way. No woman can give birth to a child without a man."

2. "The father of Christ was a young Jew and was no Angel Gabriel. Any girl who wants a child can call a Gabriel or some John."

3. "Religion, capitalism and government are all damned humbugs, liars and thieves. Those three classes combine into one organization.

4. "All religions are a deception of the people."

5. "A young man came to Mary during the night, and coming near her with a flower in his hand took her by the hand and said: 'Sh, Sh;' look how the priests teach you, the falsifiers, thieves; it is not possible that he could be of the Holy Ghost, there must be a man. A young Jew was the father of the Christ. No woman can have a child without a man; that never happened and never can happen."

6. "You see the Trinity, (pointing to a picture of God, Jesus Christ and the Holy Ghost, which he had caused to be thrown upon a screen) God the Father, Ghost and Son, a young Jew, but that old man never was and never can be; if he was God from the Ghost, then where did that belly-button come from which is sprouted like a button? Bear in mind that the black army is a trinity, clergy, capitalism and govenment, they govern the world together."

7. "There is no truth in the Bible, it is only monkey business. Religion, capitalism and government are a black army and only profiteer from the poor people. You see here (pointing to a picture of God, Jesus Christ and the Holy Ghost, which he had caused to be thrown upon a screen) scarecrows. Here is God the Father, Son and Ghost, a whole trinity, just as the priest, capitalists and government. How can the Holy Ghost be God when she is afraid a cat will kill her? And do you believe in these scarecrows?"

8. "You see this fool (pointing to a picture of Jesus Christ upon the cross, with the private parts of his body covered with a cloth; which he had caused to be thrown upon a screen) and you believe in Him. The women were sorry for the holy thing and covered the holy thing, while the rest of the body was left uncovered."

Each count in the indictment was concluded with the *contra formam statuti* clause, thus presenting an indictment for statutory blasphemy, yet blasphemy is also a criminal offense at common

law, being defined by Blackstone as denying the being or providence of God, contumelious reproaches of our Saviour Christ, profane scoffing at the Holy Scripture, or exposing it to contempt or ridicule, IV Black, Com. Sharswood Ed., 368. Although our statute defines and punishes the acts complained against in the indictment, yet the common law definitions of, and inhibitions against blasphemy should not be overlooked since they illuminate the statute. In most of the States of this country statutes against this offense have been enacted but these statutes are not understood in all cases to have abrogated the common law, the rule being that where the statute does not vary the class and character of an offense, but only authorizes a particular mode of proceeding and of punishment, the sancton is cumulative and the common law is not taken away. Bouvier, Vol. I, Title, Blasphemy.

As we have already said, the case is before us upon defendant's exceptions, the first being upon exclusion of evidence, and the others upon refusal to give requested instructions. We shall consider them in that order.

The first exception relates to the exclusion of a book known and described as a "Red Pamphlet." It appears that the book was more officially known as Senate Document No. 190, and contained a report of an ex-president of the United States upon certain conditions and things in the Philippine Islands. The court excluded the book on the ground that it was neither pertinent nor relevant to the issue. In support of his exception the respondent argued that the State had this book marked as an exhibit and identified as one of the books sold at the lecture during the delivery of which the alleged indictable language was used. He claimed that the purpose of the State in marking and identifying it was to instill into the minds of the jury a feeling that the respondent was selling pamphlets hostile to the government, and since it was not offered by the State the respondent claimed the right to offer it for the purpose of showing its innocent character. An examination of the record does not sustain the claims of the respondent as to the facts, and as it was so plainly impertinent and irrelevant the exclusion of it was clearly correct.

The requested instructions which the presiding Justice declined to give, except as they appear in the charge, are as follows:

1. The respondent respectfully requests the court to charge the jury that he had a natural and unalienable right to worship Almighty God according to the dictates of his own conscience, and that he shall not be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship.

2. That the respondent had a right at Rumford on the 6th, 7th, 8th and 10th of last September, in his lectures, to speak freely his sentiments as to the conception of Christ, his disbelief in the pigeon as the Holy Ghost, and is not responsible therefor.

3. That Sec. 30, of Chap. 125 of the R. S., of this State, under which the indictment herein is drawn, is in conflict with Section 3 and Section 4 of the constitution of the State of Maine and is therefor void.

4. That Sec. 30 of Chap. 125 of the R. S., of this State, under which the indictment herein is drawn, is in conflict with Article 1 of the amendments of the constitution of the United States and is therefore void.

5. That the State must prove beyond reasonable doubt that the respondent in expressing his sentiments at said meetings of September 6th, 7th, 8th and 10th was rudely contemptuous and insolent. And if the words uttered by him were his religious professions or sentiments unless he did not actually disturb the public peace or obstruct others in their religious worship, he cannot be found guilty herein.

6. That the respondent was present at the meetings mentioned in the indictment at the request of the Lithuanian Society at Rumford, and that he did not disturb the public peace nor obstruct any one in his audience in their religious worship.

7. That the words charged to have been spoken must have been spoken profanely to constitute blasphemy, and if not so spoken the charge cannot be sustained.

8. That unless the defendant maliciously reviled God or religion on the 6th, 7th, 8th and 10th of September at Rumford at his said lectures, he could not have committed blasphemy.

9. That there is no allegation in any count of the indictment that the respondent wilfully or maliciously committed the acts

alleged to have been committed by him and are fatally defective by reason thereof.

10. That no count in the indictment contains an allegation that any alleged act mentioned therein was maliciously done, and therefore he cannot be found guilty thereof.

11. That no count in the indictment contains any allegation that said alleged act was feloniously done, and therefore he cannot be found guilty.

12. The respondent requests the presiding Justice to direct the jury, as a matter of law, to return a verdict of not guilty, upon all of the evidence in the case and the law applicable thereto.

It is quite evident that in the third and fourth requested instructions the respondent referred to R. S., Chap. 126, instead of Chapter 125, and we shall regard this error as simply inadvertent.

Before considering these requested instructions in detail we desire to call attention to the various and distinct elements of the statute, a violation of any one of which would be a violation of the law.

To curse God means to scoff at God, to use profanely insolent and reproachful language against Him. This is one form of blasphemy under the authority of standard lexicographers. To contumeliously reproach God, His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost or the Holy Scriptures as contained in the canonical books of the Old or New Testament, under the same authorities, is to charge Him or them with fault, to rebuke, to censure, to upbraid, doing the same with scornful insolence, with disdain, with contemptuousness in act or speech. This is another form of blasphemy. But as particularly applicable, perhaps, to the present case, it is blasphemy to expose any of these enumerated Beings or Scriptures to contempt and ridicule. To have done any one of these things is blasphemy under the statute as well as at common law. It was not necessary for the State to prove that the respondent did them all.

The first requested instruction relates to religious freedom, as vouchsafed by Article I, Section 3, of the Constitution of this State, wherein it is provided that the right to worship Almighty God according to the dictates of one's own conscience shall not be restrained, nor shall one be hurt, molested, not restrained because

of his religious professions or sentiments, provided he does not disturb the public peace not obstruct others in their religious worship.

The second requested instruction relates to freedom of speech, as vouchsafed by Article I, Section 4, of the same constitution, wherein it is provided that every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty.

In the present case these two requests correlate, the respondent claiming freedom of speech regarding his religious professions or sentiments. We do not understand that upon the occasion in question the respondent claims that he was worshiping Almighty God according to the dictates of his conscience, or that the State by this proceeding is attempting to hurt, molest or restrain him for such worship. These two constitutional rights, within constitutional limits, are not to be violated, destroyed or denied. The rights are always vigorously claimed, but the limitations are not always carefully scrutinized or respected. In a charge which for clearness of thought, beauty of diction, accuracy in law, and impartiality of statement, is seldom equalled, the learned Justice who presided at the trial well said: "The great degree of liberty which we enjoy in this country, the degree of personal liberty which every man and woman enjoys, is limited by a like degree of liberty in every other person, and it is the duty of men, and the duty of women, in their conduct, in the exercise of the liberty which they enjoy, to consider that every other man and woman has the right to exercise the same degree of liberty; that when one person enters into society—and society is the State in which personal liberty exists—each gives up something of that liberty in order that the other may enjoy the same degree of liberty. It is a conception that perhaps some people find difficult to understand, but it is the conception of liberty which we enjoy." The difficult task imposed in most instances is to ascertain, determine, and declare in concrete form, what those limitations are and where they mark the line beyond which one may not cross with safety either to himself or to society.

In this State the constitutional limitations of religious freedom are non-disturbance of the public peace and non-obstruction of others in their religious worship, while the constitutional limitation of free speech is only responsibility for that liberty. These

are broad, far reaching limitations, and they travel *pari passu* with liberty in whatever paths she may desire to travel.

It is farthest from our thought to claim superiority for any religious sect, society or denomination, or even to admit that there exists any distinct, avowed connection between Church and State in these United States or in any individual State, but as distinguished from the religions of Confucius, Gautama, Mohammed, or even Abram, it may be truly said that, by reason of the number, influence and station of its devotees within our territorial boundaries, the religion of Christ is the prevailing religion of this Country and of this State. With equal truth may it be said that, from the dawn of civilization, the religion of a country is a most important factor in determining its form of government, and that stability of government in no small measure, depends upon the reverence and respect which a nation maintains toward its prevalent religion. Within the limits of an opinion it would not be expected that all the tenents of the Christian religion could be expounded, or even enumerated, but for our purpose it will be enough to say that this religion teaches acknowledgement of the existence, presence, knowledge and power of God, as related to human beings in all their walks of life; this religion teaches dependence upon God; this religion teaches reverence toward God and respect for Holy Scripture. Even as we are writing these words the man who is about to assume the duties of the high and responsible station of President of these United States, following the unbroken custom of more than a century, and to the end that his official vow may be more impressive and binding, reverently says: "So help me God," and then pausing, with equal reverence, salutes the Holy Scripture by a kiss. Congress and State Legislatures open their sessions with prayer addressed to the God of the Christian religion. Judicial tribunals, anxious to discover and apply the truth, the whole truth and nothing but the truth, require those who are to give testimony in courts of justice to be sworn by an oath which recognizes Deity. Thus it will be seen that there is acknowledgement of God in each co-ordinate branch of government. Lest any argument in support of the recognition of God in the fundamental law of our State should be overlooked we point to the very preamble of our constitution. "We, the people of Maine, in order to establish justice, insure tranquillity, provide for our

mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity so favorable to the design; and imploring His aid and direction in its accomplishment do ordain and establish the following constitution." In view of all these things shall we say that any word or deed which would expose the God of the Christian religion, or the Holy Scriptures, "to contempt and ridicule," or which would rob official oaths of any of their sanctity, thus undermining the foundations of their binding force, would be protected by a constitutional religious freedom whose constitutional limitation is non-disturbance of the public peace? We register a most emphatic negative. In support of this position we quote from Tiedman on State and Federal Control of Persons and Property, Section 65, "Public contumely and ridicule of a prevalent religion not only offends against the sensibilities of the believers, but likewise threatens the public peace and order by diminishing the power of moral precepts." In *State* v. *Chandler*, 2 Harrington, (Del.), 553, an indictment for blasphemy, the court sustains the doctrine that it was not necessary that an actual breach of the peace should occur, but the use of words tending to excite or incite a breach of the peace is indictable. In *Updegraph* v. *Commonwealth*, 11 S. & R., (Penn.), 394, upon an indictment for blasphemy, the court said in words most applicable to the case at bar, "From the tenor of the words it is impossible to say that they could have been spoken seriously and conscientiously, in the discussion of a religious or theological topic; there is nothing of argument in the language; it was the outpouring of an invective so vulgar and shocking and insulting that the lowest grade of civil authority ought not to be subject to it, but when spoken to a Christian man and to a Christian audience it is the highest offense *contra bonos mores*; and even if Christianity was not a part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to destroy the peace." Thus it will be easily seen that in cases like the one at bar the law reaches down through the surface of things to the concealed or dimly concealed, depths of intent. The presiding Justice gave the true rule when he said: "The clear boundary line between the lawful and the unlawful discussion of

religious subjects is the intent with which such discussion is carried on, and with which the words are uttered. If uttered maliciously, with an unlawful intent to ridicule and bring into contempt, as is stated in the statute 'His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost and the Holy Scriptures,' then they are punishable. The gist of the offense is the unlawful intent with which the words are uttered. Were they uttered with an unlawful intent to bring these holy subjects into ridicule and contempt? If they were, then the person who uttered them is amenable to this statute." See *Commonwealth* v. *Kneeland*, 20 Pick., Page 220.

An examination of the charge shows that the presiding Justice fully and correctly gave the substance of the first requested instruction; that the second, asking that the jury be instructed that the respondent "is not responsible" for what he said, was not proper, was correctly refused, and in place of it the proper rule was given.

The respondent takes nothing by exception to the refusal to give these instructions.

The third and fourth requested instructions challenge the right of the Legislature to enact the statute under which the respondent was indicted because of constitutional provisions both State and Federal. In respect to State inhibition, the respondent relies upon Article I, Sections 3 and 4, of our State Constitution, and in respect to the Federal Constitution he relies upon Article 1 of the amendments to the same.

Our Declaration of Rights, adopted one hundred years ago, is the same as that found in the Massachusetts constitution, with respect to religious freedom, and almost immediately after the adoption of our constitution our Legislature enacted the statute against blasphemy which was copied from the Massachusetts statute against blasphemy, with unimportant modifications. The Colonial government of Massachusetts in 1646, and the Provincial government in 1697 made similar provisions defining and punishing blasphemy. The Massachusetts statute, passed soon after the adoption of the Massachusetts constitution, was a revision of the colonial and provincial laws. In the Massachusetts constitutional convention of 1820, called to revise the existing constitution, the subject of religious freedom was freely discussed but, so far as we can learn, no one in that convention even suggested that the

existing statute against blasphemy, passed in 1782, was in violation of the constitutional Declaration of Rights.

In 1838 the Massachusetts court said in *Commonwealth* v. *Kneeland,* supra, that it was somewhat late to call in question the constitutionality of a law of such long standing and which had been repeatedly enforced without doubt as to its constitutionality. We think this view has strong and pertinent application to the case at bar when we consider that during the entire century in which our court has existed no instance can be found in which the constitutionality of our statute against blasphemy has been questioned. But, waiving the doctrines of antiquity and *stare decisis* for a moment, the reasoning of the court in the Kneeland case is so satisfactory that we crave indulgence while we quote somewhat at length from the words of the learned Chief Justice Shaw.

"In order to ascertain whether the statute against blasphemy is contrary to the letter or to the spirit of this constitutional article, it is necessary to ascertain what the statute in fact prohibits, and then see whether the act thus prohibited is one which the article allows. It makes it penal wilfully to blaspheme the holy name of God, etc. The word wilfully, in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose, and in this statute must be construed to imply an intended design to calumniate and disparage the Supreme Being, and to destroy the veneration due to him. It does not prohibit the fullest inquiry, and the freest discussion, for all honest and fair purposes, one of which is the discovery of truth. It admits the freest inquiry when the real purpose is the discovery of truth, to whatever result such inquiries may lead. It does not prevent the simple and sincere avowal of a disbelief in the existence and attributes of a supreme, intelligent being, upon suitable and proper occasions. And many such occasions may exist; as where a man is called as a witness, in a court of justice, and questioned upon his belief, he is not only permitted, but bound by every consideration of moral honesty, to avow his unbelief, if it exist. He may do it inadvertently in the heart of debate, or he may avow it confidentially to a friend, in the hope of gaining new light on the subject, even perhaps whilst he regrets his unbelief; or he may announce his doubts publicly, with the honest purpose of eliciting a more general and thorough inquiry, by public discussion, the true and

honest purpose being the discovery and diffusion of truth. None of these constitute the wilful blasphemy prohibited by this statute."

Taking this to be the true meaning, intent and construction of the statute, the court declared that it was not repugnant to the constitutional Declaration of Rights, and further declared "That the article is to be expounded with reference to every other clause and provision of the constitution, and to its whole spirit and character as a system of government, to be gathered from all its constituent parts, and from the existing laws, the known prevailing principles, and other circumstances of the times in which it was made and adopted." Adopting this conclusion because it is based upon sound principles and supported by convincing logic we have no hesitation in saying that the statute under consideration in no manner conflicts with our State constitutional guaranty of religious freedom and freedom of speech.

The constitutional guaranties found in Article 1 of the amendments to the Federal Constitution have no application to the constitutionality of our statute here being considered, for it is there provided only that Congress shall make no law restraining religious freedom or freedom of speech. Congress did not enact this statute. The Federal Declaration of Rights not only restrains Congress from enacting any statute restraining religious freedom or freedom of speech but, by necessary implication, leaves those matters to be dealt with by the sovereign power of the several States. These exceptions are unavailing to the respondent. *United States* v. *Cruikshank*, 92 U. S., 551; 23 L. Ed., 589.

The fifth requested instruction was proper in its form, but examination of the charge, especially in the light of what we have already said as to what may constitute disturbance of public peace, shows that all the elements of the instruction were given, although not in the precise words in which it was presented by the respondent. This court was not bound to do. *Anderson* v. *Bath*, 42 Maine, 346, *State* v. *Reed*, 62 Maine, 129.

The sixth requested instruction was not proper because, in effect, the Justice presiding was requested, in part at least, to instruct as to a question of fact. "A bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question of fact; nor upon a question in which law and fact were so blended as to render it

impossible to tell on which the adverse ruling was based. And requests for ruling must be free from this ambiguity, or the withholding of them will not be error." *Laroche* v. *Despeaux*, 90 Maine, 178. Moreover the first part of the request related entirely to matter entirely immaterial to the issues involved in the case.

The seventh and eighth requested instructions were fully covered by the charge, although in language other than that in which the requests were made. It is not necessary to repeat what we have just said when discussing the fifth requested instruction.

The ninth, tenth and eleventh requests relate to matters of pleading, and are based upon the omission of words which charge that the acts complained of were done wilfully, or maliciously, or feloniously. No attempt was made to take advantage of any matter of form by demurrer. It is too late to attempt such advantage by requested instructions after plea of not guilty and full trial upon the issues of fact. Having appeared generally and pleaded not guilty he thereby waived all objections to matters of form in the indictment except as they may be raised by motion in arrest of judgment. *State* v. *Regan*, 67 Maine, 380; *Commonwealth* v. *Henry*, 7 Cush., 512; *Commonwealth* v. *Gregory*, 7 Gray, 498.

Finally the respondent requested the presiding Justice, as matter of law, to direct a verdict of not guilty upon all the evidence in the case and the law applicable thereto. This request was denied and properly so. The testimony is voluminous and has received most careful examination. The respondent was charged with blasphemy. One form of blasphemy is to expose the beings and Scriptures, mentioned in the statute, to contempt and ridicule. Some of the statements of the respondent have been set forth in the various counts of the indictment and the testimony is plenary in support of the charge that he made these statements. The record discloses that as he spoke his auditors laughed and clapped their hands. Under most careful and complete instructions the verdict of the jury was that the words uttered by the respondent were uttered contumeliously, in a blasphemous manner and with unlawful intent to expose the Holy subjects mentioned in the statute to contempt and ridicule. The ruling of the presiding Justice was justified.

Exceptions overruled.
Judgment for the State.

THE PINE SPRING SANATARIUM COMPANY

vs.

THE GRAND TRUNK RAILWAY COMPANY.

Androscoggin. Opinion March 25, 1921.

For injury done to the property of another by fire communicated by a locomotive engine the user of the engine is liable, a statute making it in effect an insurer.

For injury done to the property of another by fire communicated by a locomotive engine the user of the engine is liable, a statute making it in effect an insurer.

Predicated on the premise that defendant's locomotive engine set the fire which burned over about three-fourths of an acre of land, doing it damage besides killing one hundred or less pine and other timber trees together with a larger number of a smaller growth suitable for fuel, plaintiff, as the owner of the land, brought this action to recover damages.

The jury found for plaintiff. Such finding, as the case is seen on review, is supported by a fair preponderance of proof, in nature both direct and deducible by inference. The amount of damages, fixed by the jury at $380.00, is not shown to be inordinate.

On motion for a new trial. This is an action to recover damages to trees, growth, and land of plaintiff caused by fire alleged to have been communicated by a locomotive engine of defendant. The jury returned a verdict for plaintiff of $380, and defendant filed a general motion for a new trial. Motion overruled.

Case stated in the opinion.

Frank A. Morey, for plaintiff.

H. P. Sweetser, and Dana S. Williams, for defendant.

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

DUNN, J. For injury done to the property of another fire communicated by a locomotive engine the user of the engine is liable, (R. S., Chap. 57, Sec. 63), the railroad being made in effect an insurer. *Dyer* v. *Maine Central Railroad Co.,* 99 Maine, 195; *Farren* v. *Maine Central Railroad Co.,* 112 Maine, 81.

On one day in May, 1920, the defendant owned and operated a steam railroad extending from Portland through Auburn to Montreal. In Auburn the railroad location adjoined a lot of land belonging to this plaintiff, on which grass and trees were growing. Fire, which caught in that grass, nearby the track, and thence ran across the meadow to and into the woods, burned over about three-fourths of an acre of the land, doing it damage besides killing one hundred or less pine and other timber trees together with a larger number of a smaller growth suitable for fuel. To recover resultant damages plaintiff commenced this action, predicated on the premise that defendant's locomotive engine set the fire. The jury so found, and its finding, as the case is seen on review, is supported by a fair preponderance of proof, in nature both direct and deducible by inference.

Defendant strenuously argues that $380.00 is an excessively large award of damages. Other men, impaneled as triers of fact, upon like evidence might and likely would differently measure the extent of the loss. Yet this would signify nothing more than that human agency cannot always make an estimate of damage and express it in dollars, with uniform exactness. The confronting and controlling situation in this case is, that the award bespeaks the judgment of a tribunal which constitutional guarantees have provided for the determination of such questions, and the amount of the award is not shown to be inordinate.

Motion overruled.

FANNIE R. FELTIS, et als

vs.

LINCOLN COUNTY POWER COMPANY.

Lincoln. Opinion March 26, 1921.

A bill of exceptions must contain enough to determine that the rulings excepted to are erroneous and prejudicial. Such papers only as are made a part of the bill can be considered. When requested instructions are framed on hypotheses based on the existence or absence of certain facts, it must appear in the bill of exceptions whether such facts were present or absent in the case.

An excepting party to obtain any benefit from his exceptions must set forth enough in his bill of exceptions to determine that the points raised are material and the rulings excepted to are erroneous and prejudicial.

The court cannot consider papers printed with the bill of exceptions but not made a part of it by express reference.

The requested instructions in this case were framed on hypotheses based on the existence or absence of certain facts, but it does not appear from the bill of exceptions whether the facts on which the hypotheses are based were present or absent in the case. Hence the court cannot determine whether the requested instructions were applicable to the case or their refusal was prejudicial to the defendant.

For the same reasons it does not appear that the refusal to direct a verdict for the defendant was erroneous.

On exceptions by defendant. This is a common law action of trespass for flowage. Plea, the general issue. A verdict of two hundred and twelve dollars and fifty cents for the plaintiff was rendered by a jury. The case was taken to the Law Court on exceptions to the refusal of the presiding Justice to give certain instructions, and a refusal to direct a verdict for the defendant. Exceptions overruled.

Case stated in the opinion.

A. S. Littlefield, for plaintiff.

George A. Cowan, for defendant.

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

WILSON, J. This case comes before the court on exceptions to the refusal of the presiding Justice to give certain instructions, and a refusal to direct a verdict for the defendant. The exceptions must be overruled.

It has been repeatedly said by this court "that the excepting party, if he would obtain any benefit from his exceptions must set forth enough in the *bill of exceptions* to enable the court to determine that the points raised are material and the rulings excepted to are erroneous and prejudicial. The bill of exceptions must show what the issue was and how the excepting party was aggrieved. Error must appear affirmatively." *Jones* v. *Jones*, 101 Maine, 447, 450.

The bill of exceptions in this case merely opens with the statement that the action was one for flowage of land and that the declaration did not allege that the dam was maintained without right and no proof was offered that it was. No other statement of facts appears in the bill of exceptions. The writ is printed with the bill, but is not made a part of it, hence the court cannot consider it. "The bill must be strong enough to stand alone. This court in considering exceptions cannot travel outside the bill itself." *Jones* v. *Jones*, *supra*.

Each requested instruction was framed on some hypothesis based on the existence or absence of certain facts, but it does not appear from the bill of exceptions, whether the facts on which the several hypotheses were based were present or absent in the case, or if they were, that their presence or absence had any bearing on the issue between the parties. Hence it does not appear whether the requested instructions were applicable to the case or their refusal was prejudicial to the defendant. *Neal* v. *Randall*, 100 Maine, 574. Neither does it appear that instructions fully covering the points involved in the defendant's requested instructions were not given in another form by the presiding Justice. If so the defendant would not be prejudiced by a refusal to give them in the form requested.

For the same reasons the refusal to direct a verdict for the defendant does not appear to have been erroneous. From the defendant's brief, it appears that his contention in this respect is that the plain-

tiff's remedy was under the Mill Act, so called, but nothing in the bill of exceptions discloses that a mill-dam was the cause of the injuries suffered by the plaintiffs.

Exceptions overruled.

HARRY S. COOMBS

vs.

FRED H. COOMBS AND DEBORAH COOMBS.

Androscoggin. Opinion March 26, 1921.

Since the enactment of Chap. 157 of the P. L. 1895, the rights of a married woman in the real estate of her husband have been more substantial, and she can not be deprived of such interest without her consent, and without compensation, and its present value may be determined. An agreement to release such interest cannot be enforced in an action at law between them, and a court of equity may refuse to enforce such an agreement.

In a bill in equity praying for the sale of real estate owned in common and a distribution of the proceeds, where the property does not admit of division between the co-tenants, the purchaser in case of a sale by order of court will take the property free of any claim of the wife of a co-tenant by reason of her rights by descent in her husband's real estate under Sec. 8, Chap. 80, R. S. at least, where she is made or becomes a party to the proceedings.

Since the enactment of Chapter 157 of the P. L., 1895, the rights of a married woman in the real estate of her husband have been viewed by the court as something more substantial than her right of dower at common law. A larger and more valuable right has now been given her. It is an interest that she cannot be deprived of without her consent and without compensation and admits of its present worth being valued.

If she becomes a party to a bill in equity praying for the sale of common property and objects to the sale of her husband's part without compensation to her for her interest in the property, and equity will thereby be done, her rights may be protected and her interest appraised on the basis provided in Sec. 19, Chap. 80, R. S., and ordered paid to her from the proceeds of the sale of her husband's share.

An agreement between husband and wife for the release of her interests in his real estate cannot be enforced in an action at law between them; and where as a consideration for the payment of money such a covenant is contained in an agreement between husband and wife for separation without the intervention of a trustee together with a covenant for the relief of the husband of all future obligations for the support of the wife and their minor children, a court of equity may refuse to enforce it either by way of estoppel, or as a part of a "pecuniary provision" under Sec. 11, Chap. 80, R. S., barring her rights in his property.

The covenant in the agreement in the case at bar to relieve the husband of the future support of his children is inseparable from the rest of the consideration moving to the husband and is of doubtful validity; and in view of the hardships that would flow from the enforcement of the agreement in this case, this court sitting in equity will refuse to lend its aid in its enforcement or permit it to operate as a bar to the wife's rights in the husband's property in these proceedings.

Held:

That Deborah Coombs is entitled to receive from her husband's share of the proceeds of the sale the value of her rights in the property to be determined in the manner directed by the sitting Justice.

On appeal. This is a bill in equity praying for a sale of certain real estate held in common by the plaintiff and the defendant, Fred H. Coombs, and for a distribution of the proceeds of the sale. On February 24, 1913, Fred H. Coombs and his wife, the defendant, Deborah Coombs, who had become estranged through the fault of the husband, entered into an agreement in writing for separation which provided that in consideration of two thousand dollars and certain personal property of not great value, she agreed to release all claims of every nature in any property he then owned or might thereafter acquire, and further agreed to maintain herself and their two minor children without any further claim against the husband therefor. The purpose of the bill was to have the court order a sale of the property free of any claim of the defendant, Deborah Coombs, wife of Fred H. Coombs, under Sec. 8, Chap. 80, R. S. The defendant, Deborah Coombs did not object to the sale of the property but claimed a part of the proceeds to be realized from such sale. The cause was heard upon bill, answers, replications and proofs, and the sitting Justice ordered a sale of the property and the proceeds made subject to the rights of the defendant, Deborah Coombs, therein.

From which decree plaintiff appealed. Appeal dismissed. Decree of sitting Justice affirmed.

The case is fully stated in the opinion.

George C. Webber, for Harry S. Coombs.

Ralph W. Crockett, for Fred H. Coombs.

Pulsifer & Ludden, for Deborah Coombs.

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

WILSON, J. A bill in equity praying for a sale of real estate held in common by the plaintiff and the defendant Fred H. Coombs, and for a distribution of the proceeds of the sale. The defendant, Deborah Coombs, is the wife of Fred H. Coombs. In February, 1913, Fred H. Coombs and Deborah Coombs having become estranged, as it appears through the fault of the husband, an agreement for separation was entered into between them, which provided that in consideration of the payment of the sum of two thousand dollars and the giving to her of certain personal property, of no great value, she agreed to release all claims of every nature in any property then owned by the husband and thereafter acquired by him; and also further agreed to maintain both herself and the two minor children born of their marriage without any further claim against the husband therefor, "forever releasing him from all obligations as her husband and father of said children."

The defendant, Fred H. Coombs, now contends: (1) that a sale by order of the court will convey the premises free of any claim of his wife in the property under Sec. 8, Chap. 80, R. S., that her right of descent being an inchoate right during the lifetime of the husband and contingent upon her surviving him she is not entitled to any part of the proceeds of the sale; (2) that in any event the agreement referred to is a valid existing agreement voluntarily entered into for a pecuniary consideration after marriage and is, therefore, binding on both parties and by reason of the covenant therein to release all claims or rights in any property whether then owned or after acquired by him, she is now precluded thereby from claiming any share in the proceeds of the proposed sale.

To dispose of the second contention first. A release by the wife to her husband or a covenant to release to him her present interests in his property is ineffectual, *Pinkham* v. *Pinkham*, 95 Maine,

71. A covenant to release her rights in his after acquired property would not form the basis of an action at law between them. *Hobbs* v. *Hobbs*, 70 Maine, 381; *Haggett* v. *Hurley*, 91 Maine, 542. Neither will a court of equity enforce it unless upon equitable grounds and equity will thereby be done. *National Bank* v. *Tyndale*, 176 Mass., 547; *Fowle* v. *Torrey*, 135 Mass., 90.

Neither can the agreement between these parties, without the intervention of a trustee, be upheld as a valid agreement of separation, Story Equity Juris., Vol. 2, Section 1428; *Walker* v. *Walker's Exrs.*, 9 Wall., 743. So, too, an agreement on the part of a wife to relieve her husband of all obligations for the future care and maintenance of their minor children without sanction of the court is viewed with disfavor and is of doubtful validity. *Greenwood* v. *Greenwood*, 113 Maine, 226, 229. If as in this case such a covenant forms an inseparable part of the consideration for an agreement containing other covenants, a court of equity may well refuse to enforce any part of the agreement.

The covenant to maintain herself and children cannot be separated from the covenant to release her interest in her husband's property. Together they form a joint and indivisible consideration for the money and property received by her, nor can the covenant for the maintenance of the children be separated from either of the others. There is nothing in the case from which the court may fairly infer that this agreement would have been entered into by the husband without the covenant on her part to relieve him of the future obligation of maintaining their children, or that it formed any lesser part of the consideration than the relief from future maintenance of the wife, or the release of her interest in his property.

As a "pecuniary provision," therefore, entered into after marriage, by reason of its doubtful validity and the consequent hardship that, owing to the financial and physical conditions of the wife, will now flow from its enforcement, we think this court sitting as a court of equity should not lend its aid in that behalf, or permit it to be set up as a bar to any rights she may have in the proceeds of the sale.

As to the effect of a sale by a court of equity in proceedings of this nature, we are of the opinion that the weight of authority holds that at least where the wife is made a party, her rights, whether

of dower or of descent, are barred and the title passes to the purchaser free of any claims therefore leaving her to her rights, if any, in the proceeds of the sale.

The authorities, however, are not in entire accord as to her rights to any share of the proceeds of such sale. When her interest was only that of dower, her rights were ever jealously guarded by the courts, and in *Littlefield* v. *Paul*, 69 Maine, 527, 533 the court held that only by the methods provided in the statutes could she be barred of her rights. "She was entitled to dower unless she was barred in one of the modes named in the statutes." Since the enactment of Chapter 157 of the Laws of 1895, her rights have been viewed by this court as something more substantial than under her right of dower at common law. As the court said in *Whiting* v. *Whiting*, 114 Maine, 382, "A larger and more valuable right has now been given her . . . It is an interest that she cannot be deprived of without her consent, without compensation. It is an interest which can be valued. If she refuses to release her interest by joinder in a deed with her husband, her interest may be determined and the value thereof ordered paid to her." By the same statute which gave her this larger right, provision was made for determining its value in case of a sale against her consent and her refusal to join in the deed, Sec. 19, Chap. 80, R. S.

In the instant case the rights of the wife have not been barred by any of the modes recognized in the statute. As a party to this cause she objects to the sale by judicial process without compensation to her for her interest in the property. The statutes have recognized that at all times it has a measurable value. We think that equity and good conscience requires that under the circumstances existing in this case her rights be protected and the value of her interest be set out to her from the proceeds of the sale. Nor was the sitting Justice without precedent for so holding.

In speaking of her dower at common law Washburn in his work on Real Property, Vol. 1, Page *158, says: "The wife of a tenant in common holds her inchoate right of dower so completely subject to the incidents of such an estate, that she not only takes her dower out of such part only of the common estate as shall have been set out to her husband in partition, but if, by law, the entire estate should be sold in order to effect a partition she loses by such sale all claim to the land, although no party to the proceedings. But

as will hereafter be shown, she is allowed in some cases in equity to share in the proceeds of such sale." Citing *Lee* v. *Lindell*, 22 Mo., 202, *Warren* v. *Twilley*, 10 Md., 39. Also see *Greiner* v. *Klein*, 28 Mich., 11, *De Wolfe* v. *Murphy*, 11 R. I., 630.

We are therefore of the opinion that the sitting Justice was warranted in ordering the sale of the property and the proceeds made subject to the rights of the defendant, Deborah Coombs, therein, and that the method of determining the value of her interest was a proper one.

Entry will be:

Appeal dismissed.
Decree of sitting Justice affirmed.

BELFAST SAVINGS BANK, et al., In Equity

vs.

SANFORD & CAPE PORPOISE RAILWAY COMPANY.

York. Opinion March 26, 1921.

Where express power is given by statute, to issue an injunction, both temporary and permanent, the court is authorized to appoint at the same time, or at any time during the continuance of the injunction, one or more receivers to wind up the affairs of a corporation.

This is a bill in equity brought under the provisions of R. S., Chap. 51, Sec. 82. Injunction both temporary and permanent was decreed restraining the defendant corporation, its officers and agents, from receiving any moneys, paying any debts, selling or transferring any assets of the corporation or exercising any of its privileges or franchises, appointing a receiver to wind up the affairs of the corporation. From this decree the defendant appealed.

Held:

1. Where express power is given by statute, to issue an injunction, both temporary and permanent, if sufficient cause exists, there having been found sufficient cause to issue the injunction, the court is authorized by statute

to appoint at the same time, or at any time afterwards during the continuance of the injunction, one or more receivers to wind up the affairs of the corporation. The power so to appoint is limited only by the continuance of the injunction. The reason for such appointment is found in the reason and necessity for the injunction, and the exercise of the power to appoint a receiver must be left to the sound discretion of the sitting Justice when he puts in motion the equity power of the court to accomplish that which he deems in equity and good conscience the rights of the parties require.

On appeal. This is a bill in equity brought originally by the Belfast Savings Bank as sole plaintiff against the Sanford & Cape Porpoise Railway Company, under the provisions of Sec. 82, Chap. 51, R. S., alleging that the plaintiff was a creditor of the defendant corporation on account of unpaid interest on the 5% bonds of the defendant corporation, dated January 1, 1898, since July 1, 1915, and that the defendant had ceased to do business and that it possessed assets requiring the appointment of a receiver, praying that an injunction issue, and a receiver be appointed. A demurrer was filed to the original bill and overruled and the defendant thereupon answered. Subsequently the Portland Savings Bank was allowed to intervene upon petition as a creditor holding bonds on which interest was due, and an answer was filed to the petition to intervene.

Upon a hearing on the bill, answers, replications and proofs, the bill was sustained, and the defendant appealed. Appeal dismissed.

The case is fully stated in the opinion.

Woodman & Whitehouse, for plaintiff.

Harry R. Virgin, and Eben Winthrop Freeman, for defendant.

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

PHILBROOK, J. This is a bill in equity in which the Belfast Savings Bank was originally sole plaintiff. It is instituted under R. S., Chap. 51, Sec. 82, which provides in part, and so far as this case is concerned, as follows:

"Whenever any corporation . . . . has ceased to do business, ... upon application of any creditor or stockholder by bill in equity filed in the Supreme Judicial Court in the county in which it has an established place of business, or in which it held its last stockholders' meeting, ... such Court may, if it finds

that sufficient cause exists, issue an injunction, both temporary and permanent, restraining said corporation, its officers and agents, from receiving any moneys, paying any debts, selling or transferring any assets of the corporation, or exercising any of its privileges or franchises until further order, and may at any time make a decree dissolving said corporation."

Another section of the same chapter provides that at the time of ordering any such injunction, or at any time afterwards during its continuance, such court may also appoint one or more receivers to wind up the affairs of the company and to do other duties incident to a receivership, under the directions and orders of the court.

The plaintiff is a creditor of the defendant on account of unpaid interest on its bonds, but does not claim to be a creditor for any other cause. The plaintiff alleged that the defendant had ceased to do business and that it possessed assets requiring the appointment of a receiver. The defendant admits that it ceased to do business in April 1904, at which time it sold all its property and rights of every description to the Atlantic Shore Line Railway, but claims that since that time it has had no assets. Notwithstanding this transfer of 1904, the plaintiff claims that the defendant did have, and, at the time of the bringing of this bill, continued to have assets consisting of choses in action in favor of the defendant against various parties and based upon various causes. The defendant not only says that these choses in action, if they ever existed, passed by the sale and transfer in 1904, but further says that these choses in action, if they ever existed, and if when they were fresh had value, have now by the lapse of years become stale demands, that they are no longer valid choses in action, no longer have value and cannot be classed as assets requiring the appointment of a receiver.

To the original bill, a demurrer was filed and overruled, and thereupon the defendant answered. Subsequent thereto the Portland Savings Bank, holding a large block of the defendant's bonds upon which interest was due and unpaid, was allowed to intervene and become a party plaintiff to the bill. To this the defendant also answered. In its answer to the Belfast Savings Bank, the defendant averred: (1) that by the terms of the trust mortgage given to secure the payment of the bonds and interest-bearing coupons, it was agreed by and between the defendant, and the trustee under said mortgage, and all owners and holders of bonds issued thereunder, that

the right of action under said trust mortgage should be vested in said trustee and that under no circumstances should any individual bondholder or coupon-holder have any right to institute any suit, action or other proceeding thereunder, except upon the failure or refusal of the trustee to act where it was the duty of said trustee so to do, as expressly provided in said trust mortgage; (2) that there had been no refusal of the trustee to act where it was its duty so to do under the terms of the trust mortgage; (3) that under the terms of the bonds issued under said trust mortgage, the holder of said bonds upon becoming such holder, thereby expressly agreed that no recourse for the payment of principal or interest of such bonds should be had to any stockholder, officer or director of the defendant corporation under or in pursuance of any law whatsoever, whether such law was in force at the time of the issue of said bonds or whether said law should be thereafter enacted; (4) that as to any property or assets of the defendant consisting of any action or cause of action accruing to the defendant against any of its stockholders, officers or directors, such last named property and assets are not property and assets which justify or require the appointment of a receiver in this proceeding at the instigation of the plaintiff or of any holder of said bonds or coupons.

In its answer to the Portland Savings Bank, after alleging causes of defense similar to those used in its answer to the Belfast Bank, the defendant further alleged: (1) that all the facts upon which the claims and choses in action were based, were known to the Portland Savings Bank more than ten years prior to the commencement of this bill in equity, or could have been ascertained by the Portland Bank, by due diligence more than ten years prior to the commencement of this bill in equity; (2) that the Portland Savings Bank had actual or constructive notice of all facts relating to said claims and choses in action at the time when the Portland Savings Bank purchased its bonds; (3) that the Portland Bank has had actual or constructive notice of all facts relating to said claims and choses in action as such facts have from time to time occurred, and that no such facts have occurred within ten years prior to the commencement of this bill in equity; (4) that it had no assets other than those covered by the trust mortgage; (5) that it had no claims nor choses in action other than those as to which there existed the defense of laches of the

statute of limitations; (6) that it had no claims nor choses in action which had accrued within the period of ten years next prior to the commencement of this bill in equity.

The cause came on for hearing upon bill, answer, replication and proofs. The voluminous record amply demonstrates both the diligence of counsel and the patience of the sitting Justice.

After hearing, findings were made covering with great care and impartiality all the issues raised by either side. A full history of the doings of the defendant, its relations to other corporations, and the conduct of its business by its officers and agents were all inquired into and stated. Upon these findings, it was ordered, adjudged and decreed that the bill be sustained with costs for the plaintiff, the restraining orders prayed for were issued, a receiver was appointed and full and complete instructions and authority to act were given to that receiver. It is unnecessary to recite the decree in detail. By the appeal of the defendant from this decree, the matter is before the court to be considered and dealt with according to the equity powers provided in R. S., Chap. 51, Sec. 87. Under familiar and well established rules the decision of the sitting Justice is conclusive upon all questions of fact unless shown to be clearly erroneous, and the burden of demonstrating error rests upon the appellant. After a painstaking examination of the record we not only find no such error but on the contrary fully concur with the findings of fact as stated by the Justice hearing the cause in the court below.

It must be conceded after examination of the elaborate and exhaustive briefs of counsel, that up to this point the real battle wages about the question whether or not a receiver should have been appointed. As incident to, and bearing upon this question, counsel have discussed the evidence and cited many authorities, upon their respective claims as to whether the choses in action under consideration are valid claims, or whether by reason of invalidity in their inception, or because of loss of validity by limitation, laches or otherwise, these claims, if they ever existed, have ceased to be assets. The defendant claims that if no valid assets exist, nor assets having present actual value, there should be no receiver appointed. To ask decision at this stage of procedure upon questions of fact which may arise upon the nature or validity of such claims, or any defenses against the same either at law, or in equity, would be asking this court to determine questions of fact upon which either side would have a right to a jury

trial, but, moreover, we would be expected to decide such questions in the absence of testimony taken out at a regular trial where the precise issue in each individual action might be stated in various ways or defended for various reasons. We cannot concede that it is the right or duty of this court, at this stage of the proceedings, to determine or prejudge the rights of parties, either plaintiff or defendant, upon issues of fact which may be heard in a proper forum, at a proper time, and under proper presentation of evidence. It was well said in the recent case of *Van Oss* v. *Petroleum Co.*, 113 Maine, 180, where express power is given by statute, to issue an injunction, both temporary and permanent, if sufficient cause exists, that having found sufficient cause to issue the injunction, the court is authorized by statute to appoint at the same time, or at any time afterwards during the continuance of the injunction, one or more receivers to wind up the affairs of the corporation. The power so to appoint is limited only by the continuance of the injunction. The reason for such appointment is found in the reason and necessity for the injunction, and the exercise of the power to appoint a receiver must be left to the sound discretion of the sitting Justice when he puts in motion the equity power of the court to accomplish that which he deems in equity and good conscience the rights of the parties require.

Appeal dismissed.
Decree of sitting Justice confirmed with additional costs of this appeal.

RENE DUPONT *vs.* EDOUARD PELLETIER et als.

AND

ARTHUR A. HAMEL et al. *vs.* SAME.

York. Opinion March 30, 1921.

A charitable trust created and the failure of any particular mode for the administration of the trust, does not defeat the trust.

This case involves the interpretation of the will of Pierre Emmanuel Dupont of Biddeford.

The first clause reads as follows: "I give, bequeathe and devise all my estate, real, personal and mixed, wherever found and wherever situated, to the Community of Carmelites located and established in Montreal, in the Province of Quebec and Dominion of Canada, in trust nevertheless, to hold to them and to their successors in trust, for the following purposes:

1. To pay to my nephew, Dr. Eugene Panneton, annually during his lifetime, the sum of five hundred dollars, when he shall become permanently incapacitated from earning his own living; but if his incapacity is of a temporary character, then to pay him a part of said sum of five hundred dollars, annually proportional to the time of his temporary incapacity. My said trustees may act upon their own good judgment and discretion in the matter, but a certificate of his attending physician shall be accepted as proof of his incapacity.
2. To pay to my sister, Emma Picard, annually during her lifetime, in event that she may need assistance, the sum of five hundred dollars; but if such needy condition is temporary, then to pay her a proportionate part of the said sum of five hundred dollars, proportional to the time of her needs. My said trustees may act upon their own good judgment and discretion in the matter, but a certificate of her attending physician shall be accepted as proof of her needs.
3. It is my desire to establish in said Biddeford a monastery of the order of Carmelites to be devoted to the spiritual interests of the French population of said Biddeford, and I direct my said trustees to appropriate all my estate, subject to the foregoing provisions, to this object, and it is my desire that the same be accomplished as soon as practicable; but if for any reason it is not feasible that such monastery be established in said Biddeford, then the same may be established in another place, but it shall be devoted to the spiritual interests of such French population.

Held:

1. That the proper interpretation of Paragraphs 1 and 2, is, that the trustees should act upon the certificates of the family physician as final proof of the total or partial incapacity or need of the beneficiaries described therein.
2. That item 3 created a charitable trust.
3. That the refusal of the trustees therein named does not defeat the trust.
4. That the trust cannot be permitted to fail for want of a trustee.
5. That though the particular mode for the administration of the trust has failed, there appears no insurmountable difficulty in providing a mode in perfect harmony with the intent of the testator, and in full accomplishment of his purposes.
6. That the court feels fully justified in confiding the proper execution of the trust to the special knowledge and discretion of the pastors of the two Roman Catholic Churches in the city of Biddeford.
7. That the bill of Rene Dupont be dismissed.
8. That the bill of Arthur A. Hamel and Thomas B. Walker be sustained, with costs and reasonable counsel fees.
9. A decree is to be entered in accordance with this opinion.

On report. A bill in equity seeking the construction of the will of Pierre Emmanuel Dupont, who died December 9, 1915, testate, and after specific bequests to relatives, gave the residuum of his estate to the Community of Carmelites, a religious corporation located at Montreal, Canada. He was a French Canadian, a Roman Catholic Priest, and for thirty-five years next prior to his death had been pastor of St. Joseph's Church in Biddeford, Maine, his parishioners all being either French Canadians or their descendents. Under the terms of the will the residuum of the estate was in trust for the payment of certain annuities to relatives, and to establish a monastery of the Order of Carmelites, to be devoted to the spiritual interests of the French population of Biddeford. The trustee refused to qualify and accept said trust, and the question before the court was as to whether the construction of the will showed a general charitable intent so as to bring the bequest within the Cy pres doctrine, or that it was a bequest for a particular purpose and by such refusal of said Community of Carmelities to accept such bequest, it reverted to the corpus of the estate, and be distributed to the heirs at law.

Case is stated in the opinion.

(In first case) *Robert B. Seidel, and Louis B. Lousier,* for plaintiff.

N. B. & T. B. Walker, Emery, Waterhouse & Paquin, John P. Deering, Charles L. Donahue, and Paul E. Donahue, for defendants.

(In second case) *N. B. & T. B. Walker*, for plaintiffs.

Louis B. Lausier, Robert B. Seidel, Emery, Waterhouse & Paquin, and John P. Deering, and Charles L. Donahue, and Paul E. Donahue, for defendants.

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

SPEAR, J. This case involves the interpretation of the will of Pierre Emmanuel Dupont of Biddeford.

The first clause reads as follows: "I give, bequeathe and devise all my estate, real, personal and mixed, wherever found and wherever situated, to the Community of Carmelites located and established in Montreal, in the Province of Quebec and Dominion of Canada, in trust nevertheless, to hold to them and to their successors in trust, for the following purposes:

1. To pay to my nephew, Dr. Eugene Panneton, annually during his lifetime, the sum of five hundred dollars, when he shall become permanently incapacitated from earning his own living; but if his incapacity is of a temporary character, then to pay him a part of said sum of five hundred dollars, annually proportional to the time of his temporary incapacity. My said trustees may act upon their own good judgment and discretion in the matter, but a certificate of his attending physician shall be accepted as proof of his incapacity.

2. To pay to my sister, Emma Picard, annually during her lifetime, in event that she may need assistance, the sum of five hundred dollars; but if such needy condition is temporary, then to pay her a proportionate part of said sum of five hundred dollars, proportional to the time of her needs. My said trustees may act upon their own good judgment and discretion in the matter, but a certificate of her attending physician shall be accepted as proof of her needs.

3. It is my desire to establish in said Biddeford a monastery of the order of Carmelites to be devoted to the spiritual interests of the French population of said Biddeford, and I direct my said trustees to appropriate all my estate, subject to the foregoing provisions, to this object, and it is my desire that the same be accomplished as soon as practicable; but if for any reason it is not feasible that such monastery be established in said Biddeford, then the same may be established in another place, but it shall be devoted to the spiritual interests of such French population.

Lastly—I do nominate and appoint Edouard Pelletier of said Biddeford, executor of this will and request and direct that he may be authorized to act as such without giving bonds; but in the event of his decease or that he declines to act, then I nominate and appoint Joseph Panneton executor of this will and direct and request that he may be authorized to act as such without being required to give bonds.

The solution of the questions raised in items 1 and 2, is comparatively clear. They fall in the same category as to how the total or partial incapacity in the one case, and the total or partial need in the other are to be ascertained. The testator in express terms leaves the determination of these matters to "good judgment and discretion" of the trustees, subject however to the final arbitration of the family physician.

The language of the testator in limiting the power of the trustees, in the exercise of their judgment, in the respects named, provides: "But a certificate of his attending physician shall be accepted, as proof of his incapacity;" and of "her attending physician, as proof of her needs."

It is contended that the word "proof" should be construed to mean "evidence" and that consequently the certificate cannot be regarded as final. We are of the opinion, however, that the word "proof" as used in these conditions in the will was intended by the testator to be used in the legal sense.

Evidence is but a medium of proof. Proof is the effect of evidence; is a deduction from evidence that produces conviction; the establishment of a fact by the evidence. But if the certificate is to be regarded as evidence, only, to whom would such evidence be referred, to determine whether it met the standard of proof? It must be to the trustees themselves, a proceeding which would merely remit the physician's certificate to "their judgment and discretion" and render the limiting clause inane and void. While the words "proof" and "evidence," in common usage, are sometimes employed indifferently, we are yet of the opinion that the phrase "shall be accepted as proof" was intended to mean that the certificate of the physician should be final. It furthermore seems reasonable, at least, that the testator conceived of this provision as a method of finally settling any controversy that might arise between the beneficaries and the trustees, as to the degree of disability or need, the very question now raised by Emma Picard.

The trustees are invested with the same right to invoke the certificate as the beneficiaries. The limitation of this right to "his family physician" and "her family physician" not their family physician, removes any doubt as to whom the referee shall be. In other words the provision for the "certificate of the family physician" imposes a limitation upon both the beneficiaries and the trustees and furnishes a tribunal by which each can have their privileges as well as their rights determined.

It is therefore the opinion of the court that the trustees should act upon the certificate of the family physician as final proof of the total or partial incapacity or need of the beneficiaries as described in items 1 and 2.

The trustee named in item 3, declined to accept the trust and therefore left the trust estate without a trustee. The present temporary trustees wish also to be relieved. Upon this state of facts two questions arise:

First, the intention of the testator, as discovered from the language of item 3, and the explanatory circumstances.

Second, must the trust fail for want of a trustee?

The entire phraseology of item 3, considered in connection with the admissible evidential circumstances, is most potent evidence that the main object and manifest purpose of this devout priest, who had labored so long and administered so faithfully to his people, was the dedication of his estate to the promotion of the spiritual welfare of the people of his own nationality. As he expressed it, "To be devoted to the spiritual interests of the French population of said Biddeford," a clearly charitable purpose. The monastery was conceived as a medium of administering this charitable trust. It was to act as trustee. It was not the end, but a means to the end. The provision, if not feasible to erect the monastery in Biddeford, that it might be located in some other indefinite place, but wherever located, "it shall be devoted to the spiritual interests of such French population," clearly indicates that the spiritual welfare of the French people, and not a monastery, was uppermost in his mind. It was his central thought expressed at the beginning and the end of item 3, as an observation will prove. We feel confident that the paramount thought in the mind of this benevolent priest was the spiritual welfare of the people of his own nationality in the City of Biddeford, for whose destiny in life and death he had, for so many years, been their spiritual adviser.

Accordingly the French population of the City of Biddeford are the well defined beneficiaries under the will of Father Dupont.

We now come to the second proposition: Must the trust fail for want of a trustee? The doctrine is too well established to require citation that a trust will not be permitted to fail for want of a trustee, if it can be legally avoided. The particular mode prescribed for the administration of the trust in the present case has failed, but when the intent and purpose of the trust, as above determined, are found to exist, there appears no insurmountable difficulty in providing a mode in perfect harmony with the intent of the testator, and in the full accomplishment of his purpose and design. In the City of Biddeford are two Roman Catholic Churches within the Roman Catholic jurisdiction of the State of Maine. Each parish is presided over by a priest, called a pastor. Here it is essential to distinguish between the office of a priest and that of a pastor. Bishop Walsh in his testimony stated the difference as follows: "The Priest is a position with a spiritual power, without reference to any particular locality; the Pastor is a priest who is appointed to a certain Parish to take charge of the temporal and spiritual welfare of that Parish, subject to the Bishop." It accordingly follows that, although a Priest, his functions as a Pastor are confined to the particular Parish over which he is appointed for the time being to preside, and is a permanent official of the Parish. The testator, in item 3, of his will, makes no reference to, or distinction between, the Parishes, in the City of Biddeford, whose people his benevolence was intended to assist. It was not his parish, nor the other parish, nor the American, the Irish, the German or the Jewish people, but the French people of the city, all of them, without class or distinction, whose welfare it was his purpose to promote. The language of the testator, twice expressed, that his bounty should be devoted to the "French population" is significant of his purpose to remember all the French people, alike.

The offices of the pastors of these two parishes in the City of Biddeford are permanent positions. While the priests may come and go, the succession to the office of pastor remains. Accordingly we find no insurmountable impediment in the way of designating the two pastors of the Roman Catholic Parishes of the City of Biddeford, and their successors, as joint trustees invested with authority to administer the trust created by the will of Father Dupont.

He left no specifications as to the manner of bestowing, distributing, or applying the proceeds of his trust to the "spiritual interests" of his people. It was, however, his undoubted wish and expectation that it might be administered in accordance with the particular canons of the Carmelites. But that course must be regarded as a suggestion and not a mandate of the court.

The Roman Catholic Church is so perfectly and systematically organized, and its methods of administering to the "spiritual interests" of its members, so definitely prescribed, and understood, at least, by all its clergy, that the court feels fully justified in confiding the proper execution of the present trust to the special knowledge and discretion of the pastors herein designated as trustees of the estate of Pierre Emmanuel Dupont.

We do not overlook the fact that the Cy pres doctrine has been fully argued with respect to one phase of the case, upon the theory that the monastery was the beneficiary and not the French population of Biddeford. But the conclusion that the French population is the beneficiary eliminates the application of the Cy pres doctrine. The invention of this doctrine is based upon the non-existence of the precise beneficiary of the trust, and the consequent diversion of the fund to the same general charitable purpose for which the trust was created. It carries out the general charitable intent. This being so, the argument based upon the premise that "the clause for spiritual benefit is too vague and indefinite for the court to enforce it," Cy pres fails for want of a premise. We therefore, have no occasion to pass upon this phase of the case.

It is the opinion of the court that the bill of said Hamel and Walker should be sustained. The bill of *Rene Dupont* v. *Edouard Pelletier, et als.* is hereby dismissed. The said Arthur A. Hamel and Thomas B. Walker, the present trustees are hereby discharged from further execution of their trust and, upon the acceptance and qualifications of the trustees, herein named, of the trust imposed upon them, are authorized to pay over and deliver to the said last named trustees, the entire trust estate in their care and custody. The said Hamel and Walker are to be allowed reasonable costs and counsel fees. The case is to be remanded to the Probate Court for the execution of the decree, to be filed in accordance with this opinion.

So ordered.

HENRY L. WITHEE, County Attorney for the County of Knox, In behalf of the STATE OF MAINE, In Equity,

vs.

LANE & LIBBY FISHERIES COMPANY.

Knox. Opinion March 30, 1921.

A county attorney not being a common law officer, can not exercise common law powers as the attorney general is authorized to do. There is no statute that authorizes him to bring a bill in equity in his own name for the abatement of a public nuisance.

The bill of complaint in this case is as follows:

To the Supreme Judicial Court. In equity.

Henry L. Withee, County Attorney of Knox County, in behalf of the State of Maine, complains against Lane-Libby Fisheries Company, a corporation existing by law and having its place of business at Vinalhaven, Knox County, Maine, and says:

In these lines naming the party in whose name and in whose behalf the bill is brought, is raised the issue involved in the case, namely: Is a county attorney authorized by the common law or by statute to bring a bill for the abatement of a nuisance in behalf of the State in his own name?

To the bill, the defendant demurred and after hearing upon the merits, the bill having been sustained, an injunction granted and the demurrer overruled, the defendant filed exceptions to the decision of the court in overruling the demurrer and asserts the following objection to the maintenance of the bill. (1) That there is no proper plaintiff. (2) That the bill does not set out a cause for the intervention of the court in equity.

We need, however to consider the first objection only. It is claimed that Henry L. Withee is not a proper plaintiff to the bill. While conceding for the purpose of argument that the bill might be sustained with the State of Maine as plaintiff, or by the attorney general in his official capacity, as representing the public interests, as plaintiff, the defendant, nevertheless, claims that does not follow therefrom that such a bill can be maintained in the public interest with the county attorney as plaintiff therein.

Held:

1. That the county attorney is not a common law officer.
2. That he cannot exercise common law powers as the Attorney-general is authorized to do.

3. That there is no statute that authorizes the county attorney to bring a bill in equity in his own name for the abatement of a public nuisance.
4. That on the contrary, R. S., Chap. 23, Sec. 1, by implication, under the rule of exclusion would seem to negative the plaintiff's contention.
5. That the bill should be dismissed for want of a proper party, plaintiff.

On exceptions. This is a bill in equity brought by the complainant in his own name as county attorney to restrain the defendant in the operation of its glue plant at Vinalhaven, alleging it to be a public nuisance.

The defendant incorporated in its answer a general demurrer, which was overruled, and after hearing upon the merits, the bill having been sustained and an injunction granted, the defendant filed its exceptions to the overruling of the demurrer, and the question presented was as to whether the bill was maintainable, on the grounds that there was no proper plaintiff, and that the bill did not set out a cause for the intervention of the court in equity. The first objection only was considered by the court. Bill dismissed for want of a proper party plaintiff.

Case is stated in the opinion.

H. L. Withee, for plaintiff.

A. S. Littlefield, for defendant.

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

SPEAR, J. The bill of complaint in this case is as follows:

TO THE SUPREME JUDICIAL COURT. In Equity.

Henry L. Withee, County Attorney of Knox County, in behalf of the State of Maine, complains against Lane-Libby Fisheries Company, a corporation existing by law and having its place of business at Vinalhaven, Knox County, Maine and says:

In these lines naming the party in whose name and in whose behalf the bill is brought, is raised the issue involved in the case, namely: Is a county attorney authorized by the common law or by statute to bring a bill for the abatement of a nuisance in behalf of the State in his own name?

To the bill, the defendant demurred and after hearing upon the merits, the bill having been sustained, an injunction granted and the

demurrer overruled, the defendant filed exceptions to the decision of the court in overruling the demurrer and asserts the following objection to the maintenance of the bill. (1) That there is no proper plaintiff. (2) That the bill does not set out a cause for the intervention of the court in equity.

We need, however to consider the first objection only. It is claimed that Henry L. Withee is not a proper plaintiff to the bill. While conceding for the purpose of argument that the bill might be sustained with the State of Maine as plaintiff, or by the Attorney-general in his official capacity, as representing the public interests, as plaintiff, the defendant, nevertheless, claims that it does not follow therefrom that such a bill can be maintained in the public interest with the county attorney as plaintiff therein.

We think this contention must prevail. The United States and the States composing it have inherited from the English Common Law, the officer known as the Attorney-general. In that Common Law, the duties of the Attorney-general, as chief officer of the realm, were numerous and varied. With reference to the duties of the Attorney-general in the different States, it is said in 2 R. C. L., 916, Paragraph 5: "Although in a few jurisdictions the Attorney-general has only such powers as are expressly conferred upon him by law, it is generally held that he is clothed and charged with all the common law powers and duties pertaining to his office, as well, except in so far as they have been limited by statute. The latter view is favored by the great weight of authority, for the duties of the office are so numerous and varied that it has not been the policy of the State Legislatures to attempt specifically to enumerate them; and it cannot be presumed, therefore, in the absence of an express inhibition, that the Attorney-general has not such authority as pertained to his office at common law. Accordingly, as the chief law officer of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the states, the preservation of order, and the protection of public rights."

In our State, the Attorney-general is a. constitutional officer, (See Constitution, Article 9, Section XI) and exercises common law powers.

In Pomeroy's Equity Jurisprudence, Section 1349, it is said: "A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the Attorney-general in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country."

The question here is who is the proper officer representing the commonwealth, when the proceeding is not brought either in the name of the Attorney-general or the commonwealth.

By analogy, the argument might seem plausible that the county attorney, as he is called in this State, as well as the Attorney-general, might represent the State. In discussing the distinction between the prerogatives of the Attorney-general and the county attorney with reference to representing the State 2 R. C. L., 914, Paragraph 2, under the caption, "Distinctions between Prosecuting attorneys and Attorneys-general" has the following: "The officer of prosecuting or district attorney unlike that of Attorney-general is of modern creation, with its duties chiefly prescribed by statute." Such is the distinction between the offices in this State. The county attorney is the sole creature of the statute. His duties are prescribed by the statute, enlarged only by the additional duties, incidental and necessary to carrying out those prescribed.

We find no statute in this State which authorizes the county attorney to bring a bill in equity in his own name for the abatement of a public nuisance, nor do we find any case or kindred case that has reached the courts for adjudication.

On the contrary, our statute by implication, under the rule of exclusion, would seem to negative the contention of the plaintiff in this case. R. S., Chap. 23, Sec. 1, defines certain places, acts and conditions to be common nuisances. With respect to the abatement of these nuisances, the statute then proceeds to say: "The Supreme Judicial Court shall have jurisdiction in equity, upon information filed by the county attorney or upon petition of not less than twenty legal voters of such town or city . . . . to restrain, enjoin or abate the same." The nuisances in the above section are all defined by statute, and the statutory right of the county attorney to proceed by information is confined to a process for the abatement of these particular forms of nuisance. The nuisance in the present case is not one of them.

It is obvious to the casual observer, if it was the purpose of the statute to authorize the county attorney to proceed in his own name for the abatement of all nuisances, that the authority conferred by the above statute, to abate the particular nuisances therein named, would merely be surplusage. He is nowhere given authority by statute to thus proceed to the abatement of any common law nuisance, nor of any other of the subsequently prescribed statutory nuisances, one of which embraces the very conditions which the present bill was brought to abate namely: "The erection, continuance or use of any building or place for the exercise of a trade, employment, or manufacture, which by noxious exhalations, offensive smells, or other annoyances, becomes injurious or dangerous to health, comfort or property of individuals or of the public."

We cannot avoid the conclusion, in view of the phraseology of the nuisance statute, that it was the intention of the Legislature to authorize the county attorney to proceed, in his own name, for the enforcement of that part of the nuisance statute relating to the execution of the prohibitory law, and to leave the enforcement of the other provisions to the usual and established method of procedure, in the name of the Attorney-general of the State.

Jackson v. *Norris*, 72 Ill., 364 and *Smith* v. *McDonald*, 148 Ill., 51, cited in the plaintiff's brief, are both cases brought by the county attorney in the name of the plaintiffs as relators, as is shown by the title of the cases. In the case of *Patterson* v. *Temple*, 24 Ark., 218, the court, in dismissing a bill brought in the name of the county attorney for the people, state their conclusion as follows: "We know of no law that authorizes Newton J. Temple, as a prosecution attorney, to bring his suit in behalf of the people in this state of Arkansas."

It is, however, held in *District Attorney* v. *Lynn & Boston R. R. Co.*, 16 Gray, 242 that the bill could be sustained in his name. The opinion says: "The authority of the Attorney-general or other law officer empowered to represent the government may file an information in equity, etc." But the question of a proper party to the bill was not raised in the case. We observe, no reason, however, in the present case, for leaving the well-beaten path of procedure, heretofore adopted and pursued in our own jurisdiction. Our conclusion is that the bill should be dismissed for want of a proper party.

So ordered.

HANNAH E. RAND *vs.* STUART O. SYMONDS.

Cumberland. Opinion March 30, 1921.

Verdict for plaintiff not warranted by the evidence, as the testimony fails to disclose a fair preponderance of evidence in favor of plaintiff's claim by adverse possession, and the defendant has a better record title.

This is a real action wherein the plaintiff demands possession of certain real estate claimed both by adverse possession and by record title. Verdict for plaintiff.

Held:

1. The testimony contained in the record does not disclose a fair preponderance of evidence in favor of the plaintiff's claim by adverse possession.
2. As to record title, the plaintiff presents three deeds, the first bearing date of March 4, A. D. 1739; the second, bearing date of April 1, A. D. 1748; the third is a quit-claim deed to herself dated April 18, 1864, leaving a gap of one hundred sixteen years, so far as her record title is concerned, between the quit-claim deed, by which she claims to hold, and the next prior conveyance in her chain of title. On the other hand, the defendant offers a warranty deed dated December 16, 1841, which is twenty-three years earlier than the plaintiff's quit-claim deed, and presents intermediate deeds without break in the chain tracing direct title to himself, his immediate conveyance being a warranty deed, under which he has held for more than forty years.
3. That the defendant has the better record title; that the jury must have failed to understand the rules of law pertaining to the case, and the application of the evidence to those rules of law, with the result that their verdict was manifestedly wrong.

On motion. This is a real action brought to recover possession of certain real estate situate in the town of Cape Elizabeth, the plaintiff relying on title by adverse possession and by quit-claim deed. Defendant relied on a title derived from a warrantee deed antedating the quit-claim deed under which plaintiff claimed. Verdict was for plaintiff and the defendant filed a motion for a new trial. Motion sustained. New trial granted.

Case is stated in the opinion.
W. R. & E. S. Anthoine, for plaintiff.
Frank H. Purinton, for defendant.

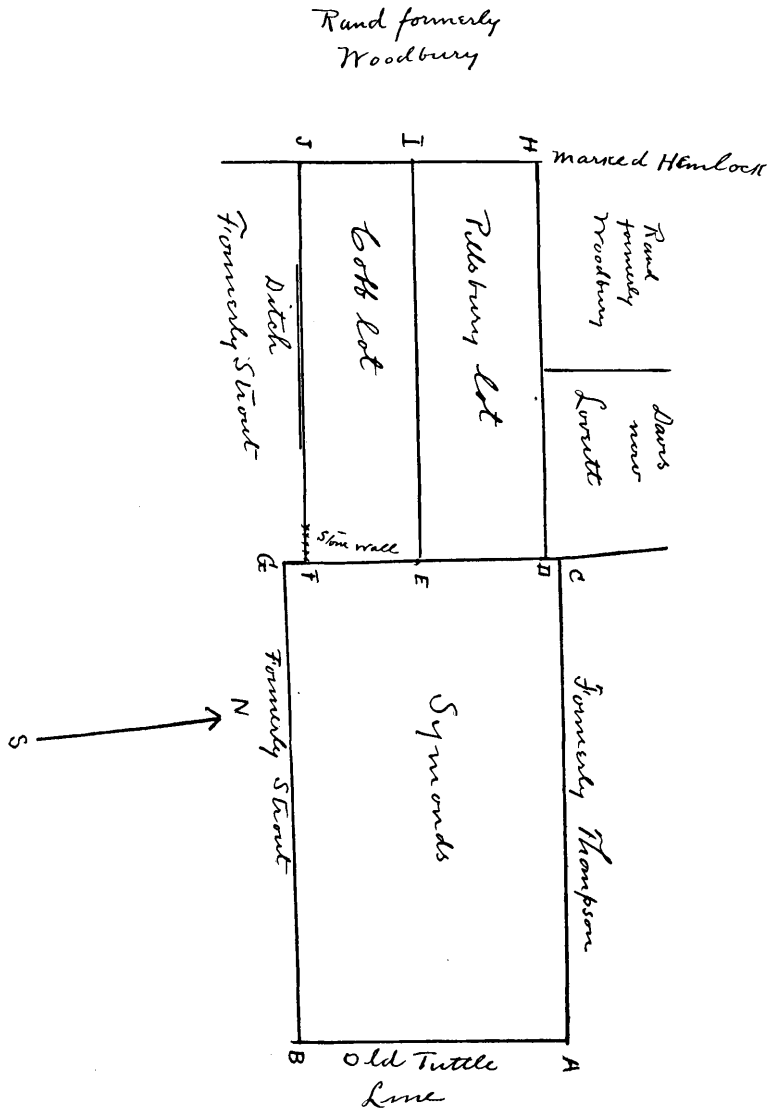
SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, MORRILL, JJ.

PHILBROOK, J. This is a real action, wherein the plaintiff demands possession of certain real estate situate in the town of Cape Elizabeth. She describes the land in her declaration as follows:

"A certain piece or parcel of land situate in Cape Elizabeth, aforesaid, known as the 'Little Marsh Lot,' containing 6 acres and 106 square rods, be it more or less. It one-third part of Twenty acres conveyed by Joshua Woodbury to Joshua Woodbury, by his deed dated April 1, A. D. 1748 (duly recorded) and by Tobias Pillsbury, et als., to the said Hannah E. Rand, by deed dated April 18, A. D. 1864 (duly recorded) and more particularly shown on plan of James Johnson made in June 1863 as follows: Beginning at a point on said plan, designated and shown as 'marked Hemlock Tree' thence southerly about twelve rods to a point marked by a pile of stones, being the northwesterly corner of a lot sold by Watson C. Rand to Joseph W. Symonds; thence, easterly at about right angles to last described line, eighty-seven and one-half rods, more or less, to a point in land now of the defendant; thence, northerly at about right angles to last described course, by line of said defendant's land, twelve rods, more or less, to a point shown on the said Johnson plan as 'marked spruce tree;' thence westerly at about right angles to last described course, eighty-seven and one-half rods, more or less, to said hemlock tree and point of beginning; being the lot shown on said Johnson plan as 'Mr. Pillsbury's lot;' said lot now being bounded northerly by other land of the said plaintiff and of Susan Davis; westerly by other land of the said plaintiff; easterly and southerly by land of the said defendant."

The accompanying sketch may be of assistance in demonstrating the situation according to the claims of the parties as we are able to gather them from the record and the arguments of counsel.

The land in controversy is the rectangle HDEI, marked "Pillsbury Land," which plaintiff claims both by record title and by adverse possession.



A careful examination of the testimony does not disclose a fair preponderance of evidence in favor of the plaintiff's claim by adverse possession, although there is evidence of certain acts upon which the

defendant might claim trespass if he maintains his ownership of the premises in dispute. The plaintiff must, therefore, depend upon the strength of her record title. We will now examine that title as it appears from the conveyances offered by the plaintiff.

By reference to the declaration, it will be observed that she claims "one-third part of twenty acres conveyed by Joshua Woodbury to Joshua Woodbury by deed dated April 1, A. D. 1748." To show the antecedent links in the chain of title as to the twenty acres, she first offered the deed of John Perry to Joshua Woodbury dated January 30, A. D. 1730 which conveyed:

"A certain tract of swampy or meadow land situate lying and being in the township of Falmouth above said and it is bounded as followeth on the south side by my own land on the west by the common land, on the north by Ebenezer Allins deed. Contained ten acres be it upland or meadows together with all the privileges and appurtances thereunto belonging or anyways appertaining."

This conveyance is a warranty deed. As to the other ten acres, thus making up twenty acres, the plaintiff offered the deed of Thomas Westbrook to Joshua Woodbury dated March 4, A. D. 1739 which conveyed.

"A ten acre lot of land lying and being in the township of Falmouth, it being ye second lot in number beginning at an ash Tree marked 1:2 and thence fronting north eighteen rods to a white oak Tree marked 2:3; thence ye same width west ninety rods or till ye ten acres be completed, which was granted and laid out to William Gills ye 19th day of March 1727-8 by ye Committee as ye return on record appears."

This is a conveyance of land but with covenant only against claims from, by or under the grantor, his heirs and assigns. The next deed which the plaintiff offered is one given by Joshua Woodbury, the grantee in the two previous deeds, to his son Joshua Woodbury, Jr., dated April 1, 1748, as we have just seen, and conveyed

"One third part of two Ten acre lots called the 'Little Marsh lots,' which I purchased of John Perry and Colonel Thomas Westbrook, bounded reference being had unto said deeds. That third part that adjoineth unto Joseph Cobb ten acre lot."

This is also a conveyance of land but with covenant only against the claims or demands of any person laying legal title thereunto from, by or under the grantor. There is no deed offered showing convey-

ance from Joshua Woodbury, Jr. to anybody. The next deed which the plaintiff offered is the immediate one to herself, the grantors being Tobias Pillsbury, Joshua Pillsbury, Daniel Pillsbury and Mary E. Webb. This is a quit-claim deed, dated April 18, 1864 and conveys only the right, title and interest which the grantors had in and to

"A certain piece or parcel of land situated in Cape Elizabeth aforesaid, known as the 'Little Marsh lot' containing six acres and one hundred six square rods, be it more or less, it being one third part of twenty acres conveyed by Joshua Woodbury to Joshua Woodbury by his deed dated April 1, 1748."

This deed covenants only "against the lawful claims and demands of all persons claiming by, through or under us, but none others."

Thus it will be seen that in the plaintiff's chain of record title from 1748 to 1864, a period of one hundred sixteen years, there is a gap in which no conveyance appears by which the plaintiff can trace title to herself, and the deed by which she now claims title is merely a quit-claim of right, title and interest. On the other hand, as we shall later see, the defendant traces back to a warranty deed given in 1841 which was twenty-three years before the time when the plaintiff received her quit-claim deed.

Let us now examine the defendant's record title. It is conceded that the defendant is the son of Joseph W. Symonds, deceased, and that by devise, the defendant now has the same title to the land in controversy, which the father had at the time of his decease.

He begins with a warranty deed dated December 16, 1841 given by George Webster and Asa T. Webster to John D. Buzzell which conveyed a certain piece or parcel of wood and pasture land in Cape Elizabeth containing ten acres, more or less and bounded on the south by James Strout's land; on the west by land owned by the heirs of John Woodbury; on the north by land of the heirs of said Woodbury and the land of Widow Susan Davis; on the east by land which was descended to John Webster, father of the grantors. This conveyance would seem to cover land which was between the Strout land on the south and the Woodbury and Davis lands on the north, which would be the southerly and northerly boundaries respectively, of the Cobb and Pillsbury lots.

The next deed offered is also a warranty deed dated January 3, 1853 in which the same John D. Buzzell mentioned in the previous deed conveyed to Robert W. Dresser "Ten acres, more or less, being the

same conveyed to me by deed from George and Asa T. Webster, dated December 16, 1841, reference being made to the Webster deed for a description of the premises."

The next deed offered is also a warranty deed dated October 31, 1853 wherein the same Robert W. Dresser mentioned in the next previous deed, conveyed to Robert Dresser "Ten acres, more or less, being the same conveyed to me by Dr. John D. Buzzell of said Cape Elizabeth by deed of January 3, 1853."

The next deed offered is a quit-claim deed dated September 27, 1855 wherein Robert Dresser mentioned in the next previous deed conveyed to Thomas E. Knight all the right, title and interest which he obtained in and to two parcels of woodland which were conveyed to Robert by Robert W. Dresser by deed dated October 31, 1853.

The next deed offered is a quit-claim deed dated January 14, 1857, given by the same Thomas E. Knight, mentioned in the next previous deed to John W. Rand and the description states "Containing ten acres, more or less, and bounded on the south by James Strout's land; on the west, by land owned by the heirs of John Woodbury late of Cape Elizabeth; on the north, by land of the heirs of said John Woodbury and the land of Widow Susan Davis; on the east, by land which descended to John Webster from George Webster." This description corresponds quite nearly, if not exactly with the first exhibit offered by the defendant viz., that from George and Asa T. Webster to John D. Buzzell.

The next deed offered is from John W. Rand to Watson C. Rand, a quit-claim deed dated July 31, 1872 which simply refers to the Cape Elizabeth land as "A parcel of pasture and woodland" and for description refers to a mortgage deed given to the Buxton & Hollis Savings Bank, but this mortgage deed does not appear in the record.

Finally, we have the warranty deed of Watson C. Rand to Joseph W. Symonds, the defendant's father, dated September 6, 1878, the boundaries in which are as follows:

"Beginning at a pile of stones on line of land formerly of John Woodbury; thence North 85½° East, twenty three rods to a ditch—thence on same general course by said ditch about sixty rods, across a marsh: thence North 85½° East, thirty three rods: thence Easterly to and by a stone wall dividing land hereby conveyed and land formerly owned by James Strout, thirty nine rods to land Quit-claimed by J. W. Rand to one Tuttle: thence North two degrees,

forty five minutes west 27½ rods, more or less, by said Tuttle's land to land of one Thompson: thence westerly by said Thompson's land about Sixty rods to land formerly of one Loveitt or Pillsbury: thence South 4½° East by the land of said Pillsbury or unknown, to a fir stump: thence 85½° west by land of unknown about ninety five rods to land formerly owned by one Woodbury: thence South 4½° west by said Woodbury land about twenty one rods to the point of beginning."

The testimony discloses that on both the easterly and westerly portions of the Pillsbury lot and the Cobb lot lying south of it, the land was somewhat higher, while through the center of both lots, there ran a marsh or swale and this appears to account for the ditch delineated on the map as being on the south line of the Cobb lot, and is the ditch referred to in the above description. By reference to the description, just above given, it would seem quite plain that the warranty deed from Rand to Symonds began at the point J, thence running by the south line of the Cobb lot and the ditch to F, and although there is a slight jog from F to G, it is quite plain that the courses are from F to G, thence to B, thence to A, thence to C, to D, to H, and to the point of beginning at J.

A comparison of these two record titles discloses on the one hand in the plaintiff's chain an unfilled gap of one hundred sixteen years followed by a mere quit-claim deed to herself from those who show no record title while on the other hand, the defendant shows record title beginning with a warranty deed dated twenty-three years earlier than the plaintiff's quit-claim and with an unbroken chain to the present time. Moreover, the plaintiff's early deeds are vague and uncertain in description while those of the defendant quite clearly and quite exactly give boundaries which include the land in dispute. It is therefore the opinion of the court that the defendant has the better title, that the jury must have failed to understand the rules of law pertaining to the case and the application of the evidence to those rules of law, with the result that their verdict was manifestedly wrong and the mandate must be,

Motion sustained.
New trial granted.

FRANK I. CLARK'S CASE.

Kennebec. Opinion April 4, 1921.

The scope of the law to provide compensation for permanent impairment of the usefulness of a member or of any physical function thereof, enlarged under Section 16 of Chapter 238, of the Workmen's Compensation Act of 1919. Compensation not confined to cases of actual loss or severance of the member or some part thereof.

The last paragraph of Section 16 of the Workmen's Compensation Act of 1919 (Chapter 238) was intended to enlarge the scope of the law and to provide compensation for permanent impairment of the usefulness of a member, or of any physical function thereof, named in the schedule, where previously compensation for loss of the member to the extent specified could alone be had.

Under the last paragraph of Section 16 of the Workmen's Compensation Act of 1919 (Chapter 238) compensation is not confined to cases of actual loss or severance of the member or some part thereof; but includes all cases of injury to the members specified in that section, not before provided for, where the usefulness of the member or any physical function thereof is permanently impaired.

The fact that there was no loss of wages in the instant case does not afford an answer to the application for compensation. By the injury to his hand, resulting in the permanent impairment of its usefulness, the applicant has sustained a distinct loss of earning power in the near or not remote future.

On appeal. This case was taken to the Law Court on an appeal from a decision of the Industrial Accident Commission. The claimant, a machinist, in the employment of the Kennebec Journal Company, while cranking a motor in the course of his employment, received a blow upon his left forearm. He lost no time from his work and no wages, as a result of the injury, but was not able to do such efficient work. It was alleged that the nerves of the arm were injured by the blow, which resulted in an impairment of function of the thumb, and first and second fingers of the left hand, and the commission found that such impairment was permanent from which finding respondent appealed.

Case is stated in the opinion.

Robert A. Cony, for plaintiff.

Andrews & Nelson, and W. T. Gardiner, for defendant.

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

MORRILL, J. On August 16, 1919, Frank I. Clark, while employed by Kennebec Journal Company received a personal injury by accident arising out of and in the course of his employment. He filed a petition for award of compensation; a decision, participated in by all members of the commission, was made February 14, 1920, in which the commission found that while cranking a motor Mr. Clark "was struck on the left forearm, which has produced a permanent impairment to the thumb, first finger and middle finger of the left hand," and determined the "extent of the incapacity" as follows: "It is the opinion of the commission from the evidence that the permanent impairment is as follows:

Thumb:	67½ per cent	33.75 weeks.
First finger:	40 per cent	12 weeks.
Middle finger:	25 per cent	6.25 weeks.
Total,		52 weeks.

The commission thereupon ordered that compensation be paid to the claimant at the rate of fifteen dollars per week for fifty-two weeks; a decree in accordance therewith was entered and the case is before us upon appeal by the employer and insurance carrier.

The petition for award of compensation was insufficient in that it did not set forth "the matter in dispute and the claims of the petitioner in reference thereto." *Maxwell's Case,* 119 Maine, 504, 507. But the objection has not been taken, and, apparently by mutual understanding, the petition was heard by the commission, as the decision states, "to determine the amount of his permanent impairment." No actual time was lost by the employee following the injury, so that the degree of disability was the one question presented. There was no loss of any portion of the hand or fingers, but an injury to the nerves of the arm.

The only question presented upon this appeal is whether upon the facts found the claimant is entitled to compensation under the last paragraph of Section 16 of the Workmen's Compensation Act of 1919, which reads as follows:

"In all cases in 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."

As stated in their brief, the employer and insurance carrier contend "That the words in the last paragraph of the said Section 16, 'In all cases in this class,' mean what they say, viz., in all cases of complete or partial amputation, or complete or partial loss of sight, and that they do not mean that, in any case where a member is impaired by any means whatever, whether by amputation or other injury, claimant is entitled to specific compensation for such impairment.

That claimant's remedy in such a case as the instant one, where there is impairment of function without actual severance of the whole or any part of the members mentioned in the schedule of amputations, is through total or partial compensation, as the case may be, for total loss of or impairment of earning capacity, under Sections 14 and 15 of the Compensation Act."

This contention presents for the first time the question of the construction to be placed upon this paragraph which is amendatory of the original Workmen's Compensation Act of 1915.

What did the Legislature intend to accomplish by this amendment? What omission in the original act did it intend to supply? What class of cases did it intend to reach?

Under the original act, by Section 14 compensation could only be awarded "while the incapacity for work resulting from the injury is total," not exceeding a period of five hundred weeks; by Section 15 compensation could only be awarded "while the incapacity for work resulting from the injury is partial," not exceeding a period of three hundred weeks; Section 16 provided for those cases where the disability was total for a period and might be partial thereafter, fixing for a specified injury the period of total disability and the amount of compensation.

Section 16 first came under consideration in *Merchant's Case,* 118 Maine, 96, and we then held that the word "loss" as used in that section means a physical severance of the member, not loss of use. In this case the injury consisted of a laceration of the back of the left hand, which affected the extensor muscles controlling the third and fourth fingers, the third finger being drawn toward the palm of the hand at an angle of about forty-five degrees, and the fourth finger at an angle of about ninety degrees. These two fingers were thereby rendered practically useless. Compensation was awarded under Section 15, the basis of compensation being the difference in the earning power of the claimant before and after the accident. It is evident that the act did not then provide adequate compensation for such permanent injuries as the claimant had sustained.

Section 16 was again under consideration in *McLean's Case,* 119 Maine, 322, in which we held that "loss of a foot" as used in that section means the loss of the entire foot, not the loss of that part of the foot in front of the plane of the tibia; and the claimant was allowed compensation based upon the loss of his toes. The accident in this case arose before the enactment of the Law of 1919; referring to the new clause now under consideration, the opinion says: "This addition provided for cases of loss or impairment of use of a member where the member itself was not lost." Here there was an impairment of the use of the foot although the whole foot was not lost.

Maxwell's Case, 119 Maine, 504, follows McLean's Case, holding that the loss of two-thirds of the distal phalange of a finger is not the same as the loss of the whole phalange.

It is evident that the additional clause under consideration was intended to enlarge the scope of the law and to provide compensation for permanent impairment of the usefulness of a member, or of any physical function thereof, named in the schedule, where previously compensation for loss of the member to the extent specified could alone be had. That the provision is confined to the members named in the schedule is clear, because the injuries named in the schedule are the basis for determining the extent of incapacity. But is there any reason for holding that compensation is limited to those cases of loss or impairment of use where there has been an amputation of some portion of the member? We think not, and we hold in harmony with the expression of the court above quoted from McLean's Case that compensation for permanent impairment of the usefulness of a

member or any physical function thereof is not limited to cases of actual loss or severance of the member or some part thereof. The words, "in cases of this class" are ambiguous; the word "class" is not used elsewhere in the fourteenth, fifteenth or sixteenth sections; it was evidently adopted from some law in which the disabilities are classified in one section, as in the law of New Jersey (Act of 1911, Chapter 95 as amended by Act of 1913, Chapter 174), in which very similar language is found in Section 11, Paragraph (c) providing for disability partial in character but permanent in quality. See *Burbage* v. *Lee*, 87 N. J. L., 36, 37. We have already held in *McLean's Case*, supra, decided since this case was argued, that "loss of a foot" means the loss of the entire foot; hence the words "cases of this class" cannot mean cases of amputation of a part of a member; nor can it mean cases of complete amputation, for that construction would add nothing to the statute; such cases were already provided for; the word "class" cannot be restricted to cases of amputation.

We think therefore that the language of the final paragraph of Section 16 before quoted is not confined to cases of amputation, but includes all cases of injury to the members specified in that section, not before provided for, where the usefulness of the member or any physical function thereof is permanently impaired. The word "class" includes and refers to injuries to the members enumerated in the section. An injury to the forearm may permanently impair the usefulness of the hand; an injury to the hand may permanently impair the usefulness of the fingers; although neither the hand nor the fingers are lost, and may be of some use.

Nor does the fact that there has been no loss of wages afford an answer to the application. By the injury to his hand, resulting in the permanent impairment of its usefulness, the applicant has sustained a distinct loss of earning power in the near or not remote future. *DeZeng Standard Co.* v. *Pressey*, 86 N. J. L., 469. *Burbage* v. *Lee* et al., 87 N. J. L., 36.

Appeal dismissed.
Decree affirmed.

ALICE CHASE HERRICK

vs.

EVENING EXPRESS PUBLISHING COMPANY.

Aroostook. Opinion April 4, 1921.

Damages not recoverable for mental suffering and nervous shock, and visible illness resulting from the negligent publication, without element of wilful wrong, of a wrong portrait with a true news item, announcing the death of a person named therein.

In case of the negligent publication in a newspaper, without any element of wilful wrong, of a wrong portrait in connection with a true news item announcing the death of a person named therein, in such a manner as to lead a reader to believe that the published portrait is the portrait of the person named in the news item, recovery of damages for mental suffering and nervous shock, and visible illness resulting therefrom, will be denied to the parent of the person whose portrait is thus negligently published, there being no physical injury to the parent.

On exceptions by defendant. This is an action on the case to recover damages by reason of the publication in a newspaper published by the defendant, of the portrait of Nathan C. Herrick, of Washburn, son of the plaintiff, in connection with a sketch reciting and concerning the death of Nathan C. Herrick of Mechanic Falls, the son of the plaintiff at the time of said publication being over-seas in the Army of the United States.

At the return term of said action defendant filed a general demurrer, which was overruled by the presiding Justice, and defendant filed exceptions. Exceptions sustained. Demurrer sustained. Declaration adjudged bad.

Case stated in the opinion.

William R. Roix, for plaintiff.

William C. Eaton, for defendant.

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

MORRILL, J. Defendant's general demurrer to the declaration was overruled, and the case is before us upon exceptions to that ruling.

The material facts alleged in the declaration may be succinctly stated thus: On August 5, 1918, the plaintiff was living, and engaged in business, in Washburn, Aroostook County; she was the mother of Nathan C. Herrick, who on that date was serving in the American Expeditionary Forces over-seas. The defendant is the publisher of a daily paper in Portland, called "Evening-Express Advertiser;" in the issue of that paper of said fifth day of August, under the heading of "Boy dies Across" the defendant, in the language of plaintiff's allegation, "carelessly and negligently published a certain sketch of Nathan C. Herrick of Mechanic Falls, son of Mrs. A. C. Herrick of Mechanic Falls, who was killed 'across', and carelessly and negligently below the title of said sketch published the picture of Nathan C. Herrick, son of Mrs. A. C. Herrick, of Washburn, Maine;" a copy of this issue came in the usual course of distribution to the house of one Katherine Chouinard, of Portland, a sister of the plaintiff, with whom the plaintiff and her husband were visiting, and was seen by the plaintiff, who, as plaintiff alleges, "recognized the picture as that of her son and immediately after seeing the picture looked above said picture at the heading of the sketch connected with the picture and read "Boy dies Across" meaning and conveying to the plaintiff the news that Nathan C. Herrick, son of Mrs. A. C. Herrick the said plaintiff was dead, and solely because of the careless and negligent publishing of the picture of Nathan C. Herrick, son of the plaintiff, by the said defendant corporation, the said plaintiff immediately became sick and disordered in mind and body and so remained and continued for a long space of time, to wit; to the time of the making of this writ, during all of which time, the said plaintiff suffered great pain in body and mind and was hindered and greatly prevented from performing and transacting her lawful business as milliner at said Washburn, during that time to be done and transacted and was put to great expense, all to the damage of the plaintiff," etc.

The alleged carelessness and negligence in publishing the news item relating to the death of Nathan C. Herrick, of Mechanic Falls, can give no cause of action to the plaintiff; the item itself was true. The plaintiff's rights must rest upon the allegation of carelessness

and negligence in publishing, in the manner set forth, the picture of plaintiff's son. It is not alleged that the publication of the picture was done wantonly, or from wrong motives, or in wilful disregard of plaintiff's parental feelings.

The question is therefore presented whether under such circumstances the plaintiff has any cause of action for her mental pain and anguish caused by the shock of the supposed death of her son and her sickness resulting therefrom. We think not.

In case of injury to a child, the father may maintain an action based upon a loss of services, but generally a parent cannot recover damages for injury to parental feelings. *Wyman* v. *Leavitt*, 71 Maine, 227, 231; 36 Am. Rep. 303, note 306; there are exceptions to this rule, as in cases of seduction or forcible abduction, which are based upon loss of services, but also involve the element of intentional, wanton and wilful wrong.

In case of physical injury to the person caused by negligence mental suffering resulting from such injury is a legitimate element of damage; but if no bodily injury is alleged or proved, there can be no premise upon which to base a conclusion of mental suffering. *Colby* v. *Inhbts. of Pittsfield*, 113 Maine, 507, 509. Such elements of damage when there is no physical injury, are outside the principle of compensation. *Sullivan* v. *Old Colony Street Ry. Co.*, 197 Mass., 512, 516. At common law it was well settled that mere injury to the feelings or affections did not constitute an independent basis for the recovery of damages. Damages for mental suffering have been generally allowed by the courts in three classes of cases: "1. Where, by the merely negligent act of the defendant, physical injury has been sustained; in this class of cases they are compensatory, and the reason given for their allowance is that the one cannot be separated from the other. 2. In actions for breach of contract of marriage. 3. In cases of wilful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." The last class contains the element of malice. *Summerfield* v. *Western Union Tel. Co.*, 87 Wis., 1; 41 Am. St., 18. *Western Union Tel. Co.* v. *Rogers*, 68 Miss., 748; 24 Am. St., 300.

But in cases of negligence without any element of wilful wrong, where there is no physical injury, recovery for mental suffering and nervous shock, and visible illness resulting therefrom should be, we think, denied. This denial has been based upon practical grounds.

Spade v. *Lynn & Boston R. R.*, 168 Mass., 285, 288. *Smith* v. *Postal Tel. Cable Co.*, 174 Mass., 576. In *Linn* v. *Duquesne Borough*, 204 Pa. St., 551; 93 Am. St., 800, it is said: "Mental suffering has not generally been recognized as an element of damages for which compensation can be allowed, unless it is directly connected with a physical injury, or is the direct and natural result of a wanton and intentional wrong. Where a claim is for mental suffering that grows out of or is connected with a physical injury however slight, there is some basis for determining its genuineness and the extent to which it affects the claimant. But as the basis of an independent action, mental suffering presents no features by which a court or jury can determine either its existence or its extent, and claims founded on it have generally been regarded as too uncertain and speculative for consideration."

In *Ewing* v. *Railroad Co.*, 147 Pa. St., 40; 30 Am. St., 709, it was held upon demurrer to a declaration not containing an allegation of bodily injury to the plaintiff, that fear, nervous excitement and distress caused by a collision of cars upon a railroad, in which the cars were overturned and thrown from the track and fell upon the premises of the defendant and against her dwelling house, producing mental and physical pain and suffering and permanent disability, but unaccompanied by any injury to the person, afforded no ground for action. *Wyman* v. *Leavitt*, supra, is cited and relied upon in both these Pennsylvania cases. Other authorities are collected in 8 R. C. L., Page 516, Title, Damages, Section 74.

We have not overlooked the extensive and learned opinions found in certain cases against telegraph companies, for negligent transmission and delivery of messages, in which recovery of damages for mental suffering, without physical injury, or element of wilful wrong, has been considered, and allowed by some courts and disallowed by others. These cases are the subject of exhaustive notes in 49 L. R. A. (N. S.,) 206 et seq.

We think however that a verdict for damages based upon the declaration before us would be contrary to law.

Exceptions sustained.
Demurrer sustained.
Declaration adjudged bad.

ALANSON S. BLANCHARD *vs.* CITY OF PORTLAND.

HARRY F. BLANCHARD *vs.* SAME.

Cumberland. Opinion April 4, 1921.

Unregistered motor vehicles and unlicensed operators of motor vehicles, not lawfully in the highways under R. S., Chap. 26, Sec. 28, unless within the exception under Chap. 26, Sec. 33, R. S. Nor is a passenger in a motor vehicle driven by an unlicensed operator a lawful traveller upon the highway, so far as the town is concerned, unless such operator is within said exception.

By R. S., Chap. 26, Sec. 28 the highways of the State are closed alike to unregistered motor vehicles and to unlicensed operators of motor vehicles.

In actions against towns to enforce a statutory liability for defects in the highways, it is not a question of casual connection in either case between the violation of the statute and the happening of the accident; the unregistered car and the unlicensed operator are alike expressly forbidden by the statute to pass along the highway.

So far as the town is concerned the unlicensed operator is not a lawful traveler upon the highway unless in any particular case he is within the exception found in R. S., Chap. 26, Sec. 33.

Nor is a passenger in a motor vehicle driven by an unlicensed operator a lawful traveler upon the highway, so far as the town is concerned, unless the unlicensed operator is within the exception found in said Section 33.

The words, "riding with or accompanied by a licensed operator," contained in said Section 33, mean that the licensed operator shall ride with, or accompany the unlicensed person, under such conditions and in such proximity that he can maintain the supervision over the unlicensed person necessary for safety, and render assistance, if need be, with reasonable promptness.

To be within the exception, the unlicensed person must be operating the vehicle in company with the licensed operator "for the purpose of becoming familiar with the use and handling of a motor vehicle, preparatory to taking out a license for driving"—not necessarily for the sole purpose of becoming familiar with the vehicle, but that purpose must be present in his mind.

Upon the undisputed facts the court is of the opinion that Harry F. Blanchard, the unlicensed operator and part owner of the motor vehicle in which Alanson S. Blanchard was riding was not within the protection of Sec. 33 of Chap. 26 of the R. S.

On exceptions and motions for a new trial by defendant. These actions were brought to recover damages for personal injuries in one case, and injuries to a motor truck in the other or second, resulting from an automobile accident caused by an alleged defect in the highway in the City of Portland. Both cases were tried to a jury, and at the conclusion of the evidence the defendant moved for a directed verdict, which was denied, and to this refusal defendant excepted. The defendant also took exceptions to certain rulings of the court, and to the refusal of the court to give certain requested instructions.

The jury awarded a verdict for plaintiff in each case, and defendant filed a motion in each case for a new trial. The defendant among other contentions asserted that the plaintiffs were not, at the time of the accident, legally in the highway, in that the driver had no operator's license, and that they did not come within the exception in Sec. 33, Chap. 26, R. S. Exceptions sustained. Motions for a new trial granted.

Case is stated in the opinion.

Frank H. Haskell, for plaintiffs.

Clifford E. McGlauflin, for defendant.

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

MORRILL, J. These are actions to recover damages claimed to have been received by reason of a defect in a highway, the first for personal injuries, the second for injuries to a motor truck. The actions were tried together resulting in verdicts for the plaintiffs, and are before us upon a single bill of exceptions and upon motions for new trials.

A decision upon the exception to the ruling refusing to direct a verdict for the defendant, upon the ground that the plaintiffs failed to prove that they were lawfully traveling upon the highway, is decisive of the cases.

The accident happened on Sunday, July 15, 1917; on that day one Frederick W. Blanchard, the father of the two plaintiffs, left his home in South Portland and drove in a motor truck to the house of his son, Harry F. Blanchard, also in South Portland; he took with him in the truck two younger sons, Alanson S., then about six years old, and Willis. Frederick W. Blanchard and Harry F. Blanchard were partners in business, as plasterers; the motor truck was the

property of the partnership and was duly registered; the father held a license to operate motor vehicles, duly issued in accordance with the provisions of R. S., Chap. 26, Sec. 31; the son, Harry F. Blanchard was not so licensed. The father and son had arranged to work on this Sunday on a job of plastering which they were doing in Portland; they left the son's house in the truck on their way to work, the father driving the truck; they had proceeded about a quarter of a mile when they changed places, the son Harry F., taking the wheel, because, as he testifies, "my father wasn't feeling well;" they proceeded, Harry driving, Alanson sitting on his father's knee, and Willis sitting in the rear of the truck. As they approached the southerly end of the bridge over Stroudwater river, the truck struck the alleged defects in the highway; Harry lost control of the truck, which ran about its length upon the bridge, swung to the left, going over the side of the bridge and into the river.

The question at once arises whether the plaintiffs were lawful travelers on the highway; it is only such travelers who have a cause of action against the municipality to recover damages for injuries received through defects in the highways.

The statute law of this State, R. S., Chap. 26, Sec. 28, provides:

"No motor vehicle of any kind shall be operated by a resident of this State, upon any highway, townway, public street, avenue, driveway, park or parkway, unless registered as provided in this chapter, and no person, a resident of the State, shall operate a motor vehicle upon any highway, townway, public street, avenue, driveway, park or parkway unless licensed to do so, under the provisions of Section 31."

The first part of this section relating to unregistered motor vehicles was under consideration in *McCarthy* v. *Leeds*, 115 Maine, 134, and in *McCarthy, Admr.* v. *Leeds*, 116 Maine, 275, and it was there held that neither the owner of, nor the passengers in an unregistered motor vehicle can recover damages from a town for injuries received on account of a defective highway while operating or riding in such unregistered motor vehicle. In such cases it is not a question of causal connection between the violation of the statute and the happening of the accident. "These decisions were based squarely and solely upon the proposition that the liability of a town for defects in its ways and bridges is purely statutory and the duty owed by the town is only to lawful travelers; that the occupants of an unregis-

tered automobile are not lawful travelers so far as the town is concerned, and therefore no duty is owed to them by the town except to refrain from wilful injury." *Cobb* v. *Cumberland County Power & Light Co.*, 117 Maine, 455, 463.

The instant cases must be held to be ruled by the McCarthy Cases, unless Harry F. Blanchard was at the time of the accident within the exception of Sec. 33 of Chap. 26, which will be considered later. As pointed out in the case last cited, *Cobb* v. *Cumb. County Power & Light Co.*, the reason for the prohibition to the animate unlicensed driver is greater and more practical than the prohibition to the inanimate unregistered car. "An inert automobile of itself is harmless, whether registered or not. It is only when in motion that danger attaches. But an unlicensed driver operating a machine may be the cause of much injury. . . . . The act providing for registration has no tendency to prevent collisions, while that requiring the licensing of operators does have that tendency, in so far as it may prevent incompetent persons from managing an engine fraught with such capacity for injury. The Legislature however has made no distinction between the two and has provided merely a penalty in either case and the same penalty."

It must follow that the highways of the State are closed alike to unregistered motor vehicles and to unlicensed operators. *McCarthy, Admr.* v. *Inhbts. of Leeds*, 116 Maine, 275, 279; in actions against towns to enforce a statutory liability for defects in the highways, it is not a question of causal connection in either case between the violation of the statute and the happening of the accident; the unregistered car and the unlicensed operator are alike expressly forbidden by the statute to pass along the highway. So far as the town is concerned the unlicensed operator is not a lawful traveler unless in any particular case he is within the exception found in Section 33, which reads as follows:

"The preceding sections shall not be construed to prevent the operation of motor vehicles by unlicensed persons, if riding with or accompanied by a licensed operator, for the purpose of becoming familiar with the use and handling of a motor vehicle, preparatory to taking out license for driving."

This provision was evidently intended to enable an inexperienced person to learn to operate a motor vehicle by operating it under the supervision and instruction of a licensed operator. The words,

"riding with or accompanied by a licensed operator," mean that the licensed operator shall ride with, or accompany the unlicensed person, under such conditions and in such proximity that he can maintain the supervision over the unlicensed person necessary for safety, and render assistance, if need be, with reasonable promptness. *Bourne* v. *Whitman*, 209 Mass., 155, 165. It is also clear that the unlicensed person must be operating the vehicle in company with the licensed operator "for the purpose of becoming familiar with the use and handling of a motor vehicle, preparatory to taking out license for driving" . . . . not necessarily for the sole purpose of becoming familiar with the vehicle, but that purpose must be present in his mind.

Upon the undisputed facts we think that Harry F. Blanchard was not within the protection of this exception; his testimony is convincing on this point and admits of no other conclusion.

The father and son were going by prearrangement to work upon a plastering job upon which they were engaged; the father drove the car for a quarter of a mile after leaving the son's house, and they then changed places, not to give the son an opportunity to learn to drive, but "because my father was not feeling well," as the son testifies; they then proceeded, the father holding the little six years old boy in his lap; he was in no position to render assistance when his son lost control of the truck—at a time when, as shown by the tracks on the bridge, slight assistance promptly given would have averted the accident. The testimony of Harry F. Blanchard shows that the firm had owned a truck for about four years; that he had driven the truck first owned by the firm, a Reo Machine, on at least two occasions when requested to do so by his father; that he had driven the truck to which the accident happened on at least one occasion, alone, carrying his father's license; that he had driven it several times with his father; that he was not licensed to operate either truck; the only particular in which he claims that he was not qualified to drive the truck, was that he had trouble with the gears, but whether that trouble arose from inexperience or from defects in a second hand truck is not clear. The testimony of the son is convincing that the father and son changed places and the father surrendered the wheel, not to enable the son to learn to operate, but because the father was not feeling well; they changed just as any two persons accustomed to operate a motor truck would change under similar circumstances.

The intention to take out a license, entertained in January as the young man claims, cannot be recognized as continuing unaccomplished and unrealized for six months to serve as a shield against the consequences of violating the law by operating the firm's truck when inclination or convenience dictated. Such intention must be pursued toward its fulfilment with reasonable diligence.

To hold that these persons at the time of the accident were occupying the positions, the one, of a licensed operator riding with or accompanying an unlicensed person to exercise supervision and render assistance, the other of a person driving for the purpose of becoming familiar with the use and handling of the truck preparatory to taking out a license for driving, would in effect nullify the statute prohibiting in the interest of public safety the operation of motor vehicles by unlicensed persons.

For these reasons the requested ruling that a verdict be directed for the defendant should have been given; and for the same reasons the motions for new trials must be granted.

Exceptions sustained.
Motions for new trials granted.

IDA B. MURRAY *vs.* ZILPHA E. MUNSEY.

Lincoln. Opinion April 4, 1921.

What constitutes boundaries of land conveyed by deed, is a question of law, but where the boundaries are is a question of fact.

The principles of law involved in this case are well settled. What are the boundaries of land conveyed by a deed, is a question of law. Where the boundaries are, is a question of fact.

An existing line of an adjoining tract may as well be a monument as any other object. And the identity of a monument found upon the ground with one referred to in the deed, is always a question for the jury.

If an existing line of an adjoining tract is mentioned in a deed as a boundary, it is the true line which is such boundary.

We must assume that all principles of law applicable to the contentions of the parties were fully explained to the jury; upon a careful examination of the record the court is compelled to the conclusion that it contains ample evidence, if believed by the jury, to sustain the verdict for defendant.

On motion by plaintiff to set aside the verdict. This is an action of trespass quare clausum involving the true line between adjoining lots. Verdict for defendant with special findings. Motion overruled.

Case is stated in the opinion.

A. S. Littlefield, for plaintiff.

Weston M. Hilton, for defendant.

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

MORRILL, J. This action of trespass quare clausum fregit involves the location of a line between the premises of the parties; the parcel in dispute, upon which the acts constituting the alleged trespass were committed, is three feet wide without trees or buildings upon it.

The premises of both parties were formerly owned by one Narcissa Brackett, the mother of the plaintiff and grandmother of defendant. On April 14, 1899, Mrs. Brackett conveyed to defendant's husband, Warren M. Munsey,

"A lot of land situated in New Harbor in said Bristol and bounded as follows: Beginning at a point in the center of the road leading from Pemaquid Falls to Pemaquid Point near the residence of Mrs. Abbie Tibbetts; *thence north 58 degrees west and by the southern line of the schoolhouse lot about six rods to a stone set in the earth;* thence south 30 degrees west three rods and eleven links to a stone set in the earth; thence south 58 degrees east about four and one-half rods and parallel with the first course given above to the center of said road; thence northerly by said road to the point first mentioned, containing one-eighth of an acre more or less."

On February 14, 1900, Warren M. Munsey conveyed the same lot to the defendant.

On May 21, 1909, the plaintiff, having acquired title to the remainder of the Brackett property, conveyed to the defendant,

"A certain lot or parcel of land situated in the village of New Harbor in the town of Bristol South of New Harbor school building, bounded and described as follows: Beginning on the west side of the town road at Zilpha B. Munsey's west bound in the southern line of the school lot; thence north 58 degrees west one rod and four links following said line to *a stone placed in the earth marked with a cross* thence in a southerly direction three rods and twelve links to a stone placed in the earth, the same being at the southeast corner of Ida B. Murray's stable; thence easterly twenty links to land of Zilpha B. Munsey, the same joining land deeded to Zilpha B. Munsey by Warren M. Munsey February 14th, 1900."

The plaintiff claims that the first call in Mrs. Brackett's deed, printed above in italics, coincides with a fence which she claims marks the southerly line of the school house lot; she does not point out any stone marking the end of that call, but at the end of the fence she points out a stone marked with a cross, which she claims is the stone referred to in the first call of the second deed, also indicated above by italics.

The defendant claims that the first call in Mrs. Brackett's deed is located three feet south of the fence and is marked by a stone, marked B, set at the end of the line when the first lot was surveyed and before the deed was executed, and that she located her house by that line, so close thereto as to leave only space for eaves-drop upon her own land; and she says that when she built her house she obtained permission from the selectmen to grade between her house and the fence.

The effect of the defendant's contention is to locate the lot conveyed by the first deed three feet farther south than by the plaintiff's contention; it was upon this strip of land along the southerly side of the lot conveyed by the deed of April 14, 1899, that the acts of alleged trespass were committed. The jury found specially that the plaintiff was not, and that the defendant was the owner of this strip of land at the time of the alleged trespass, and returned a general verdict for the defendant, which the plaintiff moves to set aside upon the usual grounds.

The principles of law involved in the case are well settled. "*What* are the boundaries of land conveyed by a deed, is a question of *law*. *Where* the boundaries are, is a question of *fact*. An *existing line* of an adjoining tract may as well be a *monument* as any other object. And the *identity* of a monument found upon the ground with one referred to in the deed, is always a question *for the jury*." *Abbott* v. *Abbott*, 51 Maine, 575, 581. If an existing line of an adjoining tract is mentioned in a deed as a boundary, it is the true line which is such boundary. *Wiswell* v. *Marston*, 54 Maine, 270. *White* v. *Jones*, 67 Maine, 20.

We must assume that all principles of law applicable to the contentions of the parties were fully explained to the jury, and upon a careful examination of the record we are compelled to the conclusion that it contains ample evidence, if believed by the jury, to sustain the verdict for defendant.

The jury found specially that the three-foot strip, owned by the defendant, along the southwesterly line of the first parcel does not extend across the southerly end of the second parcel, thus making a jog of three feet in the defendant's southwesterly line; the plaintiff thereupon contends that the two special findings are inconsistent; that the jury was right as to the second, or back, lot, and necessarily wrong as to the front lot. But we see no necessary inconsistency in the two special findings; the second call in the deed of the second lot reads, "thence in a southerly direction three rods and twelve links to a stone placed in the earth, the same being at the southeast corner of Ida B. Murray's stable;" there can be no dispute as to this bound; both stable and stone are to be seen. The next call reads, "thence easterly twenty links *to land* of Zilpha B. Munsey," not "to corner of land of Zilpha B. Munsey." In fixing upon the earth the direction of this call the jury fixed it in the same course as the front of the stable, and not on an angle to the corner of the defendant's lot, a con-

struction which appeals to us as sensible. The special finding as to the second, or back, lot was in favor of the plaintiff, but was immaterial as to the result of the case because no acts of alleged trespass were committed upon plaintiff's land adjoining that lot.

The entry will be,

Motion overruled.

BURTON H. NORRIS et als. *vs.* MARY W. MOODY et als.

Kennebec. Opinion April 5, 1921.

The proper procedure by a party aggrieved by a decree of a judge of probate exercising equity jurisdiction is by appeal to the Supreme Court of Probate, and not by direct appeal to the Law Court.

The remedy of a person aggrieved by a decree of a judge of probate exercising equity jurisdiction, is by appeal to the Supreme Court of Probate under R. S., Chap. 67, Sec. 31 and not by direct appeal to the Law Court under the provisions of R. S., Chap. 82, Sec. 22. No other question is involved in this case.

On report. This case was begun by the appellants by their bill in equity, addressed to the "Probate Court, sitting in Equity" under the provisions of R. S., Chap. 67, Sec. 2, and was heard upon bill, answer, replication and proof by the Judge of Probate; after which hearing a final decree was made by said Judge sitting in Equity and the same was duly entered in the Probate Court.

From which decree the plaintiff in said bill took an appeal to the Supreme Court of Probate according to the provisions of the statute relating to probate appeals. The appeal was entered in the Supreme Court of Probate and a hearing had thereon, at which hearing the appellees raised the question of jurisdiction of the Supreme Court of Probate and the same was submitted to the sitting Justice and was reported to the Law Court on an agreed statement. Case to stand for hearing in the Supreme Court of Probate.

Case stated in the opinion.

Harry Mansur, for plaintiff.

McLean, Fogg & Southard, and Herbert E. Foster, for defendant.

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

DEASY, J. Sec. 2 of Chap. 67 of the R. S., provides that—"The courts of probate shall have jurisdiction in equity, concurrent with the Supreme Judicial Court, of all cases and matters relating to the administration of the estates of deceased persons, to wills, and to trusts which are created by will or other written instrument. Such jurisdiction may be exercised upon bill or petition according to the usual course of proceedings in equity."

The pending suit was begun in the Kennebec County Probate Court by bill in equity praying for the construction of a will.

From the final decree of the Judge of Probate the petitioners claimed an appeal under R. S., Chap. 67, Sec. 31.

The case comes to this court on report.

The question involved relates to the remedy of a party who is aggrieved by the decree of a Judge of Probate exercising equity jurisdiction. The petitioners contend that R. S., Chap. 67, Sec. 31 providing for probate appeals affords the proper remedy. The defendants maintain that the correct procedure is to apply R. S., Chap. 82, Sec. 22 relating to appeals to the Law Court in equity causes.

It is the opinion of the court that the contention of the petitioners must be sustained.

1. Sec. 31 of Chap. 67 applies literally to the situation. Omitting parts not here material the statute reads—"Any person aggrieved by any decree of such judges (judges of probate) may appeal therefrom." This language is equally appropriate whether the decree is that of a Judge exercising probate or equity jurisdiction.

But Sec. 22 of Chap. 82, R. S., construed literally is not applicable—"From all final decrees of such justice (justice of the Supreme Judicial Court) an appeal lies to the next term of the Law Court."

To make this statute apply there must be read into it after the word 'justice" the phrase "or any judge of probate exercising equity jurisdiction." Such a clause should not be read into the statute by the court unless plainly necessary to effectuate the legislative intention.

R. R. Co. v. *Co. Commrs.*, 28 Maine, 120; *Ins. Co.* v. *Greenleaf*, 64 Maine, 129; *Karoly* v. *Commission*, (Col.), 176 Pac., 286; *Pierce* v. *Storage Co.*, (Iowa), 172 N. W., 191; 36 Cyc. 1113, 26 A. & E. Ency., 600.

While the language of the statute is not wholly free from doubt it certainly does not appear that supplying the above clause gives effect to the legislative intent.

2. The statute authorizes the court sitting in equity "upon application of either party" to frame issues of fact to be tried by a jury. R. S., Chap. 82, Sec. 33. Independently of the statute trials by jury while not guaranteed by the constitution are a well established feature of equity jurisprudence. 21 Corpus Juris, 585.

If the defendant's theory is right the moving party by selecting the Probate Court as his tribunal may close the door of opportunity for either party to have a jury trial or ask for it. So radical a change in equity practice if contemplated by the Legislature would have been made expressly and not inferentially.

3. Causes may be taken to the Law Court on exceptions to the rulings of a single Judge sitting in equity. R. S., Chap. 82, Sec. 33.

Not so in case of rulings by a Judge of Probate. From a Probate Court the whole case would have to be carried forward on appeal notwithstanding that the entire controversy might relate to a simple and single issue of law. We think that the Legislature did not intend this result.

4. The case of *Singhi* v. *Dean*, 119 Maine, 287, was begun by a bill in equity in the Probate Court and brought to the Supreme Judicial Court on appeal in accordance with R. S., Chap. 67.

Jurisdiction not having been challenged the case is, of course, not decisive.

But the fact that the method of appeal invoked was not questioned either by the eminent counsel in the case or by the court is significant.

5. Arguments supporting the opposing theory are plausible, but not convincing. The word "concurrent" does not mean exclusive and final. If so it would negative the right to resort to the Law Court. The lower court is given final jurisdiction subject to appeal. *State* v. *Sinnott*, 89 Maine, 43.

The language "such jurisdiction may be exercised . . . according to the usual course of proceedings in equity" does not relate to procedure following the final decree of the Judge of Probate. As contemplated by this section the jurisdiction of the Probate Court does not include the method of appeal from that court.

According to stipulation, case to stand for hearing in the Supreme Court of Probate.

MARY A. DYER *vs.* MAINE CENTRAL RAILROAD COMPANY.

Knox. Opinion April 5, 1921.

The full duty of a railroad company to the public is not always embraced in compliance with statutory requirements, but an engine or train run across a highway near the compact part of a town with the bell ringing at a speed not exceeding six miles an hour, does not constitute negligence, whether there are gates, flagman, or automatic signals, or not. Evidence does not justify a finding of negligence.

The defendant corporation has, and in 1916 had a branch track crossing Pleasant St., Rockland at grade. On August 29, 1916, an automobile in which the plaintiff was riding as a passenger, was, upon this crossing, struck by the defendant's locomotive. The injuries were thus caused on account of which this suit is brought.

The plaintiff has recovered a verdict. The defendant brings the case to this court on motion and exceptions to the refusal of the presiding Justice to order a verdict for defendant. No gate or automatic signal was maintained, and no flagman stationed at this crossing. It does not appear that such safety devices had been ordered by the Public Utilities Commission or asked for by the city authorities.

The mere fact however that such precautionary measures had not been ordered or prayed for does not necessarily exonerate the defendant. The requirements of the statute do not measure the full duty of a railroad company to the public.

There are situations wherein by reason of congested travel or other conditions, it would be manifestly negligent to run railroad trains across unguarded streets, although no gate or other safety appliance had been officially ordered.

But it is plain that the Pleasant St. crossing was not such a situation. The street was not a crowded thoroughfare. At the date of the accident it was used as a detour owing to the temporary closing of another street. There is nothing to show that it was other than a residential street carrying a moderate amount of traffic.

A sign board as required by R. S., Chap. 56, Sec. 72 was at the time of the accident maintained by the defendant. If the jury found the defendant corporation guilty of negligence by reason of the absence of other safety devices at the crossing, the verdict cannot be justified.

No whistle was sounded as the train approached the Pleasant St. crossing. A bell was rung however. This appears from the testimony of one of the plaintiff's witnesses. Being within the city limits no whistle was necessary.

The plaintiff contends that the defendant's train crossed Pleasant St. at an excessive and negligent rate of speed. The statute then in force provided that "no engine or train shall be run across a highway near the compact part of a town at a speed greater than six miles an hour" (unless gates, flagman or automatic signals are provided). The evidence fairly shows that the Pleasant St. crossing is "near the compact part of a town."

Violation of this section renders the corporation liable to a penalty, and is evidence of negligence though not conclusive as a matter of law.

But there was not in the case sufficient evidence to justify a jury in finding that at the time of the accident the defendant's train was crossing Pleasant St. at an excessive and negligent rate of speed. No other acts of the defendants claimed to be negligent having been shown the mandate must be. Motion sustained. New trial granted.

On exceptions and motion. This is an action to recover for personal injuries sustained by plaintiff, who was a passenger in an automobile which was hit by a train of defendant on the railroad crossing at Pleasant St. in the City of Rockland, on the twenty-ninth day of August 1916. The case was tried to a jury at September term, 1920, in Knox County, and at the close of the testimony the defendant moved for a directed verdict upon the ground that there was no negligence on the part of the railroad, and secondly that plaintiff was guilty of contributory negligence, which motion was refused by the presiding Justice and defendant took exceptions. A verdict for plaintiff was rendered for $4048.33, and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

Case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

White & Carter, and S. T. Kimball, for defendant.

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

DEASY, J. The defendant corporation has, and in 1916 had a branch track crossing Pleasant St., Rockland at grade. On August 29, 1916, an automobile in which the plaintiff was riding as a passenger, was, upon this crossing, struck by the defendant's locomotive. The injuries were thus caused on account of which this suit is brought.

The plaintiff has recovered a verdict. The defendant brings the case to this court on motion and exceptions to the refusal of the presiding Justice to order a verdict for defendant. No gate or automatic signal was maintained, and no flagman stationed at this crossing. It does not appear that such safety devices had been ordered by the Public Utilities Commission or asked for by the City Authorities. R. S., Chap. 56, Sec. 73.

The mere fact however that such precautionary measures had not been ordered or prayed for does not necessarily exonerate the defendant. The requirements of the statute do not measure the full duty of a railroad company to the public.

"The common law still requires the exercise of care and prudence commensurate with the degree of danger incurred."

Smith v. *M. C. R. R. Co.*, 87 Maine, 348.

There are situations wherein, by reason of congested travel or other conditions, it would be manifestly negligent to run railroad trains across unguarded streets, although no gate or other safety appliance had been officially ordered.

But it is plain that the Pleasant St. crossing was not such a situation. The street was not a crowded thoroughfare. At the date of the accident it was used as a detour owing to the temporary closing of another street. There is nothing to show that it was other than a residential street carrying a moderate amount of traffic.

We do not agree with the plaintiff's counsel that a branch line street crossing should be provided with gates merely because of its proximity to the main line. Train noises emanating from the main line may be in some degree confusing, but they are warnings admonishing the traveler to proceed with greater caution.

A sign board as required by R. S., Chap. 56, Sec. 72, was at the time of the accident maintained by the defendant. If the jury found the defendant corporation guilty of negligence by reason of the absence of other safety devices at the crossing, the verdict cannot be justified.

No whistle was sounded as the train approached the Pleasant St. crossing. A bell was rung however. This appears from the testimony of one of the plaintiff's witnesses. Being within the City limits no whistle was necessary. R. S., Chap. 56, Sec. 72.

The plaintiff contends that the defendant's train crossed Pleasant St. at an excessive and negligent rate of speed. The statute then

in force provided that "no engine or train shall be run across a highway near the compact part of a town at a speed greater than six miles an hour" (unless gates, flagman or automatic signals are provided). R. S., Chap. 57, Sec. 79. The evidence fairly shows that the Pleasant St. crossing is "near the compact part of a town."

Violation of this section renders the corporation liable to a penalty, and is evidence of negligence though not conclusive as a matter of law. *Wood* v. *R. R. Co.*, 101 Maine, 478; *Moore* v. *R. R. Co.*, 106 Maine, 304; *Sykes* v. *R. R. Co.*, 111 Maine, 182.

But unlawful speed was not proved. No direct testimony was offered as to the speed of the train. Two witnesses were produced who testified to the distance that the train ran after the collision. One said "perhaps one hundred and fifty feet." The other, "some hundred or more feet." From this testimony coupled with that of a witness who heard the brakes applied before the collision the plaintiff contends that the jury could legitimately and did undoubtedly deduce excessive speed.

A railroad man of many years experience testified as an expert that a train like the one in question, under conditions like those existing at the time of the accident, if running six miles an hour would require more than 200 ft. to come to a stop after the application of air brakes. The plaintiff offered this witness, but urges that his testimony is valueless by reason of his interest as an employee of the defendant.

No other expert testimony was offered. If the jury found excessive speed we think that such finding was based not on evidence, but upon conjecture and speculation.

There is no sufficient evidence of negligence on the part of the defendant in failing to provide safety devices, or to give warning signals, or in respect to the speed of its train. The plaintiff has not alleged and does not claim negligence in any other respect.

It is unnecessary to determine whether or not the plaintiff's want of due care contributed to the accident.

The bill of exceptions presents no question that is not before the court on the motion. It is unnecessary to pass upon it specifically.

Motion sustained.
New trial granted.

H. B. BUZZELL et als., In Equity, *vs.* CAROLINE S. FOGG.

Kennebec. Opinion April 6, 1921.

Interpretation of a residuary clause in a will. A bequest in terms manifesting a clear intent that it shall be taken in trust, and the trust is so indefinite that it can not be carried into effect, the legatee takes the legal title only and a trust results by implication of law to the testator's residuary legatees of next of kin.

Bill in equity praying for interpretation of a paragraph in the will of M. Angie Brown which reads thus:

"All the rest, residuum and remainder of my estate I give to Caroline S. Fogg of Augusta, Maine, to be disposed of as she directs from time to time and as she thinks will be in accordance with my wishes."

Mrs. Fogg is the executrix of the will.

Held:

That the executrix holds the residuum in trust for the heirs at law of the testatrix, and that the same be divided among them after paying debts of administration.

On appeal by defendant. This is a bill in equity seeking the interpretation of the residuary clause in the will of M. Angie Brown. A hearing was had before a single Justice upon bill, answer and replication and it was decreed that under the residuary clause of the will, Caroline S. Fogg, the executrix of the will, and the respondent in the bill in equity, held the property in trust for the heirs at law of testatrix, from which finding defendant appealed. Appeal dismissed.

Case stated in the opinion.

McLean, Fogg & Southard, for plaintiff.

M. S. Holway, for defendant.

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

PHILBROOK, J. The plaintiffs are heirs at law of M. Angie Brown who died testate on the 19th day of January, 1920. The defendant is the duly appointed and qualified executrix of the will. The residuary clause of the will reads as follows:—

"All the rest, residuum and remainder of my estate I give to Caroline S. Fogg of Augusta, Maine, to be disposed of as she directs from time to time and as she thinks will be in accordance with my wishes."

The plaintiffs pray for construction and interpretation of this residuary clause, claiming that the same is void, illegal and of no effect and that the residuum belongs to them. They further pray that the court will order the defendant to pay over the residuum to them by reason of their relationship to the deceased.

The cause was heard upon bill, answer, replication and arguments of counsel and the sitting Justice sustained the bill, with costs to be paid out of the estate, holding that the true construction of the residuary clause of the will is that the executrix holds the residuum in trust for the heirs at law of the testatrix and ordered that the residuum after paying debts of administration be divided among the heirs at law of the testatrix.

From this decree the defendant seasonably appealed and the cause is now before us for interpretation of the residuary clause hereinbefore referred to.

The legal questions involved here have been so recently and so fully discussed in *Haskell* v. *Staples*, 116 Maine, 103, and in the somewhat recent case of *Fitzsimmons* v. *Harmon*, 108 Maine, 456, that it hardly seems profitable to repeat that discussion. The case at bar is controlled by the law as expressed in those two opinions and they must govern us here.

Appeal dismissed.
Decree of sitting Justice affirmed with costs and reasonable attorneys fees for both parties to be determined by the court below and to be allowed out of the funds in the hands of the executrix.

FOUNTAIN RODICK *vs.* FLORA PINEO.

Hancock. Opinion April 5, 1921.

The equity powers of the court may be used in applying equitable principles in the defense to an action at law. Equity delights to grant relief when it is meet to do so. But even the equity powers of a court know limits. A court of equity may not go outside the evidence.

The instant action for money had and received was brought by one brother, as assignee of another, against a sister to recover a balance claimed to be due and unpaid from the proceeds of the consideration for the conveyance of certain real estate. Record title to the land was solely in defendant, but the effect of the transaction investing that title was to make her the trustee of a constructive trust implied by the law. Of such trust the aforesaid assignor and this defendant, and brothers of theirs also, eventually became beneficiaries.

The court can use its equity powers in defense to an action at law.

Laches are discountenanced in equity. Equity looks with favor upon the similar, but not reciprocal, defense of acquiescence. Asquiencence and laches are personal privileges which a defendant may assert or waive at his election.

The trustee, in this action to recover the balance of the proceeds of the sale of the assigned share, is entitled to reimbursement for expenditures with regard to the land made by her for the benefit of both the assignor and assignee.

Equity will take cognizance of cross-claims between litigants, although they are wanting in mutuality, whenever it becomes necessary to effect a clear equity or prevent injustice.

As between themselves, joint mortgagors are liable only to the extent that each received the proceeds of the mortgage.

Interest is not chargeable against a trustee as a matter of right. His liability therefor depends upon the character of the trust and the circumstances attending its administration. No rule is definable more fixed than whether he ought in good conscience to pay it.

On report. This is an action for money had and received, brought by plaintiff, a brother as assignee of another brother, against a sister to recover a balance claimed to be due from the proceeds of a conveyance of certain land on Bar Island in Frenchman's Bay. The record title of the land was in the defendant, but plaintiff claimed that the

character and nature of the transaction investing the title in defendant was such as to constitute a constructive trust implied by the law, and that she held the title to said land in trust, and the assignor of plaintiff was a beneficiary. The defendant filed a plea of the general issue and also thereunder a brief statement setting up an equitable defense for reimbursement for money she had paid in behalf of assignor, and also filed an account in set-off.

By agreement of the parties, the case, at the conclusion of the testimony, was reported to the Law Court for its determination upon so much of the evidence as was legally admissible, and judgment to be rendered to be conclusive as to all suits and equities between the parties. Judgment for plaintiff for $5796.39, with interest from date of the writ.

The case is fully stated in the opinion.

E. S. Clark, H. L. Graham, Fellows & Fellows, and David O. Rodick, for plaintiff.

C. B. Pineo, and Hale & Hamlin, for defendant.

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

MORRILL, J. does not concur.

DUNN, J. Bar Island, lying in Frenchman's Bay, within the corporate limits of the town of Gouldsboro, opposite and nearby the Bar Harbor Village landing, was owned by David Rodick. His wife was living apart from him. Fearful that she would cause attachment of his property to be made, and desirous of saving the island to himself, he, by recorded deed of absolute form, dated June 1, 1865, gratuitously conveyed its title to two of his sons, one named Fountain and the other Serenus. Eight years later, at the father's request, these sons conveyed the estate to their sister, Flora, the defendant. No actual consideration moved for this conveyance, though the deed purports otherwise. As a part of the one transaction, Flora, the grantee of the brothers, contemporaneously executed and delivered to her father, a deed of the same property. Her deed never was recorded. Mr. Rodick, the father, died intestate in 1881, survived by the children already named, and also by a son called Edward, and

still another son known as Milton. After his death, Flora, who, following that event, had found the deed among her father's papers, handed it to Fountain, for keeping in the latter's safe. Fountain later allowed Edward to have the deed. What Edward did with it is not shown.

Record title to the property continued in Flora for eighteen years after her father died. Then she conveyed an undivided fifth part to Edward. The next year she and Edward joined in mortgaging the island as security for the payment of thirty thousand dollars. Edward died. Under the statute of descents, title to his interest passed to his widow and heirs, the encumbrance still outstanding. At their request the interests of the widow and heirs were set off. The equitable shares of Fountain and Serenus, in the remaining portion of the island, Flora acquired by purchase. In 1909, to provide money for payment of the mortgage given by herself and Edward, Flora and Milton together mortgaged the island, exclusive of the Edward share, for forty-five thousand dollars. By separate mortgage Flora individually raised twenty-three hundred dollars for the defrayment of tax and other dues. That same year she and Milton sold about twenty-nine acres of the island to Mr. E. T. Stotesbury; her husband, Charles B. Pineo, Esquire, a Bar Harbor lawyer, representing the grantors in the transaction. From the proceeds of the sale Mr. Pineo paid the commission of the real estate agent instrumental in effecting the transfer. He paid the mortgage that his clients jointly gave, and also that which his wife alone had made; obtaining record cancellations. The money left he deposited in a bank, three-fourths in an account to the credit of his wife and one-fourth likewise to the credit of Milton, in accordance with his understanding of the proportions in which the grantors had owned the property. He did not affect to adjust earlier affairs of his clients. But, submitting to each a statement of receipts and disbursements, and waiving charge for his own services, he regarded his duty as at an end.

Three years went by uneventfully. Then Milton, a fortnight or so before he died, made assignment to Fountain of what was unpaid to him by the Pineos from the Bar Island sale. Almost three years afterward, relying on the assignment, Fountain brought against Flora the instant action for money had and received. His writ contains a single count. Specification makes plain that he seeks to recover an amount equal to one-fourth the gross sale price, minus

both the agent's commission and partial payment to his assignor, and plus interest because of postponed discharge of obligation. Defendant's plea is the general issue. By brief statement she interposes an equitable defense for her reimbursement for sundry expenditures of money in Milton's behalf while he was living. And besides she presents an account in set-off for boarding Milton and men in his employment; for money advanced to buy an interest in a weir for him; for taxes paid on his share in the island; for baiting his horse, and for his proportionate part of expense incidental to the Stotesbury sale. To the brief statement and to the set-off plaintiff replies that rights of persons not parties to the litigation are involved. And, as against the set-off, he particularly invokes the statute of limitations.

An auditor was appointed. With the equitable defense he was not concerned. The auditor stated that, regarding the account in set-off as barred by statute, when the action was begun, there was due from defendant to plaintiff the sum of $11,075.38. The case was brought to trial. The auditor's report, the evidence on which that report was based, and other evidence as well, was introduced. Then the controversy was reported to the Law Court for final determination.

The effect in the law of the transaction respecting the transfer of the island by the brothers to their sister in compliance with the father's request, and of her unrecorded deed to the latter, was to vest the record title solely in Flora, while the equitable title went to the father and in him remained until it descended, in virtue of statutory provision, on his death without leaving a will, in equal shares to the five children as his only heirs at law; his wife having predeceased him. Record title continuing in Flora made of her trustee for herself, and trustee for Edward, Fountain, Serenus and Milton, each an equal undivided part. The Edward trust she discharged by conveyance of his part to him. The shares of Fountain and Serenus she herself bought. But, with reference to Milton's interest, it is to be noticed that Flora all along continued to be the trustee of a constructive trust implied by the law. With a phase of that trust this case deals. The inquiry here is essentially different than that before the auditor. Decision must be moulded by equity's ideal of right. The court can use its equity powers to apply equitable principles in the defense to an action at law. *Hurd* v. *Chase*, 100 Maine, 561.

Equity has a beneficial rule known as laches. In equity laches and neglect always have been discountenanced. Equity frowns

upon laches. She looks with favor upon the similar, but not reciprocal, defense of acquiescence. Acquiescence in distinguishment from laches imports active assent. It relates to inaction while an act is being performed; laches relates to delay after the act is done. Springing from the same cardinal rule, that he who seeks equity must do equity, both acquiescence and laches are intended to prevent the doing of inequity. And this not, like limitation at law, solely because of a mere matter of time, but for the reason of assenting approval presumed from inactivity in the one instance, and of an inequity founded upon some change in the condition or relation of the parties in the other. Acquiescence and laches are personal privileges which a defendant may waive or assert at his election. The doctrine of laches is not asserted here. It is not intended to suggest that it would be availing. Nor does defendant rely on acquiescence. For, though she mentions acquiescence, yet she makes proof that no unequivocal setting up of a right adverse to Milton ever was made known to him. The defensive proposition on which she would prevail is, just credit to me will wipe out the debit that he makes, and more. And thus the case must be considered.

At the outset, plaintiff readily shows himself entitled to recover an amount equal to one-fourth of the consideration proceeding from the Stotesbury sale; less, as is conceded, pro rata deduction for the agent's commission, and less too what of that consideration was paid to Milton, while he lived. Defendant further is entitled to allowance for any claim which she may have, legally or equitably, not only against Milton, but also against Fountain, both against them individually and against them jointly. Against her claim in set-off the statute of limitations is pleaded. By analogy to law equity adapts and applies statutes of limitations to legal demands. But it is unnecessary here to consider whether the statute shall be bar. The defendant, plea of the statute notwithstanding, was, without objection, fully heard on every feature of her case; and in the presented situation equitable principles are controlling. Looking over the plea, and looking into and carefully considering the testimony, it is our conclusion that a judgment on evidence not more definite than that tendered in substantiation of the charge made for boarding Milton and his men, and to support that for feeding his horse, would be without foundation more stable than quicksand. Mrs. Pineo was devoted and generous to all her brothers. With their careers, and

that of their father before them, hers was intertwined and interwoven in pathetic and touching degree. The seal of death has closed the lips of father and of brothers all; Fountain having died since this action was begun. On her part lapse of time has neither essentially impaired the recollection of these particular transactions nor obscured their details. She is fully as conversant with them now as ever. Frankness characterizes the testimony of her case. She never knew the extent of what she did. She made no charge. She kept no record, for what was done was so done with little, if indeed any, expectation at the time of pecuniary or equivalent reward. She makes claim now because, and only because, of this suit against herself. Equity delights to grant relief when it is meet to do so. But there are limits even to the equity powers of a court. A court of equity may not go outside the evidence.

The item for money paid out for a weir defendant eliminates. That the statute lacks efficacy with regard to the item, incurred within six years of the writ, for expenses incidental to the sale of the land, the plaintiff agrees. And the sole remaining one, that for taxes paid, is available to defendant in the trust relation, independently of formal set-off.

Excepting in two instances, to be later mentioned more in detail—and in each of those two instances only in an indirect way—neither Milton nor Fountain had any of the proceeds of the original mortgage. The avails of that mortgage, as charged to Flora, chiefly were applied in discharging her liability on promissory notes and judgments which, she herself testified, had their origin in accounts with grocers and marketmen for supplies, and in bills for fodder and other things that she bought, or, if others bought, for which she became responsible to pay, and which, in one way or another, were used by the family or in family enterprises. There is yet no gauge for making allowance in her favor. There is merely vague and undistinguishing delineation of things done and moneys paid for father and for brothers, and for various business enterprises which them concerned, during the thirty-six years that intervened from the time of conveyance of the island to Flora till Mr. Stotesbury purchased a part of it.

The claim for reimbursement for taxes should be calculated in three different parts, and then aggregated: (1) from the time of the father's death to the time of the conveyance of the Edward B. Rodick share; (2) thence to the time that Fountain conveyed to

Flora his interest in the island; (3) from that time to the time of the assignment by Milton to Fountain. Expressed in another way, to and including the years of 1899, 1906, and 1912, respectively. For what she paid on the entire island, while in ownership that remained as the children inherited it, she is entitled to retain an amount as great as that expended for Milton's benefit, and futhermore for Fountain's, on the one-fifth interest of each. Next, Edward's share independently held, the other children owned the remainder in undivided quarter parts; hence, the total amount Mrs. Pineo paid on Milton's fourth, and in addition what she paid on Fountain's, should be credited to her, and, after Fountain sold his interest, for what she paid on Milton's account to the assignment basic of this action.

Evidence is lacking of any tax payments previously to 1891. Nor are payments shown for any of the years of 1892, 1893, and 1894. A single receipt covers 1899 and 1900. It seems fair to make even distribution of the last mentioned between the two years. In group one, defendant paid out $3,569.98, two-fifths of which is $1,427.99. In group two, two-fourths of $3,536.43 equals $1,768.21. In the third, one-fourth of $1,819.17 is $454.79. The grand total for credit being $3,650.99.

A fee was paid a lawyer years ago for services in obtaining a reduction in the interest rate on the original mortgage. No reason is perceived why this fee or any part of it should be charged against either Milton or Fountain. That mortgage certainly never was theirs.

From the original mortgage a partnership which Milton and Edward composed had the benefit of the payment of a promissory note for $186.86. Defendant contends, and rightly, that she should have credit for this. Although, as a usual rule, equity, following the law, will not allow a set-off of debts accruing in dissimilar capacities, it is well settled that a court of equity will take cognizance of cross-claims between litigants, though wanting in mutuality, and set-off one against the other whenever it becomes necessary to effect a clear equity or prevent irremediable injustice. The equitable right of set-off is very broad. It is not dependent upon the express provisions of statute, but is derived from the rules of the civil law, and founded upon principles of natural equity and justice. *Crummett* v. *Littlefield*, 98 Maine, 317. "The right to assert set-off at law," said

Mr. Chief Justice Fuller, "is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject." *Scott* v. *Armstrong*, 146 U. S., 499; 36 Law Ed., 1059. Equity is governed by real rather than nominal mutuality when special circumstances justify interposition. The Massachusetts court well has said: "In dealing with this question we are not embarrassed by technical rules at to parties or pleadings, nor limited by statute provisions as to set-off, but are at liberty, in the exercise of a jurisdiction possessed by the Court of Chancery before the enactment of such statutes, to apply the doctrine of set-off as grounded upon natural equity. . . . No doubt the general rule in equity as well as at law is that demands to be set off must be mutual, and that debts accruing in different rights cannot be set off against each other. But when there are peculiar circumstances which make it necessary, as the only way to prevent a clear injustice, to allow the set-off of debts not mutual but accruing in different rights, this may be done by courts of full equity jurisdiction. It has been held that in such cases they look beyond forms to the essence of transactions out of which the demands arise, and beyond the nominal parties to those to be affected by the decree; and if a party to be so affected has a clear natural equity, arising out of the transactions and superior to any equity which can be urged in favor of those for whose benefit the claim to an equitable set-off is resisted, such courts may order debts not mutual, but accruing in different rights, to be set-off and made to discharge each other." *Merrill* v. *Cape Ann Granite Co.*, 161 Mass., 212. Both members of the partnership that gave the note which Mrs. Pineo paid are now dead. Presumably the partnership estate and their individual estates have long since been settled. The fact that Mrs. Pineo has all these years preserved the note, and now presents it, as a debit against Milton, is a circumstance having some tendency to show that perhaps Milton influenced her to pay the note. But, whatever the moving spring of payment was, it would be palpably inequitable, at this day, in the situation here, to deny defendant set-off. And she shall have set-off additionally for payment from the earlier mortgage for a note given by a firm which Fountain and Serenus composed, which she now presents as a claim against Fountain; the face of this note being $2516.00.

We have not overlooked the fact that Milton Rodick was one of only two mortgagors in the later or second mortgage. From this premise, standing alone, it might be argued that, in justness and fairness, one-half of the amount paid in discharge of that mortgage should be charged against his share of the proceeds of the Stotesbury sale, and thus by a single entry extinguish the plaintiff's demand. But such an argument, in view of the whole case, would be as insubstantial as a rainbow. The second mortgage was given to pay the first. The first was that which Flora and Edward gave. And Flora alone was called upon to pay. To pay the one debt she created another, Milton joining to secure its payment. As between the mortgagors and the mortgagee the debt was jointly that of Flora and Milton. As between the mortgagors it was Flora's separate debt toward which Milton lent the sanction of security of his equitable interest in Bar Island.

Casting up the account on debit and credit sides, as the items are gleaned from the evidence, it shows:

FLORA PINEO

in account with

FOUNTAIN RODICK, Assignee of MILTON RODICK

Dr.			Cr.
To one-fourth amount received from Stotesbury sale	$21,195.00	By, paid Milton Rodick's part agent's commission	$ 529.88
		By, paid Milton Rodick	8,514.88
		By, taxes	3,650.99
		By, M. & E. B. Rodick note	186.86
		By, F. & S. H. Rodick note	2,516.00
		By balance	*5,796.39*
	$21,195.00		$21,195.00

Plaintiff would exact interest on the balance. Eminent authority is extent for the statement that, in an action for money had and received, interest is recoverable only from the date of the writ, unless demand be both alleged and proved. *Ordway* v. *Colcord*, 14 Allen, 59; *Talbot* v. *Bank*, 129 Mass., 67. But this canon need not be employed to support decision. A trustee is not chargeable with interest as a matter of right. His liability therefor depends upon the character of the trust and the circumstances attending its administration. Merely having money of the cestui que trust is not sufficient to charge the trustee with interest; that must depend upon other facts. It is fundamental that a trustee shall derive no gain, benefit or advantage by the use of the trust funds. If he be remiss in activity, in prudence, care, reasonable skill and proper diligence, or if he repudiate the trust, or refuse or unnecessarily delay an accounting, interest should be entered against him. No rule is definable more fixed than whether he ought in good conscience to pay.

Flora Pineo never disavowed the trust. She paid out certain of the money from the real estate sale, in discharge of a mortgage given by herself and Milton on their interests, to redeem from a mortgage that she and Edward previously had encumbered the whole island with. The money which came from the first mortgage went, partly to Edward, some to Serenus, still other for taxes, yet more to Fountain; and, in part, in payment of debts which Flora testified she incurred for the family benefit, the amount being unknown. Her insistence was and is that from the balance of the sale price Milton owed her more than she owed him; and there is strong suggestion in the case that that might appear to be the fact were defendant's proof complete. Suffice it to say that, as the court weighs the case, good conscience does not impel the imposition of interest before commencement of the action.

Judgment will be entered for the plaintiff for $5796.39 with interest from the date of the writ.

Agreeably to stipulation of the parties in reporting this case, upon the filing of rescript herein, in case number 4844, *Fountain Rodick* v. *Flora Pineo*, and in case number 4955, *Fountain Rodick* v. *Charles B. Pineo*, both on the Hancock nisi docket, the entry will be made: Neither party no further action.

Judgment and docket entries accordingly.

STATE OF MAINE *vs.* ARTHUR W. SANBORN.

Cumberland. Opinion April 6, 1921.

One may not by general evidence impeach the competency and credibility of his own witness, but may show by other witnesses, or by direct or re-direct examination, that the facts are otherwise than the witness testified to, for the rule never contemplated that the truth should be shut out and justice perverted. Guilty intent must be shown as coexistent with the overt act.

A jury in the Superior Court in Cumberland County convicted the respondent of the commission of the crime of assault and battery. He thereupon brought the case to this court on three exceptions to instructions defined by the judge to the jury, and also upon appeal from the denial of a motion for a new trial.

The respondent says first, that on cross examination of himself, the State erroneously was permitted to impeach its own witness,—one Jones,—whom it had previously called. Jones' version of what had happened differed essentially from that of earlier witnesses enjoying like means of knowledge.

That he who calls a witness may not by general evidence impeach his competency or credibility, if his testimony be disappointing, is a rule long since established. But this rule never contemplated that the truth should be shut out and justice perverted. It does not prevent the showing by other witnesses, or by the direct or re-direct examination, that the facts are otherwise than the witness testified to. There is no principle of law or of justice which prevents one from availing himself of the truth of his case, although the credit of his own witness may thereby be impeached.

Exception two relates to that portion of the charge relating to the weight to be given by the jury to the evidence of Jones. if found affected by bias or prejudice. No error is perceived in the instruction.

The third exception seeks to show that the trial court ruled that, in the event the respondent raised the issue, and in such event only, the State had the burden of proving criminal intent. It was incumbent on the State to prove respondent's guilty intent coexistent with his overt act. Reference to the complete charge shows that the subject of intent as an ingredient of the offense charged was fully covered.

The verdict of the jury is abundantly supported by competent evidence.

On exceptions and motion by respondent. The respondent was indicted in the Superior Court in Cumberland County for assault and battery upon one Perley C. Bennett. The case was tried with

two other cases against Homer Brooks and Emma King upon the same charge. The respondent was found guilty by the jury, and filed a motion for a new trial which was denied by the presiding Justice, and the case was taken to the Law Court on exceptions to certain rulings by the presiding Justice as to admissibility of evidence, and on an appeal from the refusal to grant a new trial. Exceptions overruled. Motion overruled.

Case stated in the opinion.

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

Arthur Chapman, and C. E. Guerney, for the respondent.

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

DUNN, J. In 1920, at the September term of the Superior Court in Cumberland County, a jury convicted the respondent of the commission of the crime of assault and battery. The case is now before this court both on exceptions to certain instructions defined by the presiding Justice to the jury and upon appeal from a ruling of that justice denying a motion for a new trial.

There are three exceptions. The first sets out that the State, in cross-examining the respondent himself, erroneously was permitted to impeach its own witness, one Jones,—prejudicially to the prisoner's rights. Jones was present at the time and place of the alleged crime. The prosecution called him to the stand without previous interview. His version of what had happened differed essentially from that of earlier witnesses enjoying like means of knowledge. Had it been believed, his story would have tended to destruction of the State's contention.

That he who calls a witness may not by general evidence impeach his competency or credibility, if his testimony be disappointing, is a rule long since established. *Morrell* v. *Kimball,* 1 Maine, 322; *Gooch* v. *Bryant,* 13 Maine, 386; *State* v. *Knight,* 43 Maine, 11. But this rule never contemplated that the truth should be shut out and justice perverted. It does not prevent the showing by other witnesses or by the direct or re-direct examination, that the facts are otherwise than the witness testified to. *Morrell* v. *Kimball,* supra; *Brown* v. *Osgood,* 25 Maine, 505; *Hall* v. *Houghton,* 37 Maine, 411; *State* v. *Knight,* supra. Substantive law extends to every litigant an oppor-

tunity to make proof of the integrity of his cause. Quoting and acknowledging Mr. Justice Weston—writing in the first volume of our judicial reports, almost exactly an hundred years ago,—"There is no principle of law or of justice which prevents the party from availing himself of the truth of his case, although the credit of his own witness may thereby be impeached." *Morrell* v. *Kimball*, 1 Maine, 322-324. Broadly speaking, by introducing a witness, a party avouches his fitness and credibleness. But it would be an inexpedient rule, aimed to strangle justice, which, if one called a witness without knowing him to be adverse, would deny him privilege,—hostility discovered,—of making that fact known. Or which would prevent him pointing out, if the situation so developed, that the witness heard not because he would not hear, or that he saw not because he would not see, or that from the same objective fact he had gathered subjective impression at variance in important particulars from those drawn by others; or that he heard but did not understand rightly, or that interest warped his judgment. The opposite side, within reasonable bounds, may hurl general evidence at the character of the witness on the subject of whether he be trustworthy of belief. His own side may not. The limitation of the rule goes no further.

In this case the State undertook to show that, by bias or by interest, the witness Jones, whom it had produced, was partial to the respondent's side; that, after testifying, and during the night recess of the court, Jones and respondent engaged in conversation on the public street at considerable length. These things the State sought to do, not out of the mouth of Jones himself (as it might have done), but by interrogation of the respondent. The evidence elicited was collateral, and not an actual impeachment. It involved, in the terse phrase of Prof. Wigmore, "nothing disgraceful or destroying to character, and is hardly worth considering." Wigmore on Evidence, Section 899.

Exception numbered two is to that portion of the charge of the Judge regarding the proposition of the weight to be given by the jury to the evidence of Jones, if found affected by bias or by prejudice. No error is perceived in the instruction.

The third exception seeks to show that the trial court charged the jury that, in the event respondent raised the issue—and in such event only—the State had the burden of proving a criminal intent on his part. An unqualified instruction of such tenor would constitute

reversible error. Reference to the complete charge shows that the subject of intent as an ingredient of the offense was fully covered. Fairly read, in the light of the full charge, the excerpt relied on in the exception is not wanting. The Judge, who before had repeatedly defined intent as related to crime, and had said that such intent was often presumed or inferred, then stated that there might be occasion for the jury to inquire into the question of a criminal intent. Continuing, he said, among other things:

"And when the defense raises the question and offers an explanation which, if believed and if true, would deprive the act of its criminal character, by reason of the absence of the intent . . . . when that issue is raised . . . . it is your duty to find on the evidence, and after canvassing the evidence you must be satisfied beyond a reasonable doubt that the intent did in fact exist."

An assault and battery is committed by carrying into effect an unlawful attempt to strike, hit, touch, or do any violence to another, however small, in a wanton, wilful, angry or insulting manner, having an intention and ability to do violence to such other. R. S., Chap. 120, Sec. 26. It is obvious that the crime would not be committed if, at the time of doing the act, the mind of the doer were innocent. Therefore, it was incumbent on the State to prove respondent's guilty intent coexistent with his overt act. *State* v. *Carver*, 89 Maine, 74. A guilty intention may be inferred as a fact by the triers of fact from the act itself. And as it may be thus inferred, so the circumstances which attended the doing of the act may show its absence. The general rule in a case of assault and battery is that, if it be proved that the accused committed the unlawful act laid against him, it will be presumed from his violent conduct, and the attending circumstances, and the outward demonstration, that the act was done with a criminal intention; and it will be left for the accused to rebut this presumption. *Luttermann* v. *Romey*, 143 Iowa, 233, 121 N. W., 1040; *Sumner* v. *Kinney*, (Texas), 136 S. W., 1192. In instructing the jury the Judge, in substance, so said.

The several exceptions are unavailing. The verdict is abundantly supported by competent evidence.

Exceptions overruled.
Motion overruled.

GEORGE B. SPENCER *vs.* INHABITANTS OF KINGSBURY.

Piscataquis. Opinion April 6, 1921.

Sufficiency of notice required by R. S., Chap. 24, Sec. 92, relative to a defect in a highway, is a question of law to be passed upon by the presiding Justice, and when instructions by the presiding Justice to the jury on the sufficiency of such notice are not erroneous, exceptions will not lie. Findings by the jury on questions of fact under proper instructions where there is not manifest error are final.

Action to recover damages sustained by reason of a defective way. Plaintiff recovered a verdict and the case is before us upon defendants' exceptions and motion for new trial.

The defendants' contentions are as follows:

1. The insufficiency of the notice given under R. S., Chap. 24, Sec. 92.
2. That the bridge was safe and convenient within the meaning of the statute in view of the casualties that might reasonably be expected to happen to travelers.
3. That neither of the municipal officers nor the road commissioner had twenty-four hours actual notice of the defect.
4. That the verdict was excessive as to damages.

Held:

1. Sufficiency of notice required by R. S., Chap. 24, Sec. 92, is a question of law to be passed upon by the presiding Justice. The jury was instructed that the notice was good and we find no error in that instruction.
2. The second, third and fourth contentions relate to questions of fact. Under instructions which were not complained of these questions were answered in favor of the plaintiff. Manifest error in respect to the jury findings not being found the mandate will be. Exceptions overruled. Motion overruled.

On exceptions and motion for new trial. This is an action to recover for personal injuries received by the plaintiff while traveling upon a public highway, to wit, while crossing a bridge, in defendant plantation. At the close of the testimony for the plaintiff, defendants moved for a directed verdict for defendants, which motion was denied,

and defendants excepted. Verdict of $775.00 for plaintiff was rendered, and defendants filed a general motion for a new trial. Exceptions overruled. Motion overruled.

Case is stated in the opinion.

Hudson & Hudson, for plaintiff.

J. S. Williams, for defendants.

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

PHILBROOK, J. This is an action on the case to recover damages for personal injuries received by the plaintiff while traveling upon a public highway, to wit, while he was crossing a bridge which, it was admitted, is a part of an established highway in the defendant plantation. The plaintiff recovered a verdict for $775.00. The case is before us upon a general motion for a new trial and exceptions. The bill of exceptions states the following grounds:

1. The plaintiff called as a witness one Mark Gerald to testify as to certain statements that he made to the road commissioner of said plantation, a short time before the date of the accident, regarding the condition of the bridge. The defendants objected to the testimony offered as being inadmissible for the purpose for which the same was offered.

2. In rebuttal the plaintiff recalled one Maud Gerald to testify in contradiction of testimony that said plantiff had brought out from Daniel Woodbury, a witness for the defendants, upon cross examination by plaintiff's counsel, to which defendants objected on the ground that such testimony elicited on cross examination by the plaintiff of defendants' witness, could not be thus contradicted.

3. At the conclusion of the testimony for the plaintiff, the defendants moved that a verdict for themselves be directed by the presiding Justice, which motion was denied. To the admission of these two pieces of testimony, and the denial of the motion, the defendants seasonably took and now present their exceptions.

Plaintiff's Ex. 1, the notice given by the plaintiff to the defendants, required by R. S., Chap. 24, Sec. 92, setting forth his claim for damages, and specifying the nature of his injuries and the nature and location of the defect which caused such injury, the charge of the presiding Justice, and the report of the evidence were all made part of the bill of exceptions.

In argument before this court, the defendants were silent upon the first two exceptions and we shall therefore treat them as waived. In passing, however, it is proper to say that in his charge to the jury, the presiding Justice clearly and correctly stated the reasons for admitting the testimony referred to in these two exceptions by explaining that it was not on the question of notice to any plantation officer of the particular defect but simply as contradicting one of the defendants' witnesses and for the purpose of affecting the credibility of his testimony.

The defendants' argument centers about four propositions.

1. The insufficiency of the notice given under R. S., Chap. 24, Sec. 92.

2. That the bridge was safe and convenient within the meaning of the statute in view of the casualties that might reasonably be expected to happen to travelers.

3. That neither of the municipal officers nor the road commissioner had twenty-four hours actual notice of the defect as required by statute.

4. That the verdict was excessive as to damages and unwarranted.

We will consider these points in their order but before doing so, we present the notice which the defendants claim is insufficient.

"To the Municipal Officers and Assessors of the Plantation of Kingsbury, Piscataquis County and State of Maine. In accordance with Sec. 92 of Chap. 24 of the R. S. of Maine, 1916, you are hereby notified that I claim damages against the said Plantation of Kingsbury on account of an accident, which took place in said Plantation on the fifth day of September, A. D. 1919. The place of the accident was on the bridge over Kingsbury stream, just below the foot of Kingsbury pond, said bridge being on the road leading from Kingsbury Village to Brighton. The defect, causing said accident, was a rotten timber at the north west corner of said bridge, which on account of its rotten and decayed condition did not have sufficient strength to hold the rod to sustain said bridge but let said rod, nut and washer, through said timber and thus caused said bridge to fall. At the time of said accident I was working for Nelson A. Damon of said Kingsbury and was driving across and over said bridge a pair of said Damon's horses, hitched into a hayrack.

My injuries consist of the moving of my muscles from my ribs, the jamming of my kidneys so that I give bloody water and other internal injuries, which I cannot describe, all of said injuries giving me much pain and suffering.

I claim damages in the sum of two thousand dollars.

Sept. 16, 1919.

Signed by HUDSON & HUDSON
Attys. for and in behalf of
GEORGE B. SPENCER of Kingsbury,
Maine,
his
GEORGE B. X. SPENCER
mark

Witness
JAMES H. HUDSON."

As we have just said, the defendants strenuously urge the insufficiency of this notice. Sufficiency or insufficiency of the notice required by R. S., Chap. 24, Sec. 92, is a question of law to be passed upon by the presiding Justice. *Rogers* v. *Shirley*, 74 Maine, 144; *Chapman* v. *Nobleboro*, 76 Maine, 427. The learned Justice who presided at nisi prius instructed the jury that the notice was good and after a careful examination of the exhibit, we find no error in the instruction but on the other hand, we are fully persuaded that the notice fully complies with the intent of the statute especially under the liberal construction of such intent which our court has given in numerous cases. *Creedon* v. *Inhabitants of the Town of Kittery*, 117 Maine, 541 and cases there cited.

The second, third and fourth contentions made by the defendants, under instructions of law which are not complained of, involve questions of fact, and the arguments address themselves as well to the motion as to the exceptions. These questions of fact were left to the decision of the constitutional arbiters, and they have made findings thereon. Counsel for the defense with great earnestness and great ability has argued the error of the jury, the bias of the witnesses and the sympathy for the plaintiff which prevailed at the trial. But under familiar rules of law, the burden is upon the defendants to satisfy this court that the verdict was clearly wrong and that

the damages were plainly excessive. The record is brief and has been examined with care, but we cannot say that the defendants have shown such error on the part of the jury either in its verdict or award of damages as should require us to set the verdict aside.

There appearing no error of law and the defendants having failed to satisfy us as to the error of the jury, the mandate will be,

Exceptions overruled.
Motion overruled.

CONGREGATION BETH ABRAHAM *vs.* PEOPLE'S SAVINGS BANK.

Androscoggin. Opinion April 7, 1921.

Every contract not under seal requires a consideration to support it, that is, some benefit to the promisor or some loss or detriment to the promisee, otherwise a contract is nudum pactum.

Action to recover damages for breach of contract. Whether the contract was made, as alleged, is a matter of fact for the jury to determine, and that question has been decided in favor of the plaintiff. Whether the contract is a valid and binding one is a question of law for this court to determine.

Held:

1. Every contract not under seal requires a consideration to support it, that is, some benefit to the promisor or some loss or detriment to the promisor.
2. Where the defendant already held a mortgage on plaintiff's real estate in which the latter had agreed to keep the premises insured against loss by fire in a sum equal to the mortgage debt, there existed an obligation which the plaintiff could be compelled to perform or suffer from its non-performance. A promise made by the bank to assign to the plaintiff certain policies of insurance which it held on the same premises was one which would be neither benefit to the promisor, nor loss nor detriment to the promisee. Such a contract would be nudum pactum for failure of consideration.

On motion by defendant. This is an action to recover damages for breach of contract. On October 30, 1917, the defendant conveyed by deed to the plaintiff certain real estate in Auburn for the

sum of $13,000.00, the plaintiff paying down $3,000 of the purchase price in cash and gave a mortgage and note to the defendant bank for $10,000.00. One of the conditions of the mortgage was that the plaintiff should keep the buildings insured against loss by fire in a sum not less than $10,000.00.

At the time of the conveyance the bank held two policies on the buildings amounting to $5,000.00. After the delivery of the deed and mortgage plaintiff alleges that the treasurer of the defendant bank told the representatives of plaintiff that if plaintiff would put $5,000.00 insurance on the buildings, it, the bank, would assign the two policies which it held amounting to $5,000.00, to plaintiff. Defendant denies this, which constitutes the contention which resulted in this action. A verdict was rendered for plaintiff and defendant filed a motion for a new trial. Motion sustained. New trial granted.

The case is fully stated in the opinion.

McGillicuddy & Morey, and Dana S. *Williams*, for plaintiff.

William H. Newell, for defendant.

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

PHILBROOK, J. The plaintiff alleges that it is a duly organized religious, eleemosynary corporation or, as its principal witness said, it is a church or synagogue of the Jewish people. The defendant, as its title indicates, is a duly organized Savings Bank. Both corporations are located at Auburn in this State.

To state the case as briefly as possible and at the same time clearly declare the claims of the parties, we will say:

That on the second day of October, A. D. 1917, the defendant owned a certain piece of real estate situated in said Auburn which the plaintiff desired to buy; that negotiations were entered into by the proper officers of the two corporations and a purchase price of thirteen thousand dollars was agreed upon, payment to be made by three thousand dollars in cash and the balance by mortgage; that in accordance with these negotiations, the defendant executed a deed of the property on said second day of October and upon same day the plaintiff paid to the defendant the cash agreed upon and executed a mortgage upon the real estate running to the defendant; that in the mortgage, the plaintiff covenanted with the defendant to keep the buildings on the mortgaged property insured against loss or

damage in a sum not less than ten thousand dollars for the benefit of the defendant or its assigns in such insurance company or companies as the defendant should approve, until payment of the debt secured by the mortgage, and to deliver the policies for all such insurance to the defendant to be retained by it until the debt secured should be paid.

Thus far the parties do not disagree and the further statement of the case is intended to recite the contentions which resulted in this litigation. The plaintiff claims that after the deed and mortgage had been executed the subject of insurance was again referred to and that Mr. Wellman, defendant's treasurer, stated to the plaintiff's officers that the bank already held two policies of insurance on the property amounting to five thousand dollars and that if the plaintiff would obtain five thousand dollars insurance, the bank would assign its policies to the plaintiff and thus the aggregate insurance would amount to ten thousand dollars. The plaintiff says that acting upon this suggestion, its officers obtained insurance to the amount of six thousand dollars on the property and, although the policy does not so state, the plaintiff's officers declare that their intention was to have five thousand dollars on the real estate and one thousand dollars on the furnishings. Three months after the deed was given, viz., on January 31, 1918, the buildings were destroyed by fire. While the fire was in progress, the plaintiff's officers delivered the six thousand dollar policy to the defendant and later the full amount of this policy was collected by the bank and applied to the mortgage debt. The balance due on the mortgage was afterward paid and the mortgage was discharged. The plaintiff now brings this action alleging breach of contract on the part of the defendant because the defendant did not assign to the plaintiff the two policies of insurance above mentioned, amounting to five thousand dollars, and claims this latter sum as the measure of damages sustained by reason of this breach.

On the other hand, the defendant emphatically denies that Mr. Wellman ever made any such contract; declares that he had no authority in any event to make it; that if in fact the contract was made, it was without consideration and void; that the alleged contract, if any such ever existed, was not in writing, duly signed by the defendant or by some person thereto lawfully authorized; and invokes R. S., Chap. 114, Sec. 1 which provides that no action shall be maintained to charge any person upon any special promise

to answer for the debt or default of another unless the promise, contract, or agreement, on which such action is brought, or some memoranda or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto lawfully authorized.

A jury trial resulted in a verdict for the plaintiff in which the damages were assessed in the sum of $5,237.50. The defendant brings the case before us upon motion that the verdict be set aside and a new trial granted. Whether or not the contract was made as alleged by the plaintiff, is a question of fact upon which the jury has found in favor of the plaintiff. Whether the contract, if so made, is a legal and binding contract, under the evidence in the case, is a question of law which this court must determine independently of the finding of fact by the jury.

As we have already seen, the contract upon which the plaintiff relies, and for breach of which, it seeks damages, is a verbal contract. In support of the claim that the contract was made, its nature, and that it was based upon sufficient consideration, the plaintiff relies upon the testimony of two witnesses presented by itself, one its president and the other its temporary treasurer. The former testifies that when the mortgage and deed had both been delivered he asked Mr. Wellman about insurance and that Mr. Wellman said in reply; "We have got five thousand dollars which we are going to transfer it to you and you put on five thousand dollars and it will be satisfactory to us." The latter says that Mr. Wellman, on being asked, "What about the insurance?" replied, using the words of the witness as it appears in the record, "And Mr. Wellman says he answered him that he has got five thousand dollars on it and if he will go out and get five thousand dollars more he will transfer to us." The plaintiff claims that, relying upon this conversation with Mr. Wellman, it obtained six thousand dollars insurance as we have above described.

Not forgetting the denial of the defendant's officers that any such contract was made, but assuming, in the light of the verdict found by the jury, that it was made, the question still arises, did the defendant bank make any contract, based upon a legal consideration, which would make it liable for any breach of the same. This question turns upon the existence of a consideration. For it is common learning that every contract not under seal requires a consideration to support it, that is, some benefit to the promisor or some loss or detriment to

the promisee. *Fisher* v. *Bartlett,* 8 Maine, 122; 22 Am. Dec. 225. Applying this two-fold test we first inquire whether the promise made by the bank would result in benefit to itself. Plainly not. The bank already held a mortgage duly signed and sealed by the plaintiff in which the latter had agreed to keep the premises insured in an amount equal to the mortgage debt. It was an obligation which the plaintiff could be compelled to perform or suffer from its non-performance. The bank could obtain no benefit by assigning the insurance which it already had. That would be a benefit to the plaintiff promisee and not to the bank.

On the other hand, would the promise be a loss or detriment to the plaintiff promisee? Again we say, plainly not. It would not be a loss or detriment to it to have the bank assign the insurance policies but instead of being a loss or detriment to the promisee it would be for its benefit. The contract would be nudum pactum.

We do not deem it necessary to discuss the defense of statute of frauds, in view of what we have said regarding consideration of the alleged contract.

Motion sustained.
New trial granted.

MARGARET V. GRAY *vs.* ELMER E. RICHARDS, Ex'r.

Franklin. Opinion April 7, 1921.

In reaching a reasonable construction of a letter as written evidence on the question or controversy at issue, it should be viewed in the light of all the circumstances and probabilities of the case.

Action of assumpsit against the executor of the estate of Henry Clay Wood to recover for services rendered as a nurse and for cash disbursements made. Items in the account annexed aggregating $597.14 are admitted. The contest is over the following item. "One year's additional compensation from the date of General Wood's death at $25 per week as per special contract, $1300." The special contract referred to is acknowledged in a letter written by General Wood to Mr. Richards, his attorney, and subsequently his executor, under date of August 31, 1915, which is as follows: "Before Miss Margaret V. Gray left New York City for Farmington to take care of me I made an agreement with her whereby in the event of Miss Gray leaving my service at any time or at my death she is to receive one year's salary and traveling expenses to New York." The controversy arises over the rate per week at which this one year's salary is to be computed. The defendant claims it should be at $7 per week, the rate at which she commenced service in 1911, while the plaintiff claims it should be at $25 per week, the wage at the time the service ceased at his death, August 28, 1918.

Held:

That a reasonable construction of this letter, viewed in the light of all the circumstances and probabilities of the case, leads to the conclusion that the rate should be fixed as of the time when the service ceased, $25 per week.

On report. This is an action of assumpsit against the executor of the estate of Henry Clay Wood to recover for services as a nurse and for cash disbursements made. The plaintiff entered into the employment of the defendant's testator as his nurse in 1911, and continued to serve him in that capacity until his decease. Before plaintiff left New York to go to Farmington, Maine, defendant's testator agreed that she should receive whenever she left his service, or at his decease one year's salary and traveling expenses to New York. The controversy in this case is over the meaning of the words "one year's

salary." By agreement of the parties the case was reported to the Law Court upon an agreed statement of facts for final determination. Judgment for plaintiff.

Case is stated in the opinion.

Thomas L. Talbot, for plaintiff.

George C. Wheeler, and Frank W. Butler, for defendant.

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

CORNISH, C. J. On report. Action of assumpsit against the executor of the estate of Henry Clay Wood to recover for services rendered as a nurse and for cash disbursements made. The account annexed contains five items.

The first, a charge for services from April 25, 1918, to September 7, 1918, at $25 per week, amounting to $482.14 is admitted.

The second, a charge for laundry work, and the third, for cash paid for drugs, the two aggregating $115, are also admitted.

The fourth, a charge for extra nursing $150 is not pressed. The sole contention is over the fifth item, viz: "One year's additional compensation from the date of General Wood's death at $25 per week as per special contract, $1300." The special contract referred to is acknowledged in a letter written by General Wood to Mr. Richards, his attorney, and subsequently his executor, under date of August 31, 1915, which is as follows:

"Before Miss Margaret V. Gray left New York City for Farmington, to take care of me, I made an agreement with her, whereby in the event of Miss Gray leaving my service at any time, or at my death, she is to receive one year's salary and traveling expenses to New York." The controversy arises over the rate per week at which this one year's salary is to be computed. Shall it be at $7 per week, the wage at which plaintiff began her service, as claimed by the defendant, or at $25 per week, the wage at the time the service ceased, as claimed by the plaintiff?

From the agreed statement of facts it appears that the plaintiff, then a resident of New York, entered the employment of General Wood in the year 1911, and her first service was performed at Farmington, in this State, where he then resided. The price then was $7 per week. As his health became more infirm and his bodily ailments

increased her compensation was correspondingly increased. In August, 1915, it was fixed at $18 per week. Later when the testator moved to Portland and took rooms at the Congress Square Hotel, the agreed price was raised to $25 per week and continued at that figure until his death on August 28, 1918. The letter of August 31, 1915, was written by the plaintiff at the dictation of General Wood, was signed by him and subsequently during his residence in Farmington was exhibited to Mr. Richards, with the evident purpose of informing Mr. Richards, whom the testator had selected as his executor, of the contract relations between the parties. It must be borne in mind that this letter did not create the contract, but was simply a written recognition or acknowledgment of that contract which was itself oral and had been made four years before. The validity of the contract is not challenged. The only question is its terms and that must be determined from the language of the letter viewed in the light of the circumstances and probabilities of the case.

The testator at the time the contract was made wished to have Miss Gray leave New York and come to Farmington to care for him during his declining years, and if possible stay with him to the end. In order to accomplish this he held out, before she left New York, this inducement of an extra year's salary and traveling expenses back to New York in the event of her leaving him at any time or at his death. The defendant contends that this meant one year's salary at $7 per week, the amount she received at the time of entering his service. We cannot so construe it. If the defendant's contention is correct then the bonus she was to receive was a fixed and definite sum, fifty-two weeks at $7 per week, or $364, it mattered not when she might leave or how long she might remain. Under this construction there would be no inducement for the plaintiff to remain in service, so far as this bonus was concerned. She would receive the same amount if she left at the end of seven months, or even seven weeks, as if she remained seven years. It was to be a fixed sum, $364, in any event, and nothing more. This would thwart the very purpose the testator had in mind.

Moreover if the amount of the bonus was fixed then that fact must have been known to both parties, and when General Wood wrote the letter of August 31, 1915, he would naturally have inserted that agreed sum. Instead of stating "She is to receive $364," he said, "She is to receive one year's salary," a varying and indefinite amount.

In our opinion the plaintiff's construction is the more reasonable, and more in harmony with the testator's purpose that the year's wages promised as an inducement should be reckoned as of the time when service should cease, whether by voluntary departure or by the testator's death. The words are: "In the event of Miss Gray leaving my service at any time or at my death she is to receive one year's salary, and traveling expenses to New York." The fair interpretation would seem to be that when that event happens, then the salary shall be computed. It is true that the language may be regarded as ambiguous, but the words are those of the testator and if ambiguous they are to be construed more strongly against him.

This view furthers the testator's desire to retain the plaintiff in his service during the remainder of his life. The longer the service, naturally the greater the wages and therefore the greater the bonus, if that was to increase as the salary increased. In this way the testator was guarding against her leaving him in his last days by increasing the inducement for her to remain. His purpose was fulfilled and she remained with him to the end.

Admittedly the traveling expenses back to New York are to be reckoned not as of 1911 but as of 1918. In like manner we think the salary is to be computed as of the time when the event happened which rendered computation necessary, namely the death of the testator. The fifth item should be allowed as charged.

Judgment for plaintiff for $1,897.14 with interest from February 16, 1920, the date of filing claim in Registry of Probate.

CAMDEN AUTO COMPANY *vs.* F. E. MANSFIELD, Adm'r.

Knox. Opinion April 7, 1921.

Service of a writ upon the resident agent of a foreign administrator, by leaving a summons at the office of such agent, an attorney, is not a valid service.

Valid service of a writ upon the resident agent of a foreign administrator may be made by leaving a summons at his "dwelling house or last and usual place of abode."

An attorney's office is not his last and usual place of abode within the meaning of the statute.

On motion to dismiss and exceptions. This is an action of assumpsit against the non-resident administrator of a Maine estate. At the return term a motion to dismiss was filed by defendant for want of sufficient service. At the following term the court allowed the return of service to be amended, and then overruled the motion to dismiss, and defendant excepted. Exceptions sustained. Writ dismissed.

Case stated in the opinion.

J. H. Montgomery, for plaintiff.

Reuel Robinson, for defendant.

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

CORNISH, C. J. Action of assumpsit against the non-resident administrator of a Maine estate. At the return term the defendant's attorney appeared specially and filed a motion to dismiss because of insufficient service. At the next term the officer was allowed to amend his return and the court then overruled the motion to dismiss. On exceptions to the overruling of this motion the case is before the Law Court.

The amended return is as follows:

"Knox ss. By virtue of this writ, on the 18th day of March 1920, I attached a chip as the property of the within defendant adm'r and

on the same day I summoned the defendant, by leaving at the last and usual place of abode in Camden, County of Knox and State of Maine (his office) of Reuel Robinson his agent in this State, appointed by him under R. S., Chap. 68, Sec. 44, a summons for his appearance at court.

(Signed) J. CROSBY HOBBS, Sheriff."

Two objections are raised against the validity of this service, first that personal service alone and not substituted service by leaving at the last and usual abode can be made upon the agent or attorney of a non-resident executor or administrator, under the provisions of R. S., Chap. 68, Sec. 44, as amended by Public Laws 1917, Chap. 133, Sec. 3. An examination of the history of this statute leads to the conclusion that this point is not well taken.

The first statute providing for the appointment of and service upon an agent of a non-resident executor or administrator was passed in 1872, and was in these words: "Executors or administrators residing out of the State at the time of giving notice of their appointment, shall appoint an agent or attorney in the State and insert his name and address in such notice. Demand or service on said agent or attorney, shall bind the principals and the estate in their case as if made on themselves." Public Laws 1872, Chapter 6.

There is no ambiguity in this act. The agent is a resident of Maine, and whatever constitutes a legal and valid service on him as a resident constitutes a legal and valid service upon him as agent and therefore upon his principal, the executor or administrator. Such service could be either personal, or made by leaving the summons at the last and usual place of abode, the same as in the case of any other resident. There is no distinction between the forms of service allowed to be made upon the resident who is acting as the agent of a foreign executor or administrator and those upon any other resident of Maine. This act was incorporated in R. S., 1883, Chap. 64, Sec. 41.

The same Legislature of 1872, a little later enacted Chapter 85 of Public Laws, 1872, amending among others, Sec. 12 of Chap. 87, and virtually repeating, perhaps through oversight of the like enactment earlier, Chapter 6 of Public Laws, 1872, as to appointment of agent or attorney and providing that "demand or service made on any such agent or attorney shall have the same effect in law as if made on such executors or administrators."

By Public Laws, 1883, Chapter 243, the following was also added to Chap. 87, Sec. 12: "When an executor or administrator residing out of the State has no agent or attorney in the State, demand or service may be made on one of his sureties with the same effect as if made on him." This last clause permitted the same form of service upon a resident surety, in case there was no resident agent, as upon any other resident of the State.

These two independent provisions duplicating the same subject in substantially the same words, appear in the Revision of 1883, as Chap. 64, Sec. 41, and Chap. 87, Sec. 12, and were re-enacted in the Revision of 1903 as Chap. 66, Sec. 43, and Chap. 89, Sec. 14.

When it came to the Revision of 1916, the Commissioner in his report, detecting the duplication, recommended the omission of the provision in Chap. 89, Sec. 14, and the amendment of Chap. 66, Sec. 43, by substituting for the words "demand or service made on such agent or attorney binds the principals and the estate in their case as if made on themselves" the following: "Such appointment shall be made by a writing filed and recorded in the registry of probate for the County in which the principal is appointed, and by such writing the subscriber shall agree that the service of any legal process against him as such executor or administrator, or that the service of any such process against him in his individual capacity in any action founded upon or arising out of any of his acts or omissions as such executor or administrator, shall if made on such agent, have like effect as if made on himself personally within the State, and such service shall have such effect." This recommendation was adopted, Public Laws, 1915, Chapter 42, and became R. S., 1916, Chap. 68, Sec. 44. It is evident that so far as concerns the manner and effect of service upon the agent, the language of the revision, though slightly different in form, is the equivalent in meaning of the preexisting statutes. There was no intention to change that part of the law and to confine service to personal service alone. It is a general rule of statutory construction that mere change of phraseology is not deemed a change of law unless such is the evident design. *Martin* v. *Bryant*, 108 Maine, 253; *Densmore* v. *Hall*, 109 Maine, 438.

The second objection raised by the defendant to the validity of the service is that the attempted substituted service was void because according to the officer's return the summons was left at the agent's office, which is not in law his "dwelling house or last and usual place of abode," as required by R. S., Chap. 86, Sec. 17.

The words of the return are "by leaving at the last and usual abode in Camden, County of Knox and State of Maine (his office) of Reuel Robinson his agent" etc. If the words "his office" had been omitted, the return would on its face have been sufficient. But the officer plainly declares that he left the summons at the agent's office, and the office or place of business of a defendant is not equivalent to his "last and usual place of abode." "Abode" is defined as "place of abiding, dwelling, residence, home," Standard Dictionary, and "place of continuance or where one dwells; abiding place, residence, a dwelling, a habitation," Webster. The essential idea is a place of dwelling, as distinguished from a place of business. "The law proceeds upon the supposition that until a new domicile is established, a man will have at the domicile he has left 'some person enjoying his confidence, careful of his interests and charged with his concerns who will give him actual notice' of any civil process that may be left for him at such place. *Ames* v. *Winsor,* 19 Pick., 248;" *Sanborn* v. *Stickney,* 69 Maine, 343. In case of substituted service the statute must be strictly complied with, and if this service here is valid, then leaving a summons at the store of a merchant or the shop of an artisan or the school house of a teacher would be equally valid. Such practice was not intended. For instances of cases holding that leaving summons at a place of business under similar statutes is insufficient see 32 Cyc., Process, 464, Note 93; 21 R. C. L., 1281.

But the plaintiff contends that the officer in his return characterizes the office as the defendant's "last and usual place of abode," and that that is controlling and sufficient, relying upon a dictum in *Wilson* v. *Bucknam,* 71 Maine, 545. There the officer posted a notice on a school house and described it as a "public place." A school house falls within the category of a public place, so that the posting was legal as shown by the authorities cited in that case. The remark that "the officer in his return states it to be a public place which is sufficient" if intended to mean that the characterization by the officer is conclusive, was not necessary to the decision and cannot be accepted at its full force. The officer's return cannot give to a place any character that it does not itself possess. It is for the court to say whether in a given case the statute has been complied with. *Blaisdell* v. *York,* 110 Maine, 500, 515.

The entry must therefore be,

Exceptions sustained.

JOHN B. FOURNIER'S CASE.

Penobscot. Opinion April 7, 1921.

An injured employee injured while engaged in a kind of work or business not specified in the written acceptance filed by the employer with the Industrial Accident Commission, can not recover.

Appeal under Workmen's Compensation Act.

Held:

1. That under R. S., Chap. 50, Sec. 3, Public Law 1919, Chap. 238, Sec. 3, an employer who is engaged in more than one kind of business must specify the particular business concerning which he desires to accept the provisions of the act, when he files his written acceptance with the Industrial Accident Commission.
2. In this case the Jordan Lumber Company limited its acceptance to the saw-mill and box board business which it was carrying on at Milford and Old Town in Penobscot County, and the Insurance carrier specified the same limitation and also expressly excluded accidents to any employee engaged in the work of cutting, hauling, rafting or driving logs.
3. The claimant was injured while in defendant's employ as a woodsman, rolling logs in a yard, in a different and independent business, a logging operation, carried on in the big woods at or near the Katahdin Iron Works, in the County of Piscataquis. He was not within the scope of the acceptance of the employer, nor of the policy of insurance, nor of the Workmen's Compensation Act, and cannot recover.

On appeal. This case reached the Law Court on an appeal from the decision of the chairman of the Industrial Accident Commission. Claimant was hired by the Jordan Lumber Company of Old Town as a woodsman to engage in the cutting, hauling, rafting and driving of logs in the woods, and while engaged in such work was injured. The employer carried on a saw-mill business at Milford and Oldtown, and became an assenting employer under the Workman's Compensation Act by filing its acceptance with the commission, limiting its acceptance of the act to the mill and lumber yard business at Milford and Old Town. The defense alleged that the company was not an

assenting employer so far as the woods operation was concerned, and that the commission therefore had no jurisdiction. The chairman held otherwise and allowed the claim, and defendant appealed. Appealed sustained. Petition dismissed.

Case is stated in the opinion.

John B. Fournier, pro se, for plaintiff.

Andrews & Nelson, and W. T. Gardiner, for defendant.

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

CORNISH, C. J. Appeal by the employer and insurance company under the Workmen's Compensation Act. The facts are not in dispute. The Jordan Lumber Company, the employer, carried on a saw-mill business at Milford and Old Town, in the County of Penobscot, with box board mill and planing and moulding mills. In the Fall and Winter of 1919-1920 it also conducted a lumbering operation, cutting and hauling logs in the big woods at or near the Katahdin Iron Works in the County of Piscataquis many miles distant from Milford and Old Town. The claimant was injured on October 7, 1919, while in defendant's employ as a woodsman in this logging operation and while rolling logs in a yard in consequence of the unhooking or slipping of a chain which permitted the fall of a log from the top of a pile.

The defense is that the company was not an assenting employer so far as this woods operation is concerned and that the Industrial Accident Commission has therefore no jurisdiction in this case. The commission held otherwise and allowed the claim, but as this issue is one of law, the facts being undisputed, this finding is reviewable by this court and it cannot be sustained.

The Workmen's Compensation Act expressly provides that if the employer is "engaged in more than one kind of business, he shall specify the business or businesses in which he is engaged and concerning which he desires to come under the provisions hereof." R. S., Chap. 50, Sec. 3, Public Laws, 1919, Chap. 238, Sec. 3. In this case the employer followed strictly the instructions contained in this section and specified the precise business concerning which it did desire to come under the statutory provisions. Its written acceptance dated at Old Town, July 17, 1919, and filed with the commission under the provisions of Section 6, contains the following:

"Average number of employees 300 male.
Location of employment, Milford and Old Town, Maine.
Nature of employment, Saw mills; box mfg., wood mfg., shooks from sawed lumber only; planing and moulding mills, lumber yards."

This acceptance expressly limited the employer's business to the manufacturing industry at Milford and Old Town, and thereby excluded beyond question any other and distinct business which it might be carrying on at Katahdin Iron Works or at any other place. The commission in its decision, in quoting the terms of this acceptance, omits, inadvertently no doubt, the "Location of the employment as at Milford and Old Town, Maine" which is of vital importance on this point.

This acceptance was filed with the commission on July 19, 1919, without objection. The employer at the same time, in compliance with the statute, filed a copy of an industrial accident insurance policy which definitely limited its application to "all factories, shops, yards, buildings and premises or other work places of the employer at Milford and Old Town, Maine," and gave the estimated payrolls upon which the premium was based, these payrolls covering these mill and lumber yard operations only. Moreover by an indorsement upon the policy it was further specified that the policy did "not cover accidents to any employee engaged in domestic service or agriculture or in the work of cutting, hauling, rafting or driving logs."

This exclusion simply emphasized the inclusion in the body of the policy. This limiting policy with its limiting indorsement was also filed with the commission without objection. There can be no doubt under this statement of admitted facts, that the Jordan Lumber Company was an assenting employer only so far as its mill and lumber yard operations, its business in Milford and Old Town, were concerned. It might have signified its liability under the Workmen's Compensation Act for accidents occurring in the separate and independent business, the lumbering operation in Piscataquis County, if it had seen fit to do so, but there is no evidence of the fact.

The decision of the commission refers to the assent as "unqualified." It is unqualified as to the business in Milford and Old Town, but goes not a step beyond those limits, and can be made to include a logging operation in Piscataquis County with no more reason than a farming operation in Aroostook County, simply because the Jordan

Lumber Company might be the owner of a farm in that County. *Shafer* v. *Parke, Davis & Co.*, (Mich.), 159 N. W., 304; *Keaney's Case*, 217 Mass., 5.

The claimant obviously was not within the scope of acceptance of the employer, nor of the policy of the insurance company, nor the Compensation Act, and the entry must therefore be,

Appeal sustained.
Petition dismissed.

CITY OF LEWISTON *vs.* ALTON L. GRANT et als.

Androscoggin. Opinion April 8, 1921.

A municipal ordinance which forbids the repairing or alteration of a wooden building standing on land within the fire district so as to increase its height and size, is not void because of constitutional provisions. Municipal ordinances, to be valid, must be reasonable and not oppressive in their character. Whether unreasonable or oppressive is a question of law. Permission of building inspector no justification for acts in violation of such ordinances. The court has no discretionary power in determining whether a building is a nuisance or not, which was erected in violation of an ordinance, adopted by virtue of statutory authority which declares such building so erected to be a nuisance.

Bill in equity to restrain defendants from enlarging a building in violation of a city ordinance. On appeal from decree of sitting Justice.

Held:

1. Since the ordinance was adopted by virtue of statutory authority, and the statute has distinctly declared that a building erected in violation of such ordinance is a nuisance, the court has no discretionary power in determining whether or not the building is a nuisance.
2. That portion of the ordinance which applies to the case at bar, which forbids the repairing or alteration of a wooden building standing on land within the fire district so as to increase its height and size, is not void because of constitutional provisions.
3. To be valid, municipal ordinances must be reasonable and not oppressive in their character. Whether unreasonable or oppressive is a question of law.

4. The plaintiff is not estopped to prosecute this action because the building inspector gave permission to proceed. That official has no power to authorize violation of law. An ordinance has the force of law over the community in which it is adopted.
5. Certain modifications of the decree as to size of building, pointed out in the opinion, may be made to conform to the testimony.

On appeal by defendant. This is a bill in equity brought by the City of Lewiston asking for a mandatory injunction and praying that a certain section of a building situated on the easterly side of Lisbon Street in the City of Lewiston between Main and Cedar Streets be condemned as a nuisance and torn down alleging that it was erected in violation of a building ordinance of the City of Lewiston. The defendants in their answer claimed that the repairs or erection were not a substantial violation of the ordinance, and that the ordinance was illegal and void. Upon a hearing before a single Justice it was decreed that a permanent injunction issue, from which decree defendants appealed. Appealed dismissed. Decree to be modified in accordance with this opinion and as thus modified is affirmed.

Case is stated in the opinion.

Frank T. Powers, and Fernand Despins, for plaintiff.

B. L. Berman, W. H. Hines, and Jacob H. Berman, for defendants.

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

PHILBROOK, J. This is a bill in equity brought by the plaintiff to restrain the defendants from enlarging a certain building in violation of an ordinance of the city which provides that no wooden building standing on any lot within certain described limits shall be repaired or altered so as to increase its present height or size. These limits are within the restricted area known as the fire district in the plaintiff city.

The case was heard before a single Justice upon a petition for temporary injunction, but all the evidence available having been put in at the hearing, it was agreed by the parties that an answer might be filed and the case decided upon its merits. The answer was filed and the presiding Justice, thereafter made finding and decree in decision of the case.

He found that the ordinance was clear and explicit; that it applied to the enlargement of the building in question; that the alterations

increased the present size of the building; that the ordinance was constitutional; that by the ordinance the new part of the building in question was forbidden; that a structure erected contrary to the ordinance is a statutory nuisance; that in such case, the court cannot exercise discretionary power; that when the statute declares a certain condition to be a nuisance the court must hold it to be such, otherwise the statute would be rendered a nullity. The following is the decree:—

"This case having been heard before a single Justice on the seventh day of October, A. D. 1920, and a finding therein entered for the plaintiff on the eleventh day of October, A. D. 1920; it is therefore, in accordance with the decision of said justice, ordered, adjudged, and decreed as follows:

That the new wooden structure in the rear of the defendants buildings, and adjoining thereto, and made a part thereof, which is sixteen feet deep, twelve feet six inches in width, and one story in height, and annexed to the southeasterly corner of the main building, is a nuisance to said plaintiff, and said defendants are hereby enjoined and commanded forthwith to remove the same; and that said plaintiff recover its costs against said defendant, execution to issue therefor."

From this decree the defendants seasonably appealed, their appeal being based upon the following contentions.

I. That the repairs which they made were not a substantial violation of the ordinance; that the alterations in the building were slight; that the increase in the size of the building, if any, was trivial.

II. That the ordinance is void because it is unreasonable and unconstitutional, as not being justified under the exercise of the police power of the State.

III. That the city is estopped from prosecuting this bill, because the repairs and additions to the building made in this case, were so constructed under the direction and by the permission of the building inspector of the plaintiff city.

IV. That the decree of the sitting Justice should be modified because it grants an injunction commanding the defendants to tear down a section, sixteen (16) feet deep and twelve (12) feet six (6) inches in width, whereas the prayer for relief describes the alteration to be twelve (12) feet square, and because the evidence indicates that the new section, if the court should conclude this to be an enlargement

of the building, is twelve (12) feet wide on the extreme rear and ten (10) feet long on the southerly side, with a small space between the two sheds seven (7) feet wide by six (6) feet deep.

So far as the findings of fact by the sitting Justice are concerned they are sustained under the familiar rule, which needs no citations, that such findings are to be so sustained unless clearly erroneous and we do not find error therein.

The defendants claim that the finding relating to the exercise of discretion is a matter of law and urge error at this point. We must ever bear in mind that this case deals with a statutory question. Hence, citation of authorities to cases which are not based upon statute, by-law nor ordinance, are not necessarily applicable and frequently have no application whatever. In *Coombs* v. *Lenox Reality Co.*, 111 Maine, 178, which is relied upon by the defendant, we have a case where the brick wall of the defendant's building overhung the plaintiff's premises about one and one-half inches. There was no question of statute, by-law nor ordinance involved. It was there held under the peculiar circumstances of that case that a mandatory injunction should not be granted in all cases; that it was a discretionary writ; that the discretion was not an arbitrary one but was to be exercised in accordance with settled rules of law and the prayer for mandatory injunction was denied. In *Stewart* v. *Finkelstone*, 206 Mass., 28, the plaintiff sought to compel the defendant to remove part of the building on certain land because the location was in violation of certain building restrictions which the City of Boston, the common predecessor in title, had inserted in deeds conveying lands to persons from whom the plaintiffs and the defendants derived their title, but that case did not arise from any violation of a city ordinance or a state statute. In *Attorney* v. *Algonquin Club*, 153 Mass., 447, the relator asked for the removal or alteration of certain buildings situated upon Commonwealth Avenue, but in that case also the request was based upon the allegation that the location of the buildings were in violation of restrictions of a deed from the Commonwealth under which the defendant derived its title. Here again, the case has nothing to do with a city ordinance or a state statute. In *Lynch* v. *Union Institution for Savings*, 159 Mass., 306, there was involved a question of continuing trespass which would work permanent injury to real estate and the case in no respects resembles the one at bar. In *Woodbury* v. *Marine Society*, 90 Maine,

17, the controversy related to the use of certain funds of the defendant society and involved no question of ordinance or statute law.

On the other hand, the sitting Justice based his finding and ruling as to discretionary powers in a case like the one at bar, upon *Houlton* v. *Titcomb*, 102 Maine, 272, which was a case on all fours with the case at bar, so far as the law was concerned. It was there pointed out that by the provisions of R. S., Chap. 4, Sec. 98, Paragraph VIII, towns, cities and village corporations may make by-laws or ordinances not inconsistent with law, respecting the erection of buildings therein and defining the proportions, dimensions and the material to be used in the construction thereof; and that any building erected contrary to any by-law or ordinance so adopted, is a nuisance. In the latter case it was held that such ordinances are in derogation of the common law, must be construed strictly and cannot be enlarged by implication. In other words, the legal position taken by the sitting Justice in his findings that the court in a case like the one at bar cannot exercise discretionary power was correct.

With relation to the contention that the ordinance of the city now under consideration is void because it is unreasonable and unconstitutional, we call attention to the fact that this ordinance, (Section 3) although appearing in the record as one entire paragraph is, nevertheless, composed of three distinct provisions. One forbids the erection or placing on any lot on either side of certain streets, of any building less than three stories in height, and requires construction of certain fire proof material; the second, that no wooden building, or any part or section of any wooden building, should thereafter be erected or placed upon any lot on either side of certain streets within certain limits; the third forbids the repairing or alteration of wooden buildings then standing on any lot within the fire district so as to increase its present height or size. It is with reference to this third provision alone that we are now concerned. Whether either of the other two provisions are void or otherwise is not now under consideration. It was held in *State* v. *Robb*, 100 Maine, 180, that a by-law or ordinance, like a statute, may be valid in part and void in part, and where it consists of several distinct or separable parts or provisions the invalidity of one or more of these will not render the entire ordinance void; that where an ordinance contains two separate prohibitions of different acts, or a prohibition applying to different classes of objects, it may be valid as to one and invalid as to the other; that if part of a

by-law or statute which is valid can be separated from that which is void, and carried into effect, it may be. It was also held a necessity that the good and bad parts be so distinct and independent that the invalid parts may be eliminated and what remains constitute the essential elements of a complete ordinance.

In the case at bar, as we have already said, not affirming or denying the validity of the first two elements of this ordinance, it is quite plain that the third element can be separated from the other two, if necessary, and therefore we are concerned only with this third element. The query then is whether police power, so-called, would authorize the City of Lewiston, by ordinance and under the authority of the statute, to declare that "No wooden building now standing on any lot within any of the above named limits shall hereafter be repaired or altered so as to increase its present height or size." We concede the defendants' claim that mere aesthetic beauty is not a basis for the exercise of police power, in cases like the one at bar, but we cannot concur with the defendant's view that an analysis of the elements of this ordinance, with the results which it seeks to accomplish, clearly indicate an intention and purpose on the part of the City of Lewiston to beautify the city, under the guise and pretext of the police power. In support of their claim that the ordinance under consideration is void the defendants cite *Winthrop* v. *N. E. Chocolate Co.*, 180 Mass., 464. The statute in that commonwealth authorizes cities and towns to pass ordinances and by-laws for the prevention of fire and the preservation of life and also to "Regulate the inspection, materials, construction, alteration and use of buildings and structures." Under the authority of that statute, the town of Winthrop adopted a by-law in the following language:

"No person shall, within one hundred feet of any other person's building or land, erect or use any building for a planing mill, woodworking establishment, hotel or public hall, or for any manufacturing or other hazardous business without first obtaining a permit in writing from the selectmen, and no such permit shall be granted until after such notice to owners of adjoining property as the selectmen shall order, and after a hearing pursuant to such notice."

In construing this by-law, the court said:

"It will be observed, that it is broad enough to cover any building, no matter how small, if only large enough for any kind of manufacturing business, and no matter of what materials composed. A one

story building of brick or stone cannot be erected or used by a person without a permit for a public hall, if within one hundred feet of any other person's building or even land. It cannot be necessary to multiply illustrations to show, that as an ordinance to prevent fire or preserve life it is beyond the authority conferred by the statute, and unreasonable. Nor is it any answer to say, that the whole matter is left to the selectmen, and that they may be presumed to act in a reasonable manner. It does not expressly or by necessary implication require them to adjudicate and determine, that it is necessary to prohibit the proposed erection and use for the prevention of fire or the preservation of life, but leaves them to act upon any reason whatever. It cannot be said that such a by-law is authorized by the statute."

We concur with the Massachusetts Court in their construction of the by-law and the result which they reached in that case but cannot concede that the decision is conclusive upon the case at bar.

It is well settled law that ordinances and by-laws of municipal corporations, to be valid, must be reasonable and not oppressive in their character. Any unreasonable ordinance or by-law is void. Whether a by-law or ordinance is reasonable or oppressive in its character, or otherwise, is a question of law for the court. This principle however, does not apply where the municipal corporation does that which it is expressly authorized to do by the Legislature, but where the power to act is a general one, the ordinance or by-law passed in pursuance of it must be a reasonable exercise of that power or it is invalid. Courts are cautious, however, in applying the rules relative to the authority of the municipal corporation to act and discretionary powers, except in extraordinary cases to restrain gross abuses, are not subject to judicial control. *Jones* v. *Sanford,* 66 Maine, 585; *State* v. *Robb,* supra; *State* v. *Phillips,* 107 Maine, 249. See also *Skowhegan* v. *Heselton,* 117 Maine, 17.

In the case at bar, the provisions of R. S., Chap. 4, Sec. 98, Paragraph VIII, were plainly intended by the Legislature to provide, among other things, for safety against conflagrations, and while, under the statute, the authority of municipal corporations to make a by-law or ordinance is to a certain extent general, yet, on the other hand, its spirit is quite specific.

As early as 1835 this court in *Wadleigh* v. *Gilman et al.*, 12 Maine, 403, decided that a city ordinance forbidding the erection of wooden buildings within certain prescribed limits was within the constitutional powers authorized under so-called police powers; and the court further held that it was not only lawful to forbid the erection of such buildings but that it was also lawful to cause them to be removed when erected. It was there pointed out that it is an object in the highest degree worthy of the attention of city or town authorities to take such measures as may be practicable to lessen the hazard and danger of fire; that no city compactly built can be said to be well ordered or well regulated which neglects precautions of this sort; hence, while erection of such wooden buildings is a menace to the safety of property in the vicinity, the removal may be made to prevent the hazard of the continuance of combustible matter in a dangerous position. The added height or size of wooden buildings in a congested portion of any city or town may have a material effect upon the danger of extensive conflagrations and the hazard to surrounding property. It appears to us that so much of the ordinance as may now be under consideration was plainly intended to diminish fire hazard, is reasonable, is clearly within the police powers of a city or town, and not in conflict with any constitutional provision.

Before we leave this branch of the case, we desire once more to emphasize the provision of the statute that any building erected contrary to a by-law or ordinance adopted under the authority given by the statute is a nuisance. With reference to this provision, the Legislature has made a declaration to which no latitude of discretion on the part of the court is allowed.

The defendant further contends that the city is estopped from prosecuting this bill because the repairs and additions made in this case were done with the consent of the building inspector of the City of Lewiston. According to the testimony of the building inspector, found in the record, he informed the man in charge of the work that in his opinion it might be right and it might be wrong for him to go ahead saying; "If I was you I would go ahead and do it." The defendants rely upon the provisions of R. S., Chap. 30, Sec. 25, et seq., which provide for the appointment of an inspector of buildings and prescribes his duties, but an ordinance is an order or regulation adopted in due form by the law making power of a municipality in pursuance of lawful authorities, and has the force of law over the

community in which it is adopted. See note to *Robinson* v. *Mayor of Franklin*, 34 Am. Dec., Page 632. It needs no argument that the statute referred to by the defendants does not give building inspectors authority to permit violation of law, or ordinance which is equivalent to law, and this contention cannot be sustained.

The decree orders the removal of a structure sixteen feet deep by twelve feet six inches in width. The bill prays for removal of a structure about twelve feet square. The testimony shows that the structure complained against was an alteration made by extending the rear wall of an existing shed, on the northerly side, twelve feet to the southerly line of the lot, and by building a wall from the corner, thus made, ten feet to the southerly end of a smaller existing shed, removing the partitions on the interior side and finishing the interior to conform to the remainder of the first floor. The decree may be modified to conform to these dimensions and when thus modified will stand affirmed.

Appeal dismissed with costs.
Decree to be modified in accordance with these findings and as thus modified is affirmed.

EDWARD N. MERRILL, Ex'r, In Equity,

vs.

JOHN H. WINCHESTER et als.

Somerset. Opinion April 9, 1921.

Bequests in a will in the following language, "to each of her children, grandchildren and great grandchildren now living or hereafter born (17 now living) I give and bequeath————each" embraces and includes all children, grandchildren and great grandchildren who might be in esse at the time of decease of testator, that is, those born or who might be born within nine months thereafter. Reservations in a will as to the use for a limited time of certain real estate, being an easement in gross and merely a personal right which is neither assignable nor inheritable, are valid. The enumeration of certain articles such as personal apparel, jewelry, etc., restricts the general words to articles of the same class as those enumerated and does not include money. There is no rule of law which prevents a person from acting as trustee for himself and others. By "articles of personal property" is meant goods and chattels; not money nor securities. No ademption of legacies except of those paid by testator himself in his life time; nor partial intestacy.

Bill in equity to obtain the construction of certain paragraphs in the will of David D. Stewart, late of St. Albans, deceased.

1. Item 3 is as follows: "To my sister, Mrs. Elizabeth M. Winchester of Corinna, I give and bequeath six thousand dollars ($6,000.00), and to each of her children, grandchildren and great grandchildren now living or hereafter born (17 now living) I give and bequeath the sum of three thousand dollars ($3000.00) each, to be paid within two years after this will is admitted to probate, to those then living, and to those born afterwards, within two years from the date of birth. To be paid out of any moneys, or collectible notes, or stocks or bonds belonging to my estate, as may be found most convenient by my executor or his successor in office, or out of the proceeds of the sales of real estate, if necessary."

Held:

1. That as Mrs. Winchester died during the lifetime of the testator her legacy of $6,000 passed under R. S., Chap. 79, Sec. 10, to her lineal descendants of whom there were four branches.

2. That so far as the $3,000 bequests are concerned the testator intended to bestow that sum upon all the children, grandchildren and great grandchildren of his sister who might be in esse at the time of his own decease; that is, upon those then born or who might be born within nine months thereafter, and that the rule against perpetuities was not thereby infringed upon and need not be considered.

3. That while the legacies vested as stated above, they were liable to be divested by death prior to the prescribed time of payment as it was the survivors at that time who by the terms of the will were to receive the gift.

II. Item 8 is as follows: "I give and devise to Jeannette Winchester of Corinna, the store and lot in St. Albans village, occupied in part by O. W. Bigelow, and in part by myself as my office. To have and to hold to herself, and to her heirs and assigns forever. Reserving, however, the rooms which constitute my office, as long as my executor and his successor may desire, in closing up my estate, and in taking care of my office library until the books and papers of all kinds, desks, and personal property of every description, are removed or disposed of, as hereinafter provided. Reserving also my said office rooms for the use of the legatees in Section No. 3 of this will, as long as they may desire. And further reserving the stairs and woodshed underneath, for the use of said office as long as said executor and his successor, and said legatees, may desire, in the same manner as I have used them."

Held:

That the reservations are valid, the interest reserved being an easement in gross; merely a personal right which is neither assignable nor inheritable.

III. Item 9 involves the same questions as item 3.

IV. Item 11 is as follows: "I give and devise to Closson C. Hanson and Florence M. Hanson, his wife, my homestead property, where I have lived with my dear wife many years. To have and to hold to them and their heirs and assigns forever. And to said Florence M. Hanson and her two daughters, Mary and Helen Hanson, I give and bequeath my dear wife's dresses, and articles of personal clothing, and apparel, and ornaments, and rings, and watches, of which she had three (one in Blake's vault, Bangor, and two at home); and all of her personal property of every kind in my house, including everything inherited from her father and mother, and everything given her by relatives and friends and myself; unless some particular article is otherwise disposed of in this will. All of these things of hers are dear indeed to me and I desire said Florence and her daughters to keep and use them with care, in rememberance of my dear wife."

Held:

1. The question whether the money and coins described and listed in Exhibit B were the property of the deceased wife of the testator we must decline to answer. It is one purely of fact and is not within our province in this proceeding for the construction of the will.

2. The items contained in Exhibit B, assuming them to belong to the testator, were not covered by the terms of the bequest. It was the evident intention of Mr. Stewart to bequeath not money but articles in the nature of keepsakes, valuable because of their personal associations and not of their pecuniary worth. The enumeration of certain articles such as personal apparel, jewelry, etc., restricts the general words to articles of the same class as those enumerated and does not include money.
3. From the personal and intimate nature of the property itself, the tender reference to it made by the testator, and from the relation of the legatees to one another, the inference is clear that Mr. Stewart desired that these articles should be kept together and treasured by the legatees as a class, as a family, and in the case of the death of any legatee that the survivors should take. Helen having died, her mother Florence, and her sister Mary, take as survivors.

V. Item 12 is as follows: "To said Closson C. Hanson I give in trust for himself and wife and children, as may suit the needs and wishes of each, the libraries in my house in rooms below and above, and all books, magazines, papers, etc. and all articles of personal property in said house not herein otherwise disposed of; and also all personal property of every kind in my stable and buildings, not heretofore mentioned."

Held:

1. This is a valid trust. There is no rule of law which prevents a person from acting as trustee for himself and others.
2. Nor is the gift void for uncertainty.
3. This being an immediate gift in trust to a class, those take as beneficiaries who were living at the testator's death, namely, Closson C., Florence M., Glenn and Mary Hanson.
4. The notes, mortgages, certificates of stock, contracts of sale and checks, all of the appraised value of nearly a half million dollars, found in the house at the testator's death and listed in Exhibit C, did not pass under this item. By "articles of personal property" was meant goods and chattels; not money nor securities.

VI. Item 22 disposes of the Minnesota property which came to David from his brother Levi.

Held:

1. The same questions are involved here as in item 3, already considered, and the same parties take as under that item for the reasons already stated.
2. The power of sale given to the plaintiff herein is valid.
3. The question as to who holds the legal title to said real estate we deem it unnecessary to answer. It may depend upon the rules of law and the statutes obtaining in Minnesota where the land is situated. Moreover it is an academic rather than a practical question.

VII. Item 23. This item disposes of Minnesota real estate standing in the testator's name, and the answers given in item 3 and 22 are applicable here.

VIII. Item 24. This item concerns testator's real estate in Maine, and the answers to the questions involved in items 3, 22 and 23 cover this.

IX. There is no undisposed residuum. Mr. Stewart intended to create none, and there is no residuary clause. He so framed his will that item 3 was made to perform somewhat the function of a residuary clause through which as a conduit all his property was to pass, except in case of special gifts. There has been no ademption of legacies except of those paid by himself in his lifetime; nor was there partial intestacy. Not one but all the living descendants of his sister were the selected objects of his benefaction, and he gave suitable and effective expression to his wish.

On report. This is a bill in equity seeking and praying for the construction and interpretation of certain paragraphs in the will of David D. Stewart, late of St. Albans, deceased. After a hearing upon the bill, answers, and proof, questions of law of sufficient importance having arisen, the case was reported to the Law Court for its determination upon so much of the evidence as was legally admissible. Bill sustained with costs. Decree in accordance with the opinion.

Case is fully stated in the opinion.

J. W. Manson, and G. H. Morse, for plaintiffs.

Merrill & Merrill, Butler & Butler, H. R. Coolidge, P. A. Smith, and O. H. Drake, for defendants.

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

CORNISH, C. J. Bill in equity brought to obtain the legal construction of the will of David D. Stewart, late of St. Albans, Maine. Mr. Stewart died December 31, 1917, the will was duly probated on February 19, 1918, and Edward N. Merrill was duly appointed executor. On May 18, 1918, the will was probated in Minnesota and letters testamentary were issued to Mr. Merrill in that State. He died on May 9, 1919, and John W. Manson was duly appointed as his successor, as nominated in the will.

The will is a lengthy document, containing twenty-six items, and of these eight are before the court for interpretation. Their construction will be aided by a recital of the general situation as deduced from the will itself, from the admitted allegations in the bill and from the evidence.

David D. Stewart was a well known attorney at law and a man of very advanced years at the time of his death. He had made a former will on April 10, 1871, and a codicil thereto on December 10, 1887, but the subsequent death of his wife followed by that of his only brother Levi M. Stewart of Minneapolis, Minnesota, on May 3, 1910, had so changed the situation as to require a revocation of the former will and codicil and the making of this last will on May 22, 1911. The testator had no issue, his nearest of kin being his sister Elizabeth M. Winchester and her descendents, namely her son, John H. Winchester, eight grandchildren and eight great grandchildren, seventeen in all at the time the will was made.

His brother Levi had accumulated a large fortune in Minneapolis, of the appraised value of $1,849,055.24, all of which, with the exception of $28,924.24, was in real estate. By his last will Levi disposed of $495,000 in specific bequests to various persons and institutions and gave all the residue to David. In the item bestowing this residue, Levi expressed the desire and request that David after retaining so much as he might deem best should "dispose of the rest by gift before his death or by gift and bequest in his will by giving the same to such persons or institutions, public or private, as in his judgment will do the most good." David promptly and faithfully fulfilled his brother's request. He was one of the executors of his brother's will and with his co-executor Charles Morse proceeded to sell portions of the real estate and with the proceeds paid the outstanding debts, inheritance and other taxes, the specific bequests, and expenses of administration. They settled their final account in Minnesota and closed that estate. The balance of the proceeds of the real estate sold by the executors, amounting approximately to $800,000 was paid over to David and the unsold real estate passed to him as sole residuary devisee.

While this settlement of Levi's estate was in progress and only four months after the executors were first licensed by the Probate Court in Minnesota to sell the real estate, David made this will in question, and in furtherance of his brother's wish he bequeathed under item 22 to various educational and charitable institutions amounts varying from $5,000 to $75,000 and aggregating $720,000 each to constitute an endowment to be known as the "Levi M. Stewart Fund." Then with the proceeds of the sales of Levi's Minnesota real estate David paid in his lifetime all the legacies to the various institutions pro-

vided for in item 22 of his own will. But instead of making a codicil stating that fact he drew his pen through the several bequests so paid, thereby making a practical physical revocation which has been accepted by all parties in interest.

The balance of Levi's estate was in David's hands at his decease, together with the property which he had personally accumulated, making a total of $1,197,504.37 according to the inventory of his estate, of which real estate in Maine amounted to $5,260, real estate in Minnesota $127,003, goods and chattels in Maine $4,514.30, rights and credits in Maine $477,466.04, and personal property in Minnesota $583,261.33.

With his property coming from these two sources, and with those who would naturally be the recipients of his bounty confined to his sister and her descendants, the testator penned his will. We will now consider in their order the paragraphs whose construction is requested.

"Item 3. To my sister Mrs. Elizabeth M. Winchester of Corinna, I give and bequeath six thousand dollars ($6000.00) and to each of her children, grandchildren and great grandchildren now living or hereafter born (17 now living) I give and bequeath the sum of three thousand dollars ($3000) each, to be paid within two years after this will is admitted to probate, to those then living, and to those born afterwards, within two years from the date of birth. To be paid out of any moneys, or collectible notes, or stocks or bonds belonging to my estate, as may be found most convenient by my executor or his successor in office, or out of the proceeds of the sales of real estate, if necessary."

No question is raised as to the validity of the gift of $6,000 to the sister Mrs. Winchester. She having died during the lifetime of the testator, this legacy passed under R. S., Chap. 79, Sec. 10, to her lineal descendants of whom there were four branches, viz: one-fourth to her son John H. Winchester; one-fourth to Olive Winchester only child of Charles Winchester deceased son of Elizabeth; one-eighth to each Florence M. Hanson and Densmore Hilliker, children of Mary W. Hilliker deceased daughter of Elizabeth; and one-eighth each to John S. Thurston and Dora T. Quimby, children of Alice W. Thurston, another deceased daughter of Elizabeth. *Nutter* v. *Vickery*, 64 Maine, 490; *Bray* v. *Pullen*, 84 Maine, 185; *Wilder* v. *Butler*, 116 Maine, 389, 392.

The important question under item 3 is as to how far into the future the testator intended that his gifts of $3,000 each should be projected. Did he purpose to bestow that sum upon all the children, grandchildren and great grandchildren of his sister who might be in esse at the time of his own decease or upon those who might be born at any time however remote? If the former, then the bequests are vested and valid; if the latter, then the gifts to such of the great grandchildren of Elizabeth Winchester as may be the unborn children of the unborn children of John H. Winchester are void as offending the Rule against Perpetuities. The words in item 3 which give color to the contention of invalidity are "hereafter" and "afterwards," and if these words were used by the testator in their broadest possible sense without limit as to time, there is ground for such contention. But we are not to accept these words alone as fettering us to that construction and forbidding us to go beyond them. We must study the instrument as a whole and determine the sense in which they were used in the light of the context and the circumstances.

Our first duty then is to construe the will and ascertain Mr. Stewart's actual and expressed intention in relation to those who should receive these $3,000 bequests, and in this ascertainment we need not discuss the Rule against Perpetuities. That rule neither aids nor seeks to aid in interpretation. On the contrary it defeats intention and obstructs the testator's wish. We must therefore first construe the will and if when construed the rule must apply, then we are bound to apply it and follow the consequences. *Strout* v. *Strout*, 117 Maine, 357.

While item 3 in terms disposes only of the $6,000 to the sister and $3,000 each to her children, grandchildren and great grandchildren, yet by reference and incorporation it is adopted as the conduit for the bulk of the estate in subsequent items, nine, twenty-two and twenty-three. Therefore it is necessary in this connection to consider the language of those items as revealing his purpose. The mode of expression differs slightly but the same and single thought runs through them all.

Thus in item nine he bequeathes "to the legatees mentioned in Section 3 of this will, consisting of my sister Mrs. Elizabeth M. Winchester and her descendants or their survivors, the library in my office and all the personal property therein including books, papers, desks, safe, tables, etc. It may be advisable eventually to

sell said library and divide the proceeds among said legatees or their survivors in equal shares. Or the law books might be sold and the other books be divided among said legatees as they may agree, or kept in the office for the benefit of all concerned including said Jeannette Winchester," wife of John H. Winchester. When penning these words Mr. Stewart evidently had in mind a time fixed and reasonably immediate at which the specified legatees or their survivors should receive the benefit of this gift. The books themselves might be divided in equal shares, or they might be sold and the proceeds divided equally, or a part might be sold and a part divided. Equality of division among the legatees named, or their survivors, was the dominant purpose. But equality of division presupposes a determined and fixed number when the division is made. If the class is to remain open and those who may be entitled to take must remain uncertain until the last great grandchild of Elizabeth Winchester may be born, however far in the future, then there can be no equal division until that time shall arrive and the number then surviving shall be ascertained. The dividend may now be definite, but the divisor and quotient must remain indefinite. In the meantime many of the descendants entitled to take at the testator's death might die before the birth of the last great grandchild, and the interests of the relatives whom Mr. Stewart knew and would naturally desire to provide for would be sacrificed to the interests of those remote collaterals whom he could never know or see.

Moreover he provides for an equal division of a part of the books "among said legatees as they may agree." Only those entitled to take could have the right to agree to a division and if the class was to remain open then no equal division by agreement could take place until the last great grandchild had been born and the class is closed. The language of Section 9 is clearly inconsistent with the idea of such a postponement and discloses a contrary intention on the part of the testator.

Look next at item 22. In this item Mr. Stewart sought to effectuate the wish of his brother Levi by distributing the residuum received from his brother's estate among various educational and charitable institutions, the total of these legacies as written amounting to $720,000. He authorizes his executor jointly with one Charles Morse of Minneapolis to sell and convey the Minnesota real estate, at such times and prices as they may deem advisable but as soon as

convenient and prudent for the payment of those legacies. He then adds this provision, which like item 9 already referred to indicates his own conception of the import of item 3: "If after the payment of the foregoing legacies to said Institutions by sales of said real estate as herein authorized, there should be a surplus or residuum of said real estate, it is to be sold in the same manner as above provided, and the proceeds divided equally between the legatees or their survivors named in item 3 of this will, unless a majority of said legatees, then of age, shall prefer to retain the same unsold." This surplus or residuum from sales of real estate amounts to about $800,000. Is it reasonable to suppose that the division of the proceeds here contemplated was to be delayed until the last great grandchild should be born, and that the decision as to sale or retention must be postponed until that time and then by a majority of those who might be of age at that time? We cannot accede to such a proposition.

Under item 23 the testator authorizes and empowers his executor and Mr. Morse to sell and convey all his own holdings of real estate in Minnesota, apart from those devised to him by his brother "at such times and prices as they may deem advisable, and divide the proceeds equally among the legatees named in Section 3 of this will, or their survivors, when payments are made."

Here he makes his intention clearer than in items 9 or 22. In those items he ordered the proceeds to be divided equally among the legatees or their survivors named in item 3 but did not specify in terms at what time the division should be made and survivorship should be fixed. In this item (23) he leaves no doubt on that point. He orders the division equally among the legatees named in Section 3 or "their survivors when payments are made." Those living when payments are made are to be the ultimate objects of his bounty, and at that time the equal division is to be made.

This takes us back directly to item 3, and the provision "their survivors when payments are made" in item 23 connects itself with and is explained by the directions as to payment in item 3, which are that the gifts of $3,000 each are "to be paid within two years after this will is admitted to probate, to those then living, and to those born afterwards, within two years from the date of birth."

In the light of the other provisions in the will we are now better prepared to construe the language of item 3, which at first seems some-

what ambiguous. Taking into account the context and the general plan which he had in mind, we construe item 3 as follows:

"To each of her children, grandchildren and great grandchildren now living." "Now living" means at the date of the will, at the time when the words were written. The general rule undoubtedly is that a will speaks from the date of the testator's death, but the language of a particular clause in the light of the circumstances may be such as to show that that clause speaks from its date. Such is the case here. In the next clause the testator himself fixes the meaning beyond doubt, when he says parenthetically "(17 now living)", and the record shows that at the date of the will seventeen were living, while eighteen were living at his decease. "Or hereafter born," is used in contradistinction to "now living" and means born after the making of the will; the word "born" is used in its broad sense to include both those actually born and living at the time of his decease and those then begotten and born within nine months thereafter. What follows refers to the time of payment, and here he makes a distinction between the two classes, thus: "to be paid within two years after the will is admitted to probate to those then living." "Then" is an adverb of time and might possibly refer either to those living at the time of probate, or at the time of payment. But the testator cleared the ambiguity in his mode of expressing the same thought in item 23, when he said "survivors when payments are made," so that payments to the first class he intended to be made to those surviving at the time of payment.

"And to those born afterwards within two years from date of birth." "Afterwards" was intended to apply to those en ventre sa mere at his decease and born within nine months thereafter, and they were to receive payment within two years from birth.

The record shows that there are no takers of the second class, as no descendants were born within nine months of Mr. Stewart's death.

This construction is in harmony with the testator's clear purpose to have his estate settled promptly. This is manifest throughout. In item 6 a legacy of $3,000 each to three parties in the west is to be paid within two years after the will is probated unless personally paid during his life. In item 25 another legacy of $3,000 was to be paid within the same time. In fact the two year limit for the final settlement of his estate seems to have been his clearly defined purpose, and in order to further that result he anticipated all the gifts to institutions, and some to individuals, by paying them in his lifetime.

Had he intended to provide for collaterals to be born far in the future, he would doubtless have created a trust for that purpose. None is provided however.

Finally this interpretation is supported by the well established rule of construction, which has sometimes been called a rule of convenience, that limits the takers under such a general clause to those in esse at the death of the testator. Of course if the language of the will is unambiguous and clearly controverts such a construction, this rule cannot apply, but where there is ambiguity, as there is in the case at bar, the rule does have application.

This rule was first announced in *Ringrose* v. *Bramham*, 2 Cox, 384, where the gift was "to every child he hath." Those children born after the death of the testator were excluded, the reason given being "the extreme inconvenience of postponing the distribution of the testator's personal estate until all the children who might be born should be ascertained, which would not happen until the death of their respective parents." This principle of construction was followed in *Storrs* v. *Benbow*, 2 My. & K., 46, where the terms of the legacy were, "to each child that may be born to either of the children of either of my brothers lawfully begotten;" again in *Same* v. *Same*, 3 DeGex Mac. & G., 390; in *Butler* v. *Lowe*, 10 Sim., 317, the words being "to each of the children of nephews and nieces begotten or to be begotten;" in *Rogers* v. *Mutch*, L. R., 10 Ch. Div., 25, the words of the bequest being "the sum of 100 pounds to each of the children of my niece M. who shall live to attain the age of twenty-one years," and in *Dias* v. *De Livera*, L. R., 5 App. Cas., 123, where the terms were "children which may be procreated by the daughter." See also *Mann* v. *Thompson*, 18 Jur., 826. In all these cases children not in esse at the testator's death were excluded, the reason being that unless the contrary was clearly and unmistakably expressed it was improbable that a testator should desire to postpone the distribution of his estate so long. The case at bar falls within this rule of construction.

Our conclusion therefore is, concerning the $3,000 legacies in item 3, that they were vested in the eighteen descendants named in the record as living at the time of Mr. Stewart's decease, that those born after nine months from that time were excluded and that the rule against perpetuities was not infringed upon and need not be considered.

While the legacies vested as stated above, they were liable to be divested by death prior to the prescribed time of payment, as it was the survivors at that time who by the terms of the will were to receive the gift.

Several specific questions are asked under this paragraph, but the general interpretation which we have given is sufficient to answer them all without going into minute details.

II. ITEM 8.

"I give and devise to Jeannette Winchester of Corinna, the store and lot in St. Albans Village, occupied in part by O. W. Bigelow and in part by myself as my office. To have and to hold to herself, and to her heirs and assigns forever, Reserving, however, the rooms which constitute my office, as long as my executor and his successor may desire, in closing up my estate, and in taking care of my office library until the books and papers of all kinds, desks and personal property of every description are removed or disposed of, as hereinafter provided. Reserving also my said office rooms for the use of the legatees in Section No. 3 of this will as long as they may desire, And further reserving the stairs and woodshed underneath for the use of said office as long as said executor and his successor and said legatees may desire in the same manner as I have used them."

The court is asked to determine whether these reservations or any of them are valid and binding upon the estate devised to Jeannette M. Winchester; If so, which ones and to what extent.

The reservation to the executor, Mr. Merrill, and to his successor, Mr. Manson, is valid. It does not violate the rule against perpetuities because they were lives in being. Nor is the rule violated as to the reservation to the legatees, as we have already held in our discussion of item 3. The interest reserved is an easement in gross, merely a personal right which is neither assignable nor inheritable. 14 Cyc. Easements, Page 1140.

III. ITEM 9.

"I give and bequeath to the legatees mentioned in Section No. 3 of this will, consisting of my sister Mrs. Elizabeth M. Winchester, and her descendants, or their survivors, the library in my office and all the personal property therein including books, papers, desks, safes, tables, etc. It may be advisable eventually to sell said library and divide the proceeds among said legatees or in equal shares."

This item involves the same questions already considered and determined under item 3, and it is unnecessary to repeat our conclusions.

IV. ITEM 11.

"I give and devise to Clossen C. Hanson and Florence M. Hanson, his wife, my homestead property, where I have lived with my dear wife many years. To have and to hold to them and their heirs and assigns forever. And to said Florence M. Hanson and her two daughters, Mary and Helen Hanson, I give and bequeath my dear wife's dresses, and articles of personal clothing, and apparel, and ornaments, and rings and watches, of which she had three (one in Blake's vault, Bangor, and two at home); and all of her personal property of every kind in my house, including everything inherited from her father and mother, and everything given her by relatives and friends and myself; unless some particular article is otherwise disposed of in this will. All these things of hers are dear indeed to me and I desire said Florence and her daughters to keep and use them with care, in remembrance of my dear wife."

Three questions are asked concerning this item. The first is whether the money described and listed in Exhibit B attached to the bill in equity was the property of the deceased wife of the testator. This question we must decline to answer. It is one purely of fact and is not within our province to answer in this proceeding for the construction of the will.

The second question is whether this money was disposed of by paragraph 11. This assumes that it was the property of the testator. Exhibit B contains a list of coins and currency found in different parts of the dwelling house, in bureaus, boxes, bags and a small tin trunk, the coins amounting to $210.43 and the currency to $233.88, a total of $444.31. We do not think this was covered by the terms of this bequest. It is not specifically mentioned and must pass if at all under the omnibus clause "and all her personal property of every kind in my house including etc." But under the familiar ejusdem generis rule the enumeration of certain articles such as personal apparel, jewelry, ornaments, etc., restricts the general words to articles of the same class as those enumerated and does not include money, In re Gibbons est. 224 Pa. St., 37, *Andrews* v. *Schoppe*, 84 Maine, 170. It was the evident intention of Mr. Stewart in this item to bequeath not money, but articles in the nature of keepsakes, valuable because of their personal associations and not of their pecuniary worth.

The third question is as to what becomes of the share given to one of the daughters, Helen, she having died during the lifetime of the testator. Ordinarily a tenancy in common and not a joint tenancy is presumed from a bequest of personal property to two or more persons individually named when the nature of the tenancy is not expressly indicated. *Stetson* v. *Eastman*, 84 Maine, 366. But this presumption may be overcome by the attending circumstances, and the different intention is manifest here. From the personal and intimate nature of the property itself and the tender reference to it made by the testator, and from the relation of the legatees to one another, being a mother and two daughters, dear friends of the deceased wife, the inference is clear that Mr. Stewart desired that these cherished articles should be kept together and treasured by the legatees as a class, as a family, and in the case of the death of any legatee that the survivors should take. It was a gift from heart to heart rather than from purse to purse. Our answer to this question therefore is that Helen having died, her mother Florence and her sister Mary should take as survivors. *Gilbert* v. *Richards*, 7 Vt., 203; *Blackmer* v. *Blackmer*, 63 Vt., 236.

V. ITEM 12.

"To said Clossen C. Hanson I give in trust for himself and wife and children as may suit the needs and wishes of each, the libraries in my house in rooms below and above and all books, magazines, papers, etc. and all articles of personal property in said house not herein otherwise disposed of; and also all personal property of every kind in my stable and buildings, not heretofore mentioned."

This is a valid trust. The fact that the father was one of the beneficiaries as well as trustee does not invalidate it. There is no rule of law which prevents a person from acting as trustee for himself and others. Perry on Trusts, Section 59; *Summers* v. *Higley*, 191 Ill., 193; *Tilton* v. *Davidson*, 98 Maine, 55. Nor is the gift void for uncertainty. Considering the nature of the property bequeathed it is difficult to see what more detailed and specific provisions the testator would be required or expected to make.

This being an immediate gift in trust to a class, those took as beneficiaries who were living at the testator's death, viz: Clossen C., Florence M., Glenn and Mary Hanson.

Exhibit C attached to the bill contains a list of the notes, mortgages, certificates of stock, contracts of sale of real estate and checks found

in the house at the testator's death. Their appraised value is $498,865.60, in addition to the coins and currency listed in Exhibit B already considered under item 11. The question is asked whether all or any portion of these securities passed under this item. For the reasons given in our discussion of item 11 we hold that this vast amount of property, forming nearly one-half of testator's entire estate, was not intended to be and was not included in the clause "and all articles of personal property in said house, not herein otherwise disposed of." By "articles of personal property" was meant goods and chattels, not money nor securities. In fact the learned counsel for the trustee and beneficiaries frankly disavow any such claim in their brief, so that further discussion is needless.

VI. ITEM 22.

This item disposes of the Minnesota property which came to David from his brother Levi. It contains legacies to a long list of institutions to be paid out of the Minnesota real estate and then provides that after such payment, the surplus or residuum is to be sold in the manner specified, that is by his executor jointly with one Charles Morse of Minneapolis, "and the proceeds divided equally between the legatees or their survivors named in item 3 of this will; unless a majority of said legatees, then of age, shall prefer to retain the same unsold."

The same questions are presented to us under this item as under item 3, and our answers need not be repeated. The same parties take as under that item and for the reasons already stated. We add that we think the power of sale given to the plaintiff therein is valid.

The question as to who holds the legal title to said real estate we deem it unnecessary to answer. It may depend upon the rules of law and the statutes obtaining in Minnesota where the land is situated. Moreover it is an academic rather than a practical question. It appears from the brief of counsel that the legatees prefer to have the property sold and the proceeds divided. Full power is given in the will to fulfil their desire. No further instructions are necessary.

VII. ITEM 23.

This item disposes of Minnesota real estate standing in the testator's individual name, independent of that coming to him from his brother. The same questions arise as in items 3 and 22, and the answers given in those items are applicable here.

VIII. ITEM 24.

"My real estate in Maine, not hereinbefore mentioned I hereby authorize and empower my said executor and his successor to sell and convey by suitable deeds of conveyance and divide the proceeds equally between the same legatees named in Section No. 3. Sale or sales to be made when requested by legatees then of age." The answers in items 3, 22 and 23 cover this.

IX.

The final inquiry does not pray for the construction of any particular item in the will, but asks who is entitled to the undisposed residuum of the personal property belonging to the estate. This assumes that such an undisposed residuum exists, and to this we cannot accede.

Evidently Mr. Stewart did not intend to create such a residuum. If he had he would undoubtedly have inserted a residuary clause with which to take care of it. This he did not in terms do. There is no residuary clause, but he so framed his will that item 3 was made to perform somewhat the function of such a clause, at least to act as the conduit through which, or to legatees named in which, all his property was to pass except in the case of special gifts.

They were to share all his property otherwise undisposed of, and whether at his decease such property existed in the form of unsold real estate in Minnesota, devised to him by his brother, or the proceeds of such real estate sold by himself in his lifetime, or in the form of real estate in Minnesota standing in his own name or the proceeds thereof so sold by him, or unsold real estate in Maine, was entirely immaterial. It was all ultimately to be converted into cash and distributed as directed. He made ample provision for such sale, conversion and distribution. There has been no ademption of legacies except those paid by him in his lifetime. Those have been satisfied. But there has been no further ademption merely because Mr. Stewart sold other real estate in his lifetime and received the proceeds. Such sale was not in contravention or revocation of any portion of his will, but strictly in accord with its entire plan. A legacy may be adeemed when the thing specifically bequeathed is essentially changed. But that is because the testator is supposed to have intended that result, and the gift is supposed to have been thus abrogated. Here however the sales by himself in his lifetime, as by his executor after his death, were made in strict harmony with his entire testamentary purpose, and in accord with the whole atmosphere of the document. His promises in the will were redeemed rather than adeemed.

Nor was there any partial intestacy. The presumption against it is always strong, especially where, as in this will, the testator takes pains to dispose of his property with the utmost care and detail, and such intestacy must have been farthest from Mr. Stewart's thought. Not one but all the living descendants of his sister were the selected objects of his benefaction and he gave suitable and effective expression to his wish.

In reaching these various conclusions we are confident that we have in each case discovered the actual intention of David D. Stewart as expressed in his will, and viewed in the light of all the circumstances, that that intention is not in conflict with any positive rule of law or fixed canons of interpretation, and can be legally carried into effect by the executor.

The parties were evidently justified in applying to this court for instructions and it is proper that the estate should bear the reasonable expense of the litigation. Reasonable counsel fees may be fixed by the sitting Justice and allowed in the executor's account.

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

WILLIAM HANSCOM et al.

vs.

NORTH ANSON MANUFACTURING COMPANY.

Franklin. Opinion April 9, 1921.

A scale of logs by a surveyor agreed upon by the parties in absence of fraud or mathematical mistake is binding on the parties. A scaler may employ relatives of the owners as sub-scalers provided he exercises his honest judgment in selecting them, but he can not employ the owners themselves as sub-scalers unless he afterwards personally verifies their work or so carefully supervises it that he could vouch for its correctness.

Action of assumpsit to recover for the sale and delivery of logs at specified prices. The logs were cut partly by the plaintiff and partly by other parties. There was no controversy over the terms of the contract, the prices, nor the selection of the agreed scaler. The only contention was the quantity of logs for which the defendant was legally bound to pay. The plaintiff having obtained a verdict, upon defendant's motion to set aside the same as against the evidence, it is

Held:

1. It is a well settled and familiar rule of law that when the parties have agreed upon a surveyor to scale logs they are bound by his scale in the absence of fraud or mathematical mistake.
2. There was no claim here of mathematical error on the part of the agreed scaler, so that the issue is narrowed to one of actual or constructive fraud, and on this issue the burden was on the defendant.
3. The employment by the scaler of relatives of the owners as sub-scalers in certain instances did not of itself constitute fraud. The situation might be such that he would deem this to be the practical and proper thing to do, realizing the smallness of their cut and knowing the men, their capacity and integrity. The vital question is whether he exercised his honest judgment in selecting them. If so, there was no fraud on his part, actual or constructive. This was left as a question of fact to the jury, and they, after seeing and hearing both the scaler, Mr. Lockyear, and the sub-scalers themselves, decided in his favor. A careful study of all the evidence, which is very voluminous, fails to convince the court that their conclusion was manifestly wrong.

4. But the scaler had no authority, either express or implied, to employ the owners themselves as sub-scalers unless he afterward personally verified their work or so carefully supervised it that he could vouch for its correctness. He could not simply accept their scale as the basis of his own and without verification make his scale of these logs conclusive upon the parties. The question of the actual quantity of logs so scaled was therefore left for the jury to determine. The presiding Justice so instructed them and they sustained the plaintiff's claim. We do not think their conclusion was manifestly wrong.
5. The defendant further contends that in the use of the so-called Holland Rule by which the logs were scaled, Mr. Lockyear and his helpers employed a wrong method, by including the bark in the diameter, while the true method should be the measurement inside the bark, and that this made a difference of fifteen per cent. Which was or is the correct method was a disputed question of fact. The general manager of the defendant testified that when he made this contract he knew it was the general custom to scale outside the bark, and the price was made accordingly. Under these circumstances the defendant cannot with reason complain if the scaler did what it assumed he would do.
6. Another claim set up by the defendant was that a large number of small logs which should have been scaled as pulp logs and put in at the pulp price of $20 per thousand were scaled as saw logs and put in at the saw log price of $25 per thousand. This however simply attacks the judgment of the agreed scaler and is not open to the defendant unless his scale is deprived of its binding force.
7. The defendant has not sustained in the judgment of the jury the burden of overthrowing the woods scale either in whole or in part, and therefore it is unnecessary to consider the force of the rescale at Fairfield, its merits or its demerits. The parties sold and bought, and the price was fixed, according to the Lockyear woods scale and not according to a rescale in the water at Fairfield where the defendant's mill was located, nor a mill scale after the lumber was sawn. The woods scale was unsuccessfully attacked at the trial and we are unable to discover from the evidence any substantial justification for holding that the action of the jury was manifestly wrong and that their verdict should be overturned.

On motion to set aside the verdict by defendant. This is an action of assumpsit to recover for logs sold and delivered at a specified price. The only question was the quantity of logs for which the defendant was legally bound to pay. The defendant questioned the correctness of the scale of the surveyor who was agreed upon by the parties. The jury rendered a verdict for plaintiff for $39,996.55, and defendant filed a motion to set aside the verdict. Motion overruled.

The case is fully stated in the opinion.

McGillicuddy & Morey, for plaintiff.

A. K. Butler, and W. R. Pattangall, for defendant.

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

CORNISH, C. J. On defendant's general motion for new trial. The controversy arises over an oral contract made between the parties in the Summer or Fall of 1918 for the sale and delivery of logs, within the limits of the Dead River Log Driving Company, in the Spring of 1919, at specified prices. There is no dispute as to the terms of the contract. The general manager of the defendant corporation who was a witness for the plaintiff, testified that he bought from the plaintiffs whatever logs they could procure during the logging season of 1918-1919, including what they might themselves cut and what they might procure from others; that the agreed price was $25 per thousand sound scale for spruce and pine; $20 per thousand for fir; $14 per thousand for cedar; and $20 per thousand for small fir and spruce, that is pulp stock; that they agreed upon one William Lockyear as a scaler, the scaling to be done by him or under his supervision and that his scale should be final and binding upon both parties.

It was also agreed that the defendant should pay the plaintiffs a commission of one dollar per thousand on all logs bought from other parties.

With all this the plaintiffs agree. So that at the trial there was no controversy over the terms of the contract, the prices, nor the selection of the agreed scaler. The only issue finally was the quantity of logs for which under the well settled rules of law the defendant was bound to pay.

The plaintiffs' claim was for 5,173,562 feet, amounting to $120,332.90, on which credits of $78,653.29 were finally agreed upon, leaving a claimed balance of $41,679.61. The jury returned a verdict in favor of the plaintiffs for $39,996.55, the presiding Justice having directed them to disallow a claim of $1,750.82 under an alleged supplemental contract concerning the Savage logs so-called. It is this verdict which the defendant seeks to set aside on the usual ground that it is against the evidence.

We must begin the consideration of this case with the rule firmly established in this State that when the parties have agreed upon a surveyor to scale logs, in the absence of fraud or mathematical mistake they are bound by his scale. This rule grew up out of the very nature of the logging contract and the peculiar conditions under which the work must be carried on, all of which are lucidly discussed by Chief Justice Whitman in the early case of *Robinson* v. *Fiske*, 25 Maine, 401. To the strictness of this principle that the agreed scaler is like an arbitrator and his scale bill is conclusive and cannot be impeached except for fraud or mathematical error, the court has closely adhered. *Berry* v. *Reed*, 53 Maine, 487; *Bailey* v. *Blanchard*, 62 Maine, 168; *Ames* v. *Vose*, 71 Maine, 17; *Nadeau* v. *Pingree*, 92 Maine, 196; *Burton* v. *Mayo*, 106 Maine, 195.

In this case therefore the Lockyear scale must stand unless it is successfully assaulted on one or both of the excepted grounds. There is no claim here of mathematical error, so that the issue is narrowed down simply to fraud, and on this issue the burden is on the defendant. *Atwood* v. *Manufacturing Co.*, 103 Maine, 394.

It is admitted that the scale of all these logs was not made by Mr. Lockyear personally. That would have been physically impossible in an operation of that size which covered a territory extending twenty-five miles along the waters of the Dead River and involved twenty-two or twenty-three different camps. Nor did the parties contemplate that he should scale the logs personally. The work was to be done as usual in our Maine woods in like conditions, under his general supervision and inspection. The parties so testify. It was understood that he must employ others to do the actual work, log by log, and in making his selection of those men he was of course bound to exercise his honest judgment. Here the defendant makes its first attack. It says that about a million feet of these logs were actually scaled by near relatives of the operators, and about a half million feet by the owners themselves; that therefore the entire Lockyear scale loses its binding and conclusive force and should be compared with and has no more weight than the re-scale made by the defendant at Fairfield which gave a total of 3,301,846 feet, a difference of 1,871,716 feet.

This point was raised at the trial as is shown by the charge which is a part of the record, as various exceptions were taken by the defendant although not pressed.

As to the employment by Lockyear of relatives of the owners, as sub-scalers in certain instances, we cannot hold that this of itself constitutes fraud. The situation might be such that he would deem this to be the practical and proper thing to do, realizing the smallness of their cut and knowing the men, their capacity and integrity. The vital question is whether he exercised his honest judgment in selecting them. If so, there was no fraud on his part, actual or constructive. This was left as a question of fact to the jury, and they, after seeing and hearing both Mr. Lockyear and the sub-scalers themselves, decided in his favor. A careful study of all the evidence, which is very voluminous, fails to convince the court that their conclusion was manifestly wrong.

As to the employment by Lockyear of the owners themselves as sub-scalers, as he did in several cases, a different rule applies. He had no authority, either express or implied, to do that unless he thereafter personally verified the work or so carefully supervised it that he could vouch for it as for his own. He could not simply accept their scale as the basis of his own and without verification make his own scale of these logs conclusive upon the parties. This aggregate therefore of about a half million feet was stripped of the badge of conclusiveness, and the question of the actual quantity was left for the jury to determine. They could hear all the testimony of the scalers who actually did the work and give to it such weight as it deserved considering they were interested parties, and they could also hear the testimony of the defendant on the re-scale which it claimed showed a large shortage. The presiding Justice so charged the jury. Again they sustained the plaintiffs claim, and again the court is unable to find their conclusion manifestly wrong.

The defendant further contends that in the use of the so-called Holland Rule with which the logs were scaled, Mr. Lockyear and his helpers employed a wrong method, by including the bark in the diameter, while the true method should be the measurement inside the bark, and that this made a difference of fifteen per cent.

Which was or is the correct method was a disputed question of fact. Mr. Forrest H. Colby, the Land agent and a man of large experience, testified that the bark should be excluded, while Mr. Lockyear, also a man of many years experience, testified that the bark should be included. He said that under a straight and sound survey it was customary to exclude the bark, but under a sound survey it should be

included, and others claimed that with the old-fashioned circular saws so much of the log was wasted in sawing that the bark was excluded, while with the modern band saws there is little wastage and the bark should be included. Some of the sub-scalers on this operation testified that they included and others that they excluded the bark. No fixed custom was proved. It was for the jury to decide which was the proper method, if there is a proper method recognized among lumbermen.

Moreover, Mr. Hume, the general manager of the defendant, testified that when he made this contract he knew it was the general custom to scale outside the bark and the price was made accordingly. Under these circumstances the defendant cannot with reason complain, if the scaler did what it assumed he would do.

Another claim set up by the defendant was that a large number of small logs which should have been scaled as pulp logs and put in at the pulp price of $20 per thousand were scaled as saw logs and put in at the saw log price of $25 per thousand. This, however, simply attacks the judgment of the agreed scaler and is not open to the defendant unless his scale is deprived of its binding force.

The result is that the defendant has not sustained in the judgment of the jury the burden of overthrowing the Lockyear scale either in whole or in part, and therefore it is unnecessary to consider the force of the re-scale at Fairfield, its merits or its demerits. The parties sold and bought, and the price was fixed, according to the Lockyear woods scale and not according to a re-scale in the water at Fairfield where the defendant's mill was located, nor a mill scale after the lumber was sawn. That woods scale was unsuccessfully attacked at the trial and we are unable to discover from the evidence any substantial justification for holding that the action of the jury was manifestly wrong and that their verdict should be overturned. The entry will be,

Motion overruled.

WILLIAM O. LITTLEFIELD *vs.* ELVIRA A. HUBBARD.

York. Opinion April 16, 1921.

Construction of language in a deed. Right of way. Easement. Dedication of right of way to the use of the public, and adjoining lot owners. Evidence not sufficient upon which to predicate the existence of a way by dedication.

This is an action of trespass brought by the plaintiff against the defendant for certain acts of trespass alleged to have been committed by the defendant on a strip of land 16 feet wide and about 54 feet long, located at Kennebunk Beach, so-called, on Lord's Point.

The declaration contains two counts. However, it is unnecessary to refer to them further than to say that the first is for building a concrete walk across the above described premises and the second for driving automobiles over and leaving them standing on the land described.

The plea is the general issue, and special matter as justifications under the general issue: 1. That the right of way in question had been dedicated to the use of the public and adjoining lot owners by the plaintiff's predecessors in title. 2. That the defendant as one of the adjoining lot owners had a legal right of entering upon the land for the purpose of improving it and that she built the concrete walk complained of for the purpose of benefiting and improving the right of way and did not injure the way or damage the plaintiff.

Held:

1. That whatever the defendant's right of passage over the way, if any, she had no right to build a concrete walk or otherwise disturb the soil upon the fee of the plaintiff.
2. That there is not sufficient evidence in the present case upon which to predicate the existence of a way by dedication.

On report. This is an action of trespass brought by the plaintiff against defendant resulting from certain acts of trespass alleged to have been committed by defendant on a strip of land sixteen feet wide and about fifty-four feet long, located at Kennebunk Beach, on Lord's Point, alleged to be owned by plaintiff. Defendant filed a plea of the general issue, and also a brief statement of special matter of defense, setting up that a predecessor in title had dedicated to the adjoining lot owners and to the public the land in question as a right

of way or road. After the completion of the introduction of evidence, the case was reported to the Law Court, to render such decision as the case required, and to assess damages if that question was reached. Judgment for the plaintiff for damages in the sum of one dollar.

Case is stated in the opinion.

Willard & Ford, for plaintiff.

Emery, Waterhouse & Paquin, and Mathews & Stevens, for defendant.

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

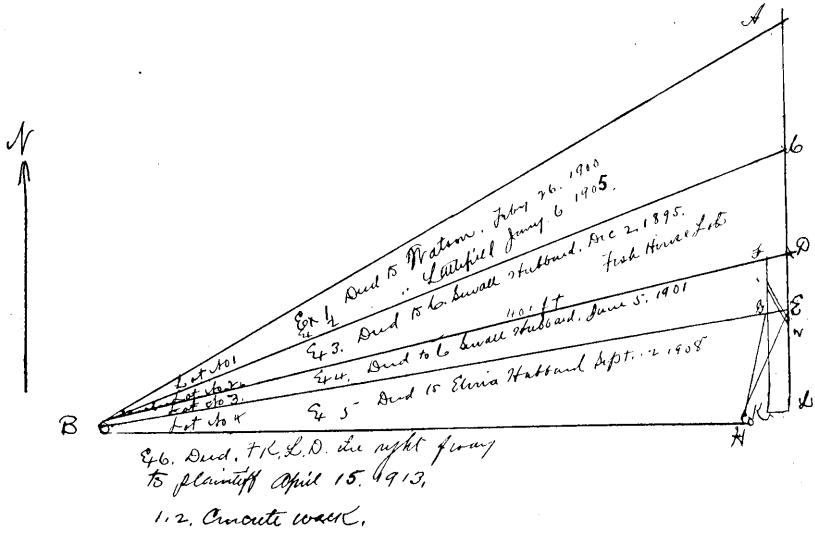
SPEAR, J. This is an action of trespass brought by the plaintiff against the defendant for certain acts of trespass alleged to have been committed by the defendant on a strip of land 16 feet wide and about 54 feet long, located at Kennebunk Beach, so-called, on Lord's Point bounded and described as follows, to wit:

"A Certain lot or parcel of land situated in Kennebunk at Kennebunk Beach on Lord's Point, so-called, and being a strip or lot of land sixteen feet wide extending from the Southerly side of the lot of Sewall Hubbard and being a road sixteen feet wide running from said lot about fifty four (54) feet to Lord's Point Road, subject, however, to any rights of way heretofore reserved to C. S. Hubbard for purposes of passing, teaming teams and access to his lot. Meaning hereby to convey the same land over which a right of way was conveyed to Benjamin Watson of Kennebunk, by the Grantor by its deed dated January 30th, 1900."

The declaration contains two counts. However, it is unnecessary to refer to them further than to say that the first is for building a concrete walk across the above described premises and the second, for driving automobiles over and leaving them standing on the land described.

The plea is the general issue, and special matter as justifications under the general issue: 1. That the right of way in question had been dedicated to the use of the public and adjoining lot owners by the plaintiff's predecessors in title. 2. That the defendant as one of the adjoining lot owners had a legal right of entering upon the land for the purpose of improving it and that she built the concrete walk complained of for the purpose of benefiting and improving the right of way and did not injure the way or damage the plaintiff.

The accompanying sketch will be referred to in the opinion, by the lots, numbers, letters, names and dates contained thereon.



The general issue raises the question of the plaintiff's title. There is no controversy that the plaintiff's deed, Exhibit 6, covered FKLD, the whole right of way, but the defendant contends that Exhibit 4, conveyed to C. Sewall Hubbard on June 5, 1901, Lot No. 3, bounded by DBE. If so bounded, then practically all of the concrete walk marked 1 and 2 would be upon the fee of Hubbard and not upon that of Littlefield. The plaintiff, however, claims that Lot No. 3 should be bounded on the east by line FG instead of the line DE which would exclude from the conveyance, DFGE and still leave the fee of the right of way in the plaintiff.

Accordingly, it is first necessary to determine whether the northerly line of Lot No. 3 begins at D or F. There is no controversy that the lines AC and CD are the eastern boundaries of Lots Nos. 1 and 2.

Lot No. 3 is bounded as follows: "Commencing at the S. E. corner of said Hubbards Fish House Lots, said Lots being conveyed to him by said Grantors Dec. 2nd, 1895, being on the West side of the 'Right of Way' from B. Watson's Fish House, said 'Right of Way'

running Southerly to the road leading to 'Lord's Point'. This first line being the same as the south side line of the said Hubbard's Lots 401 feet to an eye bolt in a ledge in the Cove, thence back to the said 'Right of Way,' about 400 feet, to a point 15 feet from the place of beginning and South of it, thence 15 feet to the place begun at, containing about 3600 feet, more or less, mostly flats land."

It appears from the deeds that a right of way was reserved to Lot No. 1 over the east end of Lot No. 2 and thence along the 'Right of Way' to Lord's Point Road, so that both of these lots had an easement over the 'Right of Way.' The language of the description in giving the starting point of Lot No. 3 is somewhat confused, yet in view of the circumstances that the grantors had already twice reserved the 'Right of Way' to the occupants directly above it, their own grantees; that they are now about to convey a lot which, if it was not excluded, would take in a part of the 'Right of Way' over which they had granted easements; that this was the first deed in front of the 'Right of Way,' and keeping in mind that there was a south east corner of the Fish House Lots at the west side of the 'Right of Way,' as well as at the east side; that the words "Fish House Lots," may be construed as merely descriptive of the adjacent ownership; we are of the opinion that the language, omitting the intervening words of reference, was intended to read as follows:

"Commencing at the S. E. corner of said Hubbard's Fish House Lots on the west side of the 'right of way,'" that is, not the S. E. corner of the Fish House Lots, which would be at D, but at the S. E. corner, on the west side of the 'right of way,' which would be at F. The language of the deed is fully as susceptible of the latter as of the former construction. It is claimed, however, that the northern line of this lot as described does not correspond in distance with the line FB. The description is as follows:

"This first line being the same as the south side line of the said Hubbard's Lots 401 feet to an eyebolt." This is not inconsistent with the exclusion of the 'Right of Way' as the 401 foot line was evidently descriptive of the "first line," that is, it was to run coincident with the 401 foot line of Hubbard's land. The description of the line from the eye bolt back, however, strongly confirms the above interpretation; 'thence back *to* said right of way.'" The word "to" is significant. It is "a word of exclusion, unless by necessary implication it is manifestedly used in a different sense." *Bradley* v.

Rice et als., 13 Maine, 198. In *State* v. *Bushey*, 84 Maine, 460. That "to," in its common use, is a word of exclusion, is understood as well by the layman as by the lawyer.

We have little doubt that it was the intention of the grantors to exclude the 'Right of Way' and the language of the deed easily bears a construction that will accomplish that purpose. Moreover, it was reasonable and what might be expected, that the grantors should exclude from this deed, the land upon which they had already granted two easements.

If the above construction of the deed, conveying Lot No. 3 is correct, it excludes that part of the 'Right of Way' east of the line FG, and vested in Littlefield, the fee thereof, subject to the easements reserved therein.' It is not denied that the concrete walk is mostly built upon this part of the 'Right of Way.' Whatever the defendant's right of passage over the way, if any, she had no right to build a concrete walk or otherwise disturb the soil upon the fee of the plaintiff. *Burr* v. *Stevens*, 90 Maine, 500.

But the defendant in her specifications under the general issue, claims the defense of dedication. But we find no occasion to discuss this question. Whatever future evidence may show, there is not sufficient evidence in the present case upon which to predicate the existence of a way by dedication.

Judgment for the plaintiff for damages in the sum of one dollar.

HARRIET N. FENDERSON, In Equity

vs.

FRANKLIN LIGHT & POWER CO.

Franklin. Opinion April 16, 1921.

An appeal from a decree of a single Justice in determining the value of the shares of a minority stockholder, cannot be taken to the Law Court, but shall be heard at the next term of the Supreme Judicial Court in the county where proceedings are pending. A vote of the majority of stockholders to sell property and franchises of the corporation, without authority of the Public Utilities Commission, or without its subsequent approval, the sale never having been consummated, does not entitle a dissenting minority stockholder to have the value of his shares determined and paid for.

Bill in equity brought under provisions of R. S., Chap. 51, Secs. 60 to 71, both inclusive, to have the value of the shares of a minority stockholder determined when such stockholder has dissented from the majority vote to sell the entire property and franchises of a corporation. The majority voted to sell but the sale was never consummated because consent of the Public Utilities Commission was not granted.

Held:

1. An appeal from the decree of a single justice, who determined the value of the shares, cannot be taken to the Law Court, since the statute provides that such appeal shall be heard at the next term of the Supreme Judicial Court in the county where the petition is pending.
2. Where a majority of the stockholders of a public service corporation vote to sell the entire property and franchises of the company, without previous authority from the Public Utilitites Commission, or without subsequent approval of that board, and the sale is never consummated, such vote does not entitle a dissenting minority stockholder to have the value of his shares determined and paid for under the provisions of R. S., Chap. 51, Secs. 60 to 71, both inclusive.

Appeal and exceptions by defendant. This is a petition in an equitable proceeding under the provisions of Secs. 60 to 71, inclusive, of Chap. 51 of the R. S., commonly known as the minority stockholders act, for the appraisal of the stock of the defendant corporation held by Albion L. Fenderson, deceased, complainant's testator. On April 25, 1917, at a special meeting of the stockholders called for

that purpose, a majority of the stockholders voted to sell the entire property and franchises of the corporation. The plaintiff in her capacity as executrix of the will of the said A. L. Fenderson dissented from such vote of the majority of the stockholders, and brought the petition instituting these proceedings, alleging that the vote to sell had been taken without any previous authority from the Public Utilities Commission, or without subsequent approval by said commission, hence a nullity. The defendant filed a motion to dismiss plaintiff's bill, which motion was dismissed by order of the court, and defendant excepted. A hearing was had upon complaint, answer, replication, evidence and admissions, and the sitting Justice sustained the bill, from which finding the defendant appealed. Appeal dismissed. Exceptions sustained.

Case is fully stated in the opinion.

McLean, Fogg & Southard, for plaintiff.

Frank W. Butler, for defendant.

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

PHILBROOK, J. The plaintiff in this bill in equity is the executrix of the last will and testament of her husband, Albion L. Fenderson, who, at the time of his decease, owned 2151 shares of the capital stock of the defendant company. A special meeting of the stockholders of the company was held on the twenty-fifth day of April, A. D. 1917 to act upon the following matters:

"1. To see if the stockholders will vote to sell to the Franklin Power Co., Inc., all its property, franchises and permits and if so, the terms and conditions of the sale.

2. To see if the stockholders will authorize the proper officers to make an application for and in behalf of said company to the Public Utilities Commission for authority to make such a sale."

Upon a majority ballot it was voted:

"To sell to the Franklin Power Co., Inc. all the property rights and franchises of the company subject to the outstanding bonds of the company amounting to $114,000 all of which outstanding bonds the said Franklin Power Co. Inc. assumes and agrees to pay for the sum of one dollar."

The plaintiff in her representative capacity as owner of 2151 shares of the capital stock of the defendant company voted "No", but there

were 4801 shares voting "Yes". The plaintiff duly dissented from the vote and filed her dissent in accordance with the provisions of R. S., Chap. 51, Sec. 60 et seq.

The statute just referred to is commonly known as the minority stockholder's act and is designed to protect the interests of minority stockholders in corporations when the majority votes to dispose of its franchises, entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of business. Section 61 of the act provides:

"If any stockholder in any corporation which shall vote to sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, shall vote in the negative and shall file his written dissent therefrom with the president, clerk or treasurer of such corporation within one month from the day of such vote, the corporation, in which he is a stockholder may within one month after such dissent is so filed, enter a petition with the Supreme Judicial Court, sitting in equity, in the county where it held its last annual meeting, in term time or in vacation, setting forth in substance the material facts of the transaction, the action of the corporation thereon, the names and residences of all dissenting stockholders whose dissents were so filed, making such dissenting stockholders parties thereto, and praying that the value of the shares of such dissenting stockholders may be determined, and for other appropriate relief."

Section 62 of the act provides that if the corporation should fail to enter the petition mentioned in Section 61, then the dissenting stockholder, within certain statutory time, may enter such petition and prosecute the same, making the corporation party defendant. In the case at bar, the corporation did not file its petition and on July 16, 1917, the plaintiff filed her petition under the provisions of statute just referred to. Her dissent was dated May 19, 1917 and served on the treasurer of the corporation May 21, 1917. The time within which the corporation could file its petition, under the provisions of Section 61, just above quoted, expired on June 21, 1917. So much of the statute as gives the minority stockholder the right to file petition reads thus:

"If any such corporation shall fail to enter such petition as aforesaid, any stockholder dissenting as aforesaid may within one month thereafter enter such petition and prosecute the same, making such corporation party defendant."

Assuming, but not deciding, that the words "within one month thereafter" means within one month after the expiration of the time allowed for filing petition by the corporation, the steps taken by the plaintiff, so far as dates are concerned, were proper. Her petition was ordered returnable on the second Tuesday of September, 1917, which was September 11th of that year. The cause did not come on for hearing until April 16, 1920, and the decree of the sitting Justice who determined the value of the shares was dated June 21, 1920. The record does not disclose the date when the decree was entered and filed in court, but on October 11, 1920, the defendant took an appeal "to the next Law Court to be held in the district where said cause was pending." This appeal was valueless and void, because Section 64 of the act from which we have been quoting provides that an appeal from a decree determining the value of the shares shall be heard at the next term of the Supreme Judicial Court where such petition is pending, and where, at the request of either party, the issue may be submitted to a jury. The appeal to this court, therefore, is not properly here, cannot be considered, and must be dismissed.

The long silence between the return day of the petition in September, 1917 and the date of hearing, April 16, 1920 may, and probably is accounted for by reason of the fact that the defendant sought the necessary consent of the Public Utilities Commission to make the sale which had been previously voted. By stipulations annexed to the record, it will appear that the report of the Public Utilities Commission for 1918, pages 112-120 inclusive, may be referred to as part of the record. We there learn that the defendant and other corporations kindred and allied in their purposes and business were seeking consolidation and for this purpose the defendant company was desirous of making the sale indicated in the vote. Public hearings were held before the commission on October 18, 1917, and on December 5-6, 1917. The decision of the commission is dated December 20, 1917 in which that tribunal said that authority to sell would be granted only upon certain conditions. It is evident that these conditions were not carried out and that no sale was made because in the bill of exceptions, allowed by the Justice in the court below and to

which no objection appears on the part of the plaintiff's counsel, we find the statement that no sale was made or could be made in accordance with the preliminary vote.

This raises the crucial question with reference to the bill of expections. The defendant claims that the vote to sell having been passed without any previous authority from the Public Utilities Commission or without subsequent approval by said commission was a mere nullity and without any legal force and was not such a vote as the statute contemplates as the foundation for the valuation of stock by a dissenting stockholder.

The Justice sitting in equity held to the contrary and in effect decided that such vote was the vote contemplated by the R. S. of the State giving minority stockholders a right to have an appraisal of their stock, notwithstanding the fact that the Public Utilities Commissoin refused to permit a sale in accordance with the vote so passed.

This question has never before been presented to this court and we find no precedent elsewhere upon which to base a ruling, but reason, good conscience and equity lead us to decide that the ruling below was error and that the exceptions should be sustained. It is the sale and not the vote to sell which gives the minority dissenting stockholder the right to have his stock appraised. If a corporation by majority vote should decide to sell and subsequently for good reason rescind that vote it cannot be reasonably held that the Legislature intended such vote to give minority dissenting stockholders the benefits conferred by the statute under consideration. A fortiori when the vote to sell proves to be a nullity and incapable of execution the dissenting minority stockholder's rights cannot be held to have accrued under the statute.

It is urged by the plaintiff that the exceptions lie to an interlocutory decree but as our decision makes final disposition of the case, the exceptions may be entertained and disposed of as we have now done.

It follows that the bill is unavailing and entry in the court below should be made dismissing the same but we do not allow costs to either party.

Appeal dismissed.
Exceptions sustained.
Decree below annulled, new decree to be executed in accordance with this opinion.

JOSEPH FOURNIER'S CASE.

Androscoggin. Opinion April 19, 1921.

Workmen's Compensation Act. In a building where stairways are provided for workmen in going from basement to floors above, a workmen, in violation of the orders of his employer, with full knowledge of such orders, took hold of a rope used for hoisting bales of cotton from the basement to floors above through trap doors in the floors and received injuries while being hauled up through such trap doors, was not injured in "the course of his employment."

Where a workman took hold of a rope used for hoisting bales of cotton from the basement of a building up through doors in the floors above and received injuries while being hauled up through such trap doors, which he knew was against the orders of his employer as the evidence clearly shows in this case,

Held:

That by so violating the orders of his employer he placed himself outside the course of his employment, there being a stairway provided for use of the workmen in going from the basement to the upper floors.

The words in "the course of the employment" relate to the time, place and circumstances under which the accident takes place. An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or doing something incidental thereto.

The claimant in this case was not in a place where he reasonably might be in the performance of his duties when the accident occurred. He had taken a forbidden way, which the evidence shows he took for his own convenience and not that of his employer.

On appeal. This case was taken to the Law Court on an appeal by defendant from a decision of the Industrial Accident Commission granting compensation to claimant. Claimant was working for defendant in its cotton mills at Lewiston, and took hold of a rope used for hoisting cotton from the basement to the floors above through trap doors in the several floors and was injured there being stairways

provided for workmen in going from basement to floors above, and the Industrial Accident Commission held that he was injured in "the course of his employment" and granted him compensation, from which decree defendant appealed. Appeal sustained. Decree of sitting Justice reversed.

Case stated in the opinion.

Joseph Fournier, pro se, for plaintiff.

Andrews & Nelson, and W. T. Gardiner, for defendant.

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

WILSON, J. The claimant, Joseph Fournier, was in the employ of the Androscoggin Mills and engaged in sorting or "mixing" bales of cotton and hoisting them from the basement up stairs through a trap door by means of a rope running over a pulley and attached to an engine or other motor power. At nearly the close of his day's work, wishing to go upstairs to see how many bales of cotton of the different kinds were up there, he took hold of the rope and called to the man operating the hoisting machinery: "I am coming up. Go ahead." The hoisting machinery was started, the claimant was being pulled up through the trap door to the floor above when he began to swing from side to side and as he reached the trap door swung under and struck the floor above and fell to the floor of the basement below receiving the injuries on account of which he now seeks compensation.

The Associate Member of the Industrial Accident Commission found that orders not to use this rope in going up or down between these floors had not been given directly to the claimant; that it did not appear that there was a clear rule understood by the workmen and enforced by the employer; and further that the claimant was actually at work at the time of the accident, and was going up by means of this rope in furtherance of the master's business, and not for any business of his own, and ruled that in so going up by means of the rope the claimant did not place himself beyond the scope of his employment.

While there may not be sufficient evidence of the adoption of a formal rule by the employer relating to the use of this rope as a means of conveyance between the floors of its storehouse where the claimant was employed, we think the finding of fact that orders not to use the hoisting rope for this purpose had not been directly given the claimant

is not warranted from the evidence. The claimant himself expressly admitted the contrary. In reply to the following questions he said:

Q. "Did you hear that there was a rule that no man should go up that rope?"

A. "Yes."

Q. "Had Mr. Thompson (who was the overseer over the claimant) ever given you instructions in regard to going up and down this rope?"

A. "Yes."

Q. "What had he said?"

A. "Said to be careful and not go down that rope."

Q. "Had he told you not to go?"

A. "Not to go by that rope?"

Q. "Yes."

A. "Yes."

It matters not we think whether these orders were given at a prior employment which was interrupted by the claimant's service in the late war. The conditions remained exactly the same so far as the evidence discloses at the time of the injury, and the testimony of the claimant and fellow employees clearly shows that it was understood by them all at the time of the injury that the use of this rope for this purpose was prohibited by their employer. The claimant in response to an inquiry: "Did the men working around there generally know that they were not supposed to go up and down that rope?" said "Yes, sir."

As to whether the claimant was actually at work and at the time was going up the rope in the furtherance of his master's business and by so doing did not place himself outside the scope of his employment is in this case a question of mixed law and fact, and is to be determined upon the following considerations.

The claimant's own reason for doing what he acknowledges he knew was forbidden was, as stated by him: "I wanted to go upstairs and see how many different cottons there was up there. It was kind of late, almost the end of that day, and I thought to go the shortest way. That's how the accident happened." A stairway was provided for the use of the employees in going from the upper floors to the basement and the claimant used this means when he went into the basement on that afternoon to do his work.

The question of the liability of employers under Compensation Acts for injuries to employees received when in some place they were

prohibited from entering, or in the performance of some act they were prohibited by rules or positive orders from doing, has been the subject of much consideration by the courts in the different jurisdictions and no little confusion has arisen as to the principles upon which the various cases have been distinguished.

Some of the Compensation Acts contain provisions that in cases of serious and wilful misconduct on the part of the employee which contributes to the injury the employee is not entitled to compensation. Deliberate violations of rules or orders of the employer made to safeguard the employee against injury have frequently been held to be such serious and wilful misconduct as to bar the employee from compensation under such provisions. *United States Fidelity and Guaranty Co.* v. *Industrial Accident Com. of Cal.*, (1917) 174 Calif., 616; *Nickerson's Case*, 218 Mass., 158.

In other instances where this question has arisen, attempts have been made to distinguish the cases by denying compensation when the violation of the rules or orders took the employee out of the sphere of his employment, and allowing compensation when the violation was only of rules dealing with the conduct of the employee within the scope of his employment. Elliott on Workmens Compensation, 7 Ed., Page 50. *Dietzen Co.* v. *Industrial Board of Ill.*, 279 Ill., 11, 16; *Barnes* v. *Nunnery Colliery Co.*, 5 B. W. C. C., 195; *Kalaszynski* v. *Klie*, 91 N. J. L., 37; *Macechko* v. *Bowen Mfg. Co.*, 166 N. Y. Supp., 822.

There is no provision in the Maine Compensation Act exempting the employer in case the injury resulted from serious and wilful misconduct, hence this phase of it does not concern us.

Where the violation of the rules has clearly taken the employee out of the sphere of his employment, as in the case of an employee employed in the boiler rooms of an electric plant entering the transformer room of the plant where by the rule of the company, which he knew, he was forbidden to enter and where he had no business, *Northern Ill., Light and Traction Co.* v. *Ill. Industrial Board*, 279 Ill., 565; or where the rule violated clearly related to the conduct of the employee within the scope of his employment, as in the case of the workman whose duty it was to oil certain machinery, but it was against the rules or orders of his employer to oil it while in motion, *Mawdsley* v. *West Leigh Colliery Co.*, 5 B. W. C. C., 80; or the domestic whose duty it was to kindle the kitchen fire but was ordered not to

use for the purpose kerosene or anything similar, but used wood alcohol, *Kalaszynski* v. *Klie*, supra, this rule is sufficiently clear in its application.

It does not, however, clearly indicate the underlying principle upon which such cases must finally be distinguished and upon which we think such rule itself actually rests. The Compensation Act of this State permits recovery only in cases of accident "arising out of and in the course of the employment" and all cases of whatever nature must be reduced to these terms. To say that the violation of one rule took the employee out of the sphere of his employment and another rule only relates to his conduct within the scope of his employment, is only another way of saying that in the one case by reason of the rule the accident did not happen in the course of his employment, while in the other it did occur in the course of his employment because he was at the time actually engaged in doing the work he was engaged to do though doing it in a forbidden way.

Here lies the real test. The phrase "in the course of the employment" is too frequently lost sight of, and is seldom discussed. It is often clear that the accident did not "arise out of," because it did not occur "in the course of," but only the former reason is assigned for the decision. One is just as essential a condition of the right to compensation as the other. If an accident does not occur "in the course of" it cannot "arise out of" the employment. In this particular class of claims the determining factor is, we think, whether the accident occurred in the course of the employment. To discuss spheres of employment and rules of conduct only obscures the real issue.

The words "in the course of the employment" relate to the time, place and circumstances under which the accident takes place. An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *Westman's Case*, 118 Maine, 133, 142; *Larke* v. *John Hancock, etc., Ins. Co.*, 90 Conn., 303; *Bryant* v. *Fissell*, 84 N. J. L., 72; *Dietzen Co.* v. *Industrial Board*, 279 Ill., 11, 18.

If then the employee is in a place where he is prohibited from being by positive orders of his employer by reason of the danger, or has taken a certain course in going from one place to another which he is prohibited from taking by his employer for the same reason, notwith-

standing it is within the period of his employment and his purpose in going to the other place is to perform some of his duties he is engaged to perform, he cannot be said, while in the forbidden place or while going by the forbidden route or means, to be acting in the course of his employment within the meaning of the Compensation Act, because he is not in a place where he reasonably may be in the performance of any of his duties. *Nelson Construction Co.* v. *Indus. Com.*, 286 Ill., 632, 637; *Powell* v. *Brynder Colliery Co.*, 5 B. W. C. C., 124; *Barnes* v. *Nunnery Colliery Co.*, 5 B. W. C. C., 195; *Borin's Case*, 227 Mass., 452; *United Disposal Co.* v. *Indus. Com.*, 291 Ill., 480, 486; *McDard* v. *Steel*, 4 B. W. C. C., 412. Of course, if he went to the forbidden place for a purpose not connected with his duties *a fortiori* would he be outside the course of his employment. If, however, he is in the place where his duties are intended to be performed and where, of course, he reasonably may be, and is engaged in the performance of them and only violates some rule relating to his conduct while in such performance, he is still acting in the course of his employment even though he performs them recklessly and knowingly exposes himself to danger in violation of orders and, unless the injury can be said to have been inflicted by "wilful intention," may recover compensation.

The claimant in this case was not in a place where he reasonably might be when the accident occurred. He had taken a forbidden way. He was as much in a forbidden place where he could not reasonably be, when he was dangling at the end of a swinging rope between the floors of the building where he was working, as he would have been had he, in order to save time in going to some part of his employer's premises where his next duties were to be performed, passed through a transformer chamber full of high tension wires, which he was forbidden to enter. He took the forbidden course for his own convenience and not that of the master. The case does not show his employer had required the work he was doing to be finished that day.

It is clear, we think, that the accident did not arise in the course of employment of the claimant although within the period of it. The ruling, therefore, that in going up the rope he did not place himself outside the scope of his employment was erroneous.

Entry will be,

Appeal sustained.
Decree of sitting Justice reversed.

CHRISTINE E. LARRABEE'S CASE.

Washington. Opinion April 19, 1921.

Findings of fact by the Industrial Accident Commission from circumstantial evidence alone are not unwarranted as a matter of law if they are supported by rational or natural inferences from facts proved or admitted, provided the inferences upon which the findings are based are more consistent with the proven or admitted facts than any other inferences which may be rationally drawn therefrom. Hearsay or incompetent evidence alone not sufficient for reversal of findings, if such findings are based upon sufficient competent evidence.

In determining whether injuries resulting in death arose out of and in the course of the employment, statements, not of deceased's mental or physical condition, but of what occurred from which his physical condition resulted are inadmissable, unless occurring at the time of the injury.

The mere receipt of hearsay or inadmissible evidence by the Industrial Accident Commissioner, however, is not alone sufficient to require a reversal of his findings, if there is sufficient competent evidence in the case upon which his findings may rest, unless it appears that his findings were in some part at least, based on such incompetent testimony.

Findings of fact by the commissioner from circumstantial evidence alone are not unwarranted as a matter of law if they are supported by rational or natural inferences from facts proved or admitted even though not only possible or even reasonable inference to be drawn therefrom; provided the inferences upon which the commissioner's findings are based are more consistent with the proven or admitted facts than any other inferences which may be rationally drawn therefrom.

There was sufficient competent testimony presented before the commissioner in this case upon which his findings may rest, and it does not appear that his findings were in any part based on the inadmissible testimony.

On appeal by defendant. This case was taken to the Law Court on an appeal by defendant from a decree of the Industrial Accident Commission granting compensation to claimant under the Workmen's Compensation Act. The claimant is the widow of Herbert Larrabee, who, on March 12, 1920, while in the employment of the St. Croix Paper Company at Woodland, Maine, in removing ashes from under

the boilers in defendant's mill, breathed gas fumes from the ashes, which it was alleged caused his death which followed on March 21, 1920. The question involved was as to whether the evidence in the case warranted the findings of the commission. Appeal dismissed. Decree of sitting Justice affirmed.

Case stated in the opinion.

Reed V. Jewett, for plaintiff.

Curran & Curran, for defendant.

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

WILSON, J. The deceased was employed by the St. Croix Paper Company to clean ashes from pits where they were dumped from the boilers. Ashes in large quantities were dumped every two or four hours, depending on the kind of coal used. When Minto coal was being used the ashes had to be dumped four times a "shift" or every two hours. The ashes were dumped into a concrete pit about three feet high and twelve feet square and when first dumped were very hot and gave off more or less gas, especially the Minto coal which contains considerable sulphur.

The duties of the deceased required him to put water on the ashes, and when cool enough, to remove them from the pits. If the heat when first dumped was too severe or the gas too strong, the workmen were supposed to go out and let them cool off and the gas escape, until they could go back to work.

In one of the boilers on the day the illness or injury of the deceased occurred, Minto coal was being used. At the close of his "shift" the deceased came out and said to a fellow-employee who was just going on: "Got too much gas." To another who inquired how he felt he said: "Never mind, the gas almost kill me." When he reached home that night his wife asked him what the trouble was and, as she stated: "He said he got gassed." To the doctor who was called the next day he said: "Doctor, I have been working in the boiler room and got poisoned with gas," and perhaps at another time: "I got gassed in the mill."

The following day owing to his serious condition he was removed to a hospital where he died about a week later. No evidence was offered of his condition while in the hospital or the immediate cause of his death, except it appears to have been assumed at the hearing

that the death certificate gave, as the cause of his death, bronchial pneumonia. The attending physician prior to his entering the hospital testified that death from bronchial pneumonia might have resulted from the conditions which he found existing at the time of his first call.

The Industrial Accident Commissioner found that "the claimant received a personal injury by accident arising out of and in the course of his employment, to wit, an overdose of gas from the ashes dumped into the ash pit under boiler No. 10 from the direct results of which he died."

The matter comes before this court in the usual course, and the only question is whether there was sufficient competent evidence introduced before the commissioner to warrant his findings as a matter of law. If so, his findings must stand, even though inadmissible testimony was received, unless it appears that his findings were in any part based on such incompetent testimony. We think there was sufficient competent evidence on which his findings may rest.

The appellant contends that evidence is entirely lacking upon which to base the commissioner's findings, unless certain hearsay evidence was considered, and it not appearing it was not considered, the appeal should be sustained.

If such were the rule, the appeal should be sustained. Evidence clearly hearsay in its nature was received, bearing directly upon the manner in which the injury occurred. It should not have been received, but the receipt of it alone is not sufficient to require a reversal of the findings, if there is otherwise a legal basis for the conclusions of the commissioner. *Kinney* v. *Cadillac Motor Car Co.*, 199 Mich., 435; *Reck* v. *Whittlesberger*, 181 Mich., 463; *Mailman's Case*, 118 Maine, 172. In the last case, the commissioner expressly stated, he did not base his findings in any part on the incompetent testimony; but if no such statement is made in the findings of the commissioner, we do not think in this class of cases it is to be presumed that prejudice resulted from the receipt of inadmissible testimony, if there is sufficient competent evidence in the case on which his findings may rest. *Reck* v. *Whittlesberger*, supra; *Kinney* v. *Cadillac Motor Car Co.*, supra.

The statements of the deceased as to the cause of his illness are not statements as to his mental or physical condition at the time, but statements as to what occurred from which his physical conditions

had resulted and all come within the rule of hearsay evidence. While statements of pain, suffering, symptoms and even a statement that deceased "got hurt, and then or afterwards indicating the place of injury," where the question was whether his death was the result of traumatic pneumonia or of a weakened physical condition due to natural causes, have been held to be properly received, Greenleaf Ev., Vol. 1, Sec. 1626, 16 Ed.; *Heald* v. *Thing*, 45 Maine, 392, 394; *Mailman's Case*, supra; we find no case where a statement of the cause of the physical injury or condition has been held admissable. *Roosa* v. *Boston Loan Co.*, 132 Mass., 439; *Com.* v. *Sinclair*, 195 Mass., 100, 108-109 *Reck* v. *Whittlesberger*, supra; *Kinney* v. *Cadillac Motor Car Co.*, supra; *C. & A. R. R.* v. *Industrial Board*, 274 Ill., 336; Bradbury on Workmen's Compensation, Vol. 1, Pages 800-801; Boyd Workmen's Compensation, Vol. II, Sec. 560, Page 1123.

But eliminating the statements of the deceased from the case, the evidence discloses a man in good health, "a strong and rugged looking fellow" as his foreman testified, who had never had any illness unless from the ordinary "colds" prior to the day of the alleged injury; it further discloses conditions of employment where care must be taken to avoid the effects of gas which at times as one workman stated was "awful bad," and another said "had a way of affecting your throat;" "it makes your throat smart," and affects your breathing "like anything—like stifling;" that deceased went home immediately following the end of his "shift" and went to bed, the next day was in great distress and suffering from respiratory troubles, complained of pain through his mouth and down through the respiratory course; his breathing was shallow and he appeared to be in more or less of a suffocating condition; that his symptoms were not those of the ordinary respiratory diseases induced by exposure or weakened physical condition, but were similar, though more severe, to those experienced from inhaling the gases arising from the ashes by other workmen employed in the same work as the deceased; that the attending physician attributed his condition to the inhaling of an irritant, and in a week's time he died of bronchial pneumonia which in the opinion of the physician who first saw him resulted from the conditions in which he found him on his first visit on the day following the alleged accident.

While direct evidence of the alleged accident is lacking we are unable to say as a matter of law that there is no competent evidence

from which the more reasonable inference would be that the deceased through accident inhaled an excessive amount of the gases which the evidence shows were frequently present in great quantities so that it was necessary for the workmen to leave the place until the gases escaped.

The finding is supported, not, perhaps, by the only possible or even reasonable inference, but by inferences which are not unnatural nor irrational; *Mailman's Case*, supra. The evidence, we think, is sufficient to take the cause of the death out of the realm of mere speculation and fancy and conjecture and discloses a state of facts "more consistent with the commissioner's findings than with any other theory," *Papinaw* v. *Railway Co.*, 189 Mich., 441. If this were not the true state of facts the employer apparently could easily have furnished the evidence of the fellow workman who was present when the alleged accident occurred, and also the physician who attended him while in the hospital up to the time of his death. Not having done so the natural inferences to be drawn from the undisputed facts appearing in the case are strong enough to sustain the findings, *Simmons Case*, 117 Maine, 175, 178.

Appeal dismissed.
Decree of sitting Justice affirmed.

EDEN C. MADDOCKS *vs.* T. E. GUSHEE.

Knox. Opinion April 26, 1921.

A judgment by a court of competent jurisdiction, as a general rule, is a bar as a plea or as evidence, conclusive and binding between the same parties and their privies, as to all matters properly alleged and embraced within the issue in the action, and which were or might have been litigated therein, whether such judgment is by default or otherwise.

Parties and privies are estopped by a judgment. The term privity denotes mutual or successive relationship to the same rights of property. As a general rule, a judgment by a court of competent jurisdiction, directly upon the point, is as a plea a bar, or as evidence, conclusive and binding between the same parties and their privies upon all properly alleged matters embraced within the issue in the action, and which were or might have been litigated therein. It is immaterial whether issue actually was joined by defendant, or tendered him and left unanswered. The rule applies as well to a judgment by default, when the facts stated warrant the relief sought, as to one rendered after contest.

This defendant, albeit he had ample notice, did not heed it. His exceptions are meritless.

On exceptions by defendant. This is an action to recover damages for breach of warranty in the sale of a horse by defendant to plaintiff, which horse was later taken from the plaintiff, on a replevin writ brought by Nathan B. Hopkins. In the replevin action, in which the plaintiff in this case was defendant, the plaintiff gave to the defendant, Gushee, notice that the question, involved in the replevin action, was as to whether, Hopkins, plaintiff in the repelvin action, or the defendant, Gushee, in this case, owned the horse at the time Gushee, defendant in this action, sold it to the plaintiff in this action, and notified him to come into court and defend the replevin suit. The replevin suit after being continued for several terms was defaulted, and the question involved in this action is whether the judgment in the replevin suit is conclusive and binding upon this defendant as to title to the horse. Plea, the general issue, and a brief statement.

Verdict for plaintiff for $354.96. Defendant excepted to refusal of presiding Justice to give certain requested instructions, and also took exceptions to the exclusion of certain evidence. Exceptions overruled.

Case is fully stated in the opinion.

A. S. Littlefield, for plaintiff.

R. I. Thompson, and M. A. Johnson, for defendant.

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

DUNN, J. The defendant in this action sold and delivered a horse to a man named Hopkins, taking a Holmes note in payment. Defendant afterward made sale and delivery of the same horse to the plaintiff in this action. Thereupon the original purchaser replevied the horse from the second vendee. Eventually, on default of the defendant in the replevin suit, the court adjudicated, to quote from its record, that the property which had been recovered "belonged to" the plaintiff in the case. Then the present action was begun. When this action came on for trial, evidence was offered tending to show that in the replevin case he who had twice sold one horse was notified by the first vendee to come into court and make good a warranty of title, express or implied, against asserted subsisting previous ownership. He disregarded the notice. In the instant case, however, he asked the Justice presiding to instruct the jury that, as the judgment in replevin was by default, title to the horse was not thereby determined as between himself and him who is plaintiff now and was defendant before. The Justice declined to so rule. Nor would the Judge permit this defendant to show that, in advance of the later sale, he had received the horse back in amicable adjustment of the unpaid note. The Justice was clearly right.

Parties and privies are estopped by a judgment. *Corey* v. *Ice Company* 106 Maine, 485; *Stacy* v. *Thrasher,* 6 How., 144. "It is a well settled doctrine in this State," said Chief Justice Peters, "that if any issue be judicially established between parties to a litigation, the benefit of the finding will inure in favor of the winning party whenever such issue again arises between the same persons or their privies in any other suit. This is upon the principle of estoppel which declares that an issue of fact once judicially proved is forever proved." *Parks*

v. *Libby*, 90 Maine, 56. The term "privity" denotes mutual or successive relationship to the same rights of property. Greenleaf on Evidence, Section 523. As a general rule a judgment by a court of competent jurisdiction, directly upon the point is, as a plea, a bar, or as evidence, conclusive and binding between the same parties and their privies upon all properly alleged matters embraced within the issue in the action, and which were or might have been litigated therein. *Corey* v. *Ice Company*, supra. It is immaterial whether issue actually was joined by the defendant or tendered him and left unanswered. The rule applies as well to a judgment by default, when the facts stated warrant the relief sought, as to one rendered after contest. *Gates* v. *Preston*, 41 N. Y., 113; *Goebel* v. *Iffla*, 111 N. Y., 170. A judgment by default or upon confession is, in its nature, just as conclusive upon the rights of the parties before the court as a judgment upon a demurrer or verdict. *Gifford* v. *Thorn*, 9 N. J. Eq., 702.

Whether the present defendant was seasonably and reasonably vouched in the replevin suit was a question of fact, in regard to the finding, and the effect as a matter of law of the finding, of which the jury was guided by instructions to which exceptions were not taken. If defendant were duly called in, as he seems to have been, to defend on a warrant of title, then of right he could have summoned witnesses to testify in his favor; he could have cross-examined witnesses introduced by the opposite side; indeed, the defense would have been his to control. Actual notice in apt time to the party liable over, with request and opportunity to assume the defense, makes him, in the absence of fraud or collusion, a privy to the record, and binds him by it to the extent to which his rights were tried and adjudged. *Ryerson* v. *Chapman*, 66 Maine, 557; *Boston* v. *Worthington*, 10 Gray, 496; *Blasdale* v. *Babcock*, 1 Johns., 517. Quoting our own Judge Kent: "When a person is responsible over to another, either by operation of law or by express contract, and he is notified of the pendency of the suit, and requested to take upon himself the defense, he is not afterward to be regarded as a stranger to the judgment that may be recovered; because he has a right to appear, and make as full defense, as if he were a party to the record. . . . A judgment, after such notice, will be conclusive against him, whether he appeared or not." *Veazie* v. *Penobscot Railroad Company*, 49 Maine, 119. See too, *Davis* v. *Smith*, 79 Maine,

351. *Blasdale* v. *Babcock*, supra, was an action on the case on an implied warranty in the sale of a horse, which a defendant had sold to a plaintiff, but which belonged to another person, who had recovered it from the plaintiff. The record of the judgment in favor of the owner of the horse against the plaintiff was admitted in evidence on the question of title.

This defendant, albeit he had ample notice, did not heed it. He now contends and insists that notwithstanding, yet judgment in replevin went only to the determination of that plaintiff's right to the possession of the property. To prevail in replevin a plaintiff must show that at the time of the unlawful taking or detaining of the replevied chattel, he had either a general or special property therein and right to its possession. How far a plaintiff must go to make proof of his case often depends upon his adversary's plea. In the replevin case adverted to, no plea was filed. A default was suffered. An action of replevin is not finally disposed of by the entry of a default. That is not the final judgment. It has been said that an action of replevin is not disposed of until the question of the return of the property is acted upon. *Tuck* v. *Moses*, 58 Maine, 461. Default of the replevin defendant did not settle the question of the return of the property. This was determined by the inquiry into the facts and the adjudication thereon by the court. The court adjudged the property to belong to the plaintiff. The record so shows. Were the record not extended then the docket entries, likewise in this instance so showing, would be proper evidence of that fact. The primary meaning of the words "to belong," and also their common and ordinary meaning, is to be the property of. *State* v. *Fox*, 45 N. W., 874; *Gammon* v. *Seminary*, 153 Ill., 41; *Com.* v. *Hamilton*, 15 Gray, 480. Words and Phrases, Vol. 1, Page 744. Virtually the court said to the then plaintiff: Keep the property that you replevied, because you own it. Such was its judgment concerning an issuable fact in the case. Its record thereof is not subject to explanation or contradiction by evidence from outside. As between the parties and their privies a judgment must be conclusive upon all questions settled by it, as long as it stands; motives of public policy so dictate. Defendant's exceptions are meritless.

Exceptions overruled.

JOHN FENNESSEY'S CASE.

Aroostook. Opinion April 28, 1921.

Workmen's Compensation Act. "Status" defined. There is a distinction between a judicially determined right to receive compensation while disability resulting from accident continues, and the receiving of money, primarily from an erstwhile employer, but ultimately from society for supposed disability, when in reality not any exists.

The word "status," as that term is used in the Workmen's Compensation Act, in inhibition of change of a compensation carrying decree, prior to application for a review thereof, has reference to the relation in which an injured person stands towards him who was his employer at the time of the accident. It means that if the question of such persons right to receive compensation be an adjudicated one, that question may not be reviewed previously to the date of application looking to that end. But there is easily seen distinction between a judicially determined right to receive compensation while disability resulting from accident continues and the receiving of money, primarily from an erstwhile employer, but ultimately from society for supposed disability, when in reality not any exists.

In accordance with the agreed facts, Mr. Fennessey's right to compensation should have been terminated as of the date that total disability on his part ceased.

On appeal by defendants. This case went to the Law Court on an appeal from the decision of the Chairman of the Industrial Accident Commission. On May 18, 1919, John Fennessey, claimant, while in the employ of the Stebbins Lumber Company, received a personal injury by accident arising out of and in the course of his employment, and was decreed compensation for the period of his resulting total incapacity to labor. On or about June 5, 1920, claimant began work for another employer, and while in such employment received another personal injury, and compensation for total disability was allowed him from the new employer. Thus claimant received from both employers compensation for total disability until about August 9, 1920. The first employer on learning of claimant's second employment and injury, and the granting of compensation for total disability from the

second employer, while receiving compensation as aforesaid from such first employer, petitioned for a review of the original decree, and for the termination of the compensation thereunder, on August 9, 1920. On such petition the Chairman of the Industrial Accident Commission ordered that compensation under such original decree terminate from date of petition, and not from date claimant entered the employment of the second employer. The only question involved is as to whether the original compensation should terminate from date of filing of the petition, or from the date claimant entered the employment of the second employer. Appeal sustained.

Case stated in the opinion.

Archibalds, for plaintiff.

Andrews & Nelson, and W. T. Gardiner, for defendants.

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

DUNN, J. On May 18th, 1918, one John Fennessey, an employee of the Stebbins Lumber Company, sustained personal injury "arising out of and in the course of his employment." He filed a petition under the Workmen's Compensation Act, and, on establishing the factors necessary to support his claim, was decreed compensation for the period of his resulting total incapacity to labor. R. S., Chap. 50, Secs. 30-34. Thus matters continued until August 9, 1920. At that time, for an injury suffered by him while working for another employer, for whom he began work on or about June 5th, then last past, Fennessey was adjudged by the Chairman of the Industrial Accident Commission to be totally disabled for work, as a result of the injury so sustained. Compensation was allowed him from the new employer accordingly. Thereupon employer number one, on learning of what recently had happened to Fennessey, filed with the Accident Commission a petition for a review of the original decree, and for the termination of the compensation that it provided for (R. S., Chap. 50, Sec. 36); which compensation the petitioner insisted, and insists, should be from the date on which Fennessey commenced laboring for the later, or second, employer; all this on the grounds that the earlier disability had then ended, and that overpayment already had been made for several weeks. Fennessey himself, in a separate writing, lent assent to the truth of the recitals of the petition, and incidentally expressed satisfaction and contentment

with the amount of money which he already had received. On the unquestioned facts, the Chairman of the Accident Commission ordered termination of compensation, but from the time of the filing of the petition, rather than relating the command back somewhat more than two months, to the day on which the first inability admittedly ceased. A Justice of this court vivified the order by the entry thereon of statute directed decree. R. S., Chap. 50, Sec. 34. The single question arising on appeal is whether what the chairman decided ought to have been otherwise.

The underlying object of the Workmen's Compensation Act, as Mr. Justice MORRILL aptly observed in *Emile Thibeault's Case*, 119 Maine, 336, is to pay an injured workman for his loss of capacity to earn. Such payment is made primarily by the industry or occupation in which the employee was injured; ultimately it is borne by society. The act bespeaks liberality in interpretation. Yet, as counsel suggested in argument, its liberality goes no further, and never was intended to go further, than to provide for compensation for an actual or a legally presumed resulting loss of the ability to work. In this is its whole design, a design woven of the warp and woof of an indemnity contemplated certainly and speedily to be paid.

Divergence of view in this case is attributable to phrascology of the act regarding the subject of a review of decision previously made. Employee or employer, within two years from the entry of decree, may petition the chairman of the commission for a review, because incapacity is ended, or that it is increased or diminished. And the chairman may, in accordance with the facts, and from the date of the application, increase the amount of compensation, or reduce or discontinue it, "or make such other order as the justice of the case may require, but shall order no change of the status existing prior to the application for review," runs the law. R. S., Chap. 50, Sec. 36. It will be noticed that the clause, introduced by the disjunctive conjunction "or", concerning the doing of that which Justice enjoins, is followed immediately by the words, "but shall order no change of the status existing prior to the application for review." Interpetation of the word "status," within the meaning of the act, is the hinge on which decision must turn. Apparently the chairman regarded himself as constrained to make his order operative from the day of the date of the filing of the application for review. To be sure, at first blush, cursory reading might lead one to such conclusion. Broad

construction, as we have seen, is expressly exacted. If, in seeking for the meaning of a statute, a literal rule would produce irrational interpretation and absurd result, it should be eschewed. Said the New York court in the case of *People* v. *Lacomb*, 99 N. Y., 43: "In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within its letter. It is the spirit and the purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute. A reasonable construction should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the lawmakers."

In the present case the manifest initial purpose was that Mr. Fennessey should be compensated at a stipulated weekly rate for total loss of capacity to work, while such loss continued. Only this, and nothing more. Good faith and fair play were as much expected of him as from his employer or the latter's insurance carrier. And be it said to his credit that, his attention called to the matter, he assumed such attitude. It was open to him, when total disability had ceased or diminished, to file a petition for a review of the compensation carrying order. Of course he could waive compensation as fully and freely after it was granted as he might have foregone request therefor. It would seem consistent for him and his employer mutually to agree as to the time when his total disability ceased, and, so agreeing, to join in asking revokement of the compensatory order. It is not that the Legislature meant that payments should go on and on, and still on, in continuing duty on the one hand and right on the other, ranking higher in potency than the decree which brought both the duty and the right respectively into being, unless, and until, petition be filed for review. The term "compensation" by necessary implication spurns the suggestion. Compensation is not a gratuity; it is not charitableness. Compensation makes good a lack or loss. Contention that the language, "shall order no change of the status" is of trammel-

ing effect finds not more than mere semblance of sustention. Status has reference to the legal social relation and condition of a person; as the status of a married woman. *Burlen* v. *Shannon*, 3 Gray, 387. Derivatively the word relates to relationship. As used in the statute it means the relation in which an injured person stands towards him who was his employer at the time of the accident. It goes to his right to receive compensation. It means that if the question of such right be adjudicated that it may not be reviewed previously to the date of application. There is, however, easily seen distinction between a judicially determined right to receive compensation while disability resulting from accident continues and the receiving of money, directly or indirectly, from an erstwhile employer for supposed disability when in reality not any exists. The commission in the first instance made a virtually self-annulling decision; that is to say, its efficacy was to cease when total disability ended. Analogy will be found in a decree of alimony awarded on the dissolution of a marriage. Reconciliation ends alimony. Co. Litt., 32, 33. So, ordinarily, does the wife's remarriage. 60 Am. Dec., 672. Certainly the Legislature did not mean that injury incurred by a workman out of and in the course of his employment should continue without alleviation or cure until the filing of an application for review. That would outreason reason. But it is not more illogical than it would be to say it meant that, regardless of the fact that the employee to his own knowledge had fully recovered from total injury, nevertheless amends must be his until petition filed against him for a change of decision.

In accordance with the agreed facts, Mr. Fennessey's right to compensation should have been terminated as of the date that total disability on his part ceased.

The appeal is sustained. The decree appealed from hereby is modified so as to be effective from June 5, 1920.

Appeal sustained.

ARTHUR L. HERSEY, In Error *vs.* FREDERICK L. WEEMAN.

Cumberland. Opinion May 2, 1921.

A writ of error maintainable to reverse a judgment when judgment debtor has been defaulted without service upon him, or appearance by or for him. But if defendant has been duly served with process and had opportunity to protect his rights by appeal or by exceptions, and has failed or neglected to do so, he can not afterwards raise the same questions upon a writ of error. R. S., Chap. 82, Sec. 97, is a declaration of the forum, and not a declaration giving choice of procedure.

The provisions of R. S., Chap. 82, Sec. 97, relating to the re-examination of final judgments in the Superior Courts, upon writ of error or petition for review, is a declaration of the forum in which writs of error and petitions for review may be maintained, and not a declaration giving a choice of procedure.

A judgment debtor, who has been defaulted without service upon him, or appearance by or for him, may maintain a writ of error to reverse the judgment.

But when a defendant has been duly served with process and has had full opportunity to protect his rights by appeal or by exceptions, and has failed or neglected to do so, he cannot afterwards raise the same questions upon a writ of error.

So, where, as in the present case, the plaintiff in error had been defaulted in the original suit, without service upon him, or appearance by or for him, and at a subsequent term filed a motion that the cause be brought forward and the judgment vacated, which motion was denied, a writ of error to reverse the judgment cannot be maintained; the plaintiff in error, having had opportunity to protect his rights by exceptions to the ruling denying his motion, and having neglected so to do, cannot be permitted to raise the same questions by writ of error.

On exceptions by plaintiff in error. This is an action by writ of error brought by plaintiff to reverse a judgment rendered against him in the Superior Court in the County of Cumberland at the December term, 1919, alleging that the defendant in the original action, being the plaintiff in error in this action, was defaulted in the original action because he did not appear and answer in the original action in which said judgment was rendered. Certain alleged errors in the proceedings and judgment of the Superior Court were set out in the writ of

error, and defendant appeared and demurred specially to each assignment of error, and the demurrer after a hearing was sustained by the court, to which ruling the plaintiff excepted. Exceptions overruled. Demurrer sustained.

The case is stated in the opinion.

Clinton C. Palmer, for plaintiff.

Edmund P. Mahoney, and Albert E. Anderson, for defendant.

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

MORRILL, J. The plaintiff seeks to reverse a judgment rendered against him in favor of the defendant in error at the December term, 1919, in the Superior Court of Cumberland County, and in his writ specifies two alleged errors. The case is before us upon exceptions to a ruling sustaining a demurrer.

The *first* specification of error is that the Superior Court had no jurisdiction to render the judgment in question "because the writ in said action and upon which said judgment was based was not served on said Hersey in the manner provided by law and the statutes in such case made and provided, or at all, and said Hersey had not appeared in said action." To this specification the defendant in error demurs and for ground of demurrer alleges "that the plaintiff in error has alleged causes of error which would have entitled him, the said plaintiff in error, to a remedy by review, and that as a matter of law, his writ of error is insufficient, because a remedy by review is open to him."

This contention of the defendant in error may be stated thus, that a judgment debtor, who has been defaulted without service upon him or appearance by or for him, cannot maintain a writ of error to reverse the judgment, but must have recourse to proceedings in review.

We cannot accede to that proposition; we think the law is otherwise.

We may say in passing that the provision of R. S., Chap. 82, Sec. 97,—"Final judgments in said Superior Courts may be reexamined in the Supreme Judicial Court on a writ of error or on petition for review,"—only indicates the intention of the Legislature as to the forum in which writs of error and petitions for review may be entertained. The rules of law and practice which determine

whether a judgment may be re-examined by writ of error or by petition for review still obtain, and although the forum for examining final judgments rendered in the Superior Courts, is declared to be the Supreme Judicial Court, yet that is a declaration of forum only, and not a declaration giving a choice of procedure.

It is undoubtedly true that when a defendant has been duly served with process and has had full opportunity to protect his rights by appeal or by exceptions, and has failed or neglected to do so, he cannot afterwards raise the same questions upon a writ of error. So when a defendant has been duly served with process but through mistake or accident has not had notice of the action or has failed to appear, his remedy is by proceedings in review. But we are not aware that these principles have been extended, and we think that they should not be extended, to cases where the record shows no legal service of the writ, and no appearance by the defendant, in the original action.

In *Jewell* v. *Brown*, 33 Maine, 250 the court said: "By suffering judgment by default, a party may admit the justice of the claim, but he does not thereby admit the jurisdiction of the court, or the correctness of the proceedings to establish and enforce the claim. He may safely rest upon the assumption that, unless the process be legal, and the service sufficient, and the jurisdiction certain, no judgment will be rendered against him; or if from fraud, accident or mistake, a judgment should be erroneously entered, that the whole may be revised on error. . . . .

The rule, therefore, that a party who had the right of appeal, cannot bring error, is subject to qualifications. If he was not duly served with legal process, ... and an erroneous judgment has been rendered against him on default, he may have remedy by writ of error." This statement is to be taken with the further qualification that there has been no appearance by or for the defendant, in the original action, the defendant thereby submitting himself to the jurisdiction of the court.

In *Weston* v. *Palmer*, 51 Maine, 73, Judge Walton quoted Chief Justice Dana in *Skipwith* v. *Hill*, 2 Mass., 35, as follows: "I take it to have been decided, generally, that where a party has a right of appeal to this court, and will not avail himself of it, he shall not afterwards be allowed his writ of error. *Perhaps the rule has never been extended to a judgment on default, where no personal notice of the*

suit has been given. But where, *after legal notice of the action* in the lower court, a defendant suffers himself to be defaulted, he ought not to be permitted to lie by, and at any time within twenty years come in and reverse the judgment for a cause of which he might have availed himself in the original suit." Judge Walton proceeds in his opinion as follows: "In that case the judgment was reversed, *because the defendant had had no notice of the suit,* as appears by the remarks of Mr. Justice Sedgwick. The rule is now well settled that a writ of error will not lie, where the party has had an opportunity to appeal. The rule is not applicable to cases where the defendant is an infant, or a person non compos mentis, for such persons are regarded as incapable of appealing, or doing any other act necessary to protect themselves against a groundless suit; nor does it apply to suits where there has been no legal service of the writ."

The first of these exceptions, relating to an infant was recognized in *Easton* v. *Eaton,* 112 Maine, 106.

The reason for the last exception or qualification is thus stated by Chief Justice Shaw in *Bodurtha* v. *Goodrich,* 3 Gray, 508:

"The first answer of the defendant in error to this, and a plausible one certainly, is that the remedy is by writ of review. But the objection goes deeper than the service, and the mere want of notice, and is that the court has no jurisdiction. The ground of the plaintiff in error is, not that he had a good defense which he might have made if he had had notice; but that he was not amenable to the jurisdiction of the court, and not bound to make any defense. If he should come in and petition for a review, or sue out a writ of review as of right, he would thereby submit himself to the jurisdiction of the court and be obliged upon his review, if granted, to meet the trial on the merits, which he says he was not bound to do."

The fact that the plaintiff in error in that case was a non-resident can make no difference. *Johnson* v. *Thaxter,* 12 Gray, 200; in which, we think the law is correctly stated thus:

"A writ of review is a proper remedy to correct an error in a judgment, when the statute has been complied with by causing the writ to be properly served, but through some mistake or accident the defendant has not had notice of the action. In such action the court has jurisdiction of the case and can proceed to render a proper judgment. But this cannot be done where there has been no legal service of the writ. An essential pre-requisite to enable the court to take

cognizance of the case is wanting, and no valid judgment can be rendered against the defendant, and if one is rendered, it is erroneous and liable to reversal on error." See also *Smith* v. *Paige*, 4 Allen, 94.

In *Thompson* v. *Mason*, 92 Maine, 98, it is laid down, (Page 101), as "settled beyond controversy, that when a party litigant has had his day in court, has had a fair opportunity to raise his questions of law and to preserve his rights by exceptions, but has neglected or omitted to do so, and has stood silently by while his case went to judgment, he cannot afterwards raise the same questions by writ of error." The case of a party litigant who has not had this day in court, because service was not made upon him, was not before the court. In the discussion of that case *Lovell* v. *Kelley*, 48 Maine, 263 is cited as authority for the proposition that, "error will not lie where remedy is afforded by review;" but *Lovell* v. *Kelley* upon examination will be found not to support that broad, unlimited proposition. In *Lovell* v. *Kelley* the return on the original writ showed a legal service, therefore there was no error on the face of the proceedings; the plaintiff in error, admitting himself to be an inhabitant of the State at the time of the service of the writ, alleged that he was absent therefrom at the time of service and did not return until after the sitting and final adjournment of the court, and had no notice of the suit. To this contention the court replied that he had ample remedy by review. This opinion falls far short of holding that in a case where service was not made upon the defendant in the original action, he may not have a writ of error, and we think that the learned Justice in citing the case thus broadly and without limitation had in mind only the second contention of the defendant that, although legal service was made, he was entitled to his writ of error, because he had no actual notice of the suit. A similar remark in *Denison* v. *Portland Co.*, 60 Maine, foot of Page 522, is to be taken in the light of the context as not applicable to cases where no service has been made and judgment has been rendered on default without appearance.

The line is sharply drawn between the cases in which, on the one hand legal service of the original writ has not been made and there has been no appearance by or for the defendant, and, on the other hand, where legal service has been made. In the former a writ of error will lie to reverse a judgment rendered upon default; in the other, the remedy is by proceedings in review.

In the instant case the plaintiff in error alleges that the writ in the original action was not served upon him; this is admitted by the demurrer, and upon the authorities, nothing further appearing, is legal ground upon which a writ of error may be maintained to reverse the judgment.

Whether proceedings in review may also be maintained is not very material here; but we see no reason why the defendant in the original suit may not file a petition in review, if he is willing to submit to the jurisdiction of the court. *Holmes* v. *Fox*, 19 Maine, 107; *Hall* v. *Staples*, 166 Mass., 399, 400.

The further allegations of the writ, however, show that the plaintiff has voluntarily appeared in the Superior Court and has there had opportunity to raise the same questions which he now raises before us, and being overruled, has neglected or omitted to protect his rights by exceptions.

The *second* specification of error is set forth as follows: "Because said court at a term thereof, held at said Portland on the first Tuesday of May 1920, and on the fourteenth day of said Term, denied a motion theretofore made by said Hersey, appearing specially for the purpose of said motion and not otherwise, that the cause in which said judgment was given be brought forward on the docket of said Court, that then and thereupon, said judgment might be vacated, set aside and held for naught."

There is a line of demarcation between the first and the second ground as alleged in the writ of error, in this respect, viz., that as to the first ground the defendant in the original action, plaintiff in this writ of error, was not in court, but as to the second ground he was in court, even though appearing specially and not generally, and being thus in court must not slumber on any of his rights which were then and there available to him.

The plaintiff in error claims that the denial of the above motion is a valid ground of error but this the defendant in error denies, claiming that the plaintiff in error had the right of exceptions to the denial of the above motion. This the plaintiff in error in turn denies on the ground that in his ruling the Justice who refused the motion was acting with discretionary powers. If this be literally true, then the plaintiff in error has effectually answered his own contention upon the second ground of error, because he is setting forth as a ground of error a ruling which he says is discretionary, and in this State, it has

been held, *Prescott* v. *Prescott,* 59 Maine, 146, that "A writ of error cannot be brought to reverse a judgment purely discretionary." Where a bill of exceptions might have been taken, a writ of error will not lie. *Denison* v. *Portland Co.,* 60 Maine, 519; *Howard* v. *Hill,* 31 Maine, 420. Although the present plaintiff in error urges that exceptions would not lie to the refusal of the motion to bring the original case forward on the court docket, we cannot agree with his contention.

It was certainly within the power of the court to bring the case forward and to vacate the judgment if satisfied that it had been entered erroneously. *Myers et al.* v. *Levenseller et als.,* 117 Maine, 80, 82; this the presiding Justice may do in the exercise of a sound discretion. "That discretion is not to be exercised arbitrarily, but to be guided and controlled, in view of all the facts, by the law and justice of the case, subject only to such rules of public policy as have been wisely established for the common good." *Y. & C. Railroad Co.* v. *Clark,* 45 Maine, 151, 154. It must be exercised judicially, *Long* v. *Rhodes,* 36 Maine, 108, and for its abuse exceptions will lie. *McDonough* v. *Blossom,* 109 Maine, 141, 145. *Charlesworth* v. *American Express Co.,* 117 Maine, 219.

The demurrer to the second specification of error is therefore well founded and must be sustained.

A case is thus presented, in which a judgment has been erroneously entered upon default, without service upon, or appearance by or for the defendant. Instead of proceeding for reversal of the judgment by writ of error or petition for review the defendant, appearing specially for the purpose of the motion and not otherwise, filed a motion at a subsequent term that the cause be brought forward and the judgment vacated; the motion was denied, and the defendant omitted to preserve his rights by exceptions.

Upon the issue raised by the demurrer, "that as a matter of law, his writ of error is insufficient, because a remedy by exceptions was open to him, the said plaintiff in error," we hold in consonance with the principles hereinbefore set forth that the plaintiff in error, having had the opportunity to protect his rights by exceptions to the ruling denying his motion to bring the cause forward and vacate the judgment, and having omitted so to do, cannot now be permitted to raise the same questions upon a writ of error, and that the demurrer was properly sustained.

It is immaterial here that the appearance was special for the purpose of filing the motion; that situation would have become material as to future proceedings in case the motion had been sustained.

Exceptions overruled.
Demurrer sustained.

MARJORIE GREGG et al. *vs.* GEORGIE J. BAILEY et al.

Oxford. Opinion May 5, 1921.

The construction and interpretation of a will. There is no fixed rule of construction that a gift or devise in general terms without words of inheritance or a general power of disposal, but with a remainder over at the death of the first taker, conveys an absolute estate. In all such cases it becomes a question of interpretation to determine the intent of the testator from the entire will which must and should control. The presumption that a fee or an absolute estate was intended, may be rebutted by a limitation or remainder over at the death of the first taker.

A will provided in terms: First, to my sister, A, I give and bequeath four thousand dollars. At her decease, same to go to my sister B. Second, to my sister, B, I give and bequeath four thousand dollars. At her decease the same to go to my two daughters together with what I previously gave to my sister, A. Lastly, in my bequest to my sister, B, I wish to make this change, that at B's death, if my sister, A, survives, I wish the property to revert to her and to only become the property of my daughters when both of my sisters become deceased,

Held:

That where personal property is bequeathed without words of inheritance, the same rules of construction as in case of real estate have been so long applied in the interpretation of wills that it may now be considered settled, that in all bequests of personal property without words of inheritance, an absolute estate passes unless it appears from the other provisions of the will that a lesser estate was intended.

The controlling factor in the construction of wills is always the intent of the testator to be gathered from the entire instrument. If, however, his intent cannot be carried out without conflicting with some positive rule of law, or

is so expressed that it cannot be effectuated without violating some canon of construction so firmly established as to have become a fixed rule of law governing the transfer of property by will, it must fail of execution.

The intent of the testator as clearly expressed in the will under construction does not violate the well known substantive rule of law that a fee or an absolute estate cannot be limited upon another fee or absolute estate. It was the testator's expressed wish that "at the death" of either sister "the same," not what was left, was to go to the survivor; and upon the death of the survivor, both bequests, not what remained of them, should go to his daughters. Only by isolating each gift from the rest of the will can it be said that there was any indication of an intent to create an absolute estate in either sister.

No firmly established rule of construction will be violated by carrying out the testator's intent. A gift or devise of property without words of inheritance carries only a persumptive fee or absolute estate. Under Sec. 19 of Chap. 79, R. S., it is always a question of construction as to the quantity of the estate conveyed.

If to a gift or devise without words of inheritance a general power of disposal is added, whether expressly or by implication, by rules of construction firmly established, the estate in the first taker is held to be absolute, in which case any remainder over is obviously repugnant thereto and therefore void.

A limitation or remainder over at the first taker's death, in the light of the remainder of the will, may as clearly indicate that only a life estate in the first taker was intended as the words "for life" or a limited power of disposal; and where it is clear from the entire will that the lesser was intended, a remainder over is good.

The burden of showing that a rule of construction has become so firmly fixed that it must prevail against the clearly expressed intent of the testator is upon him who asserts it.

It has not become firmly established as a rule of construction in this State, that where there is a gift or devise in general terms without words of inheritance or a general power of disposal in the first taker, a limitation or remainder over at his death may never be sufficient to indicate that a fee or an absolute estate was not intended in the first taker.

In only one case in this State, *Hopkins* v. *Keazer*, 89 Maine, 347, has such a state of facts arisen and there the contrary doctrine was applied, and the cases where a general power of disposal was added to the first gift were differentiated. In all other cases which have come before this court where the remainder over has been held void, there were either words of inheritance added to the devise or a general power of disposal given to the first taker, and for this reason they are not controlling of the present case.

There being no fixed rule of construction that a gift or devise in general terms without words of inheritance or a general power of disposal, but with a remainder over at the death of the first taker, conveys an absolute estate, it becomes in all such cases a question of interpretation to determine the intent of the testator from the entire will which must and should control. A limitation

or remainder over at the death of the first taker may in the light of the other provisions of the will be sufficient to rebut the presumption, which follows from a gift or devise without words of inheritance, that a fee or an absolute estate was intended.

There is nothing in the will under consideration, if a life estate only is given to the sisters, that indicates it was the intent of the testator that they should use any part of it; on the contrary, we think it may be fairly inferred from the language of the will that the principal sum was to be kept intact and the income only used by the sisters.

If the testator intended to create a trust to protect the principal during the continuance of the life estates he did not say so. He apparently was content to entrust it to his sisters and rely on their integrity to preserve it. It should be paid to them. If there is any reason why security should be given for its protection, it must be established in other proceedings.

On report. This is a bill in equity brought by Marjorie Gregg of Seattle, Washington State, and Hortense G. Gates of Norway, Maine, daughters of the late William Gregg of Andover, against Georgie J. Bailey and Frances Ann Gregg, as executrix, sisters of the said William Gregg, seeking the interpretation and construction of the will of the said William Gregg. The cause was heard upon bill and answer, and by agreement reported to the Law Court. Bill sustained.

Case is fully stated in the opinion.

Aretas E. Stearns, and Alton C. Wheeler, for plaintiffs.

George A. Hutchins, and Ralph T. Parker, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ. MORRILL, J., dissenting. DUNN, DEASY, JJ., concur in dissenting opinion.

WILSON, J. A bill in equity praying for the construction of the will of William Gregg, late of Andover in the County of Oxford. The clauses of which interpretation by the court is requested are as follows:

"First, to my sister Georgie J. Bailey I give and bequeath four thousand dollars. At her decease same to go to my sister, Frances Ann.

Second, to my sister Frances Ann Gregg, I give and bequeath four thousand dollars, at her decease the same to go to my two daughters in equal amounts together with what I previously gave to my sister, Georgie J. Bailey.

Lastly . . . In my bequest to my sister, Frances as mentioned above, I wish to make this change, that at Frances' decease, if my sister survives I wish the property to revert to her and to only become the property of my daughters when both of my sisters become deceased."

In addition to these provisions, the sisters were made his residuary legatees, while the only other provisions for his two daughters, the plaintiffs in this action, were bequests of one thousand dollars each.

The contention of the plaintiffs is that the respective gifts to the sisters in the first and second paragraphs above are for life with cross remainders to the survivor, with remainders over to his daughters in equal shares.

The defendants, however, contend that the gifts to the sisters in the first instance were absolute in terms and not only the remainder to the daughters, but the cross remainders to the survivors, being repugnant thereto, are void under the familiar rule that a fee or an absolute estate cannot be limited upon a fee or another absolute estate.

It is true that the bequest here is of personal estate and no words of inheritance are required to convey an absolute gift, but the same rule applicable to real estate without words of inheritance has been so long and indiscriminately applied in the interpretation of wills to personal property, viz: That it conveys an absolute estate unless the contrary appears to have been the intent of the testator, that the principles governing one class of property in this respect may properly be held to govern the other, *Hopkins* v. *Keazer*, 89 Maine, 347, *Bradley* v. *Warren*, 104 Maine, 423; *Reed* v. *Creamer*, 118 Maine, 317; *Smith* v. *Walker*, 118 Maine, 473; *Bassett* v. *Nickerson*, 184 Mass., 169; *Ware* v. *Minot*, 202 Mass., 512, in all of which cases the same rule was applied to both real and personal property without discrimination.

The controlling factor in the interpretation of wills always is the intent of the testator to be gathered from the entire instrument interpreted in the light of the existing circumstances. If, however,

that intent cannot be carried out without conflicting with some positive rule of law, or is so expressed that it cannot be effectuated without violating some "cannon of interpretation so firmly established as to have become a fixed rule of law governing the transfer of property" it must fail of execution. But these so-called canons of construction must in all cases be applied with caution and especially so if they override the real purpose of the testator, and should never be forced. *Hopkins* v. *Keazer*, 89 Maine, 347, 353; *Bradley* v. *Warren*, 104 Maine, 425, 427; *Barry* v. *Austin*, 118 Maine, 51, 53, 54. The courts will never substitute what has been termed the judicial intent for that of the testator, unless it clearly appears that his actual intent as expressed in his will, if carried into effect, would violate a substantive rule of law or one of the established rules of construction above referred to.

It is a substantive rule of law that a fee or an absolute estate cannot be limited upon a fee or another absolute estate. The plain intent of the testator in the case at bar, however, does not violate this rule. There is nothing in the provisions of the will, unless each gift be isolated from the rest of the will, that indicates an intent on the part of the testator that his sisters should take an absolute estate in the sums specifically bequeathed to them under the first and second paragraphs,—no general power of disposal either express or implied as in *Jones* v. *Bacon*, 68 Maine, 34 and *Mitchell* v. *Morse*, 77 Maine, 423, no words of inheritance as in *Morrill* v. *Morrill*, 116 Maine, 154. On the contrary it is perfectly clear, we think, that such was not his intent. It was his expressed wish that at the death of either, not what was left, but "the same" should go to the survivor; and upon the death of the survivor both bequests, not what remained of them, should then be equally divided between his daughters. Such a disposition of the gifts at the decease of the sisters in the same paragraph "without the pen being lifted from the paper" as the court said in *Hopkins* v. *Keazer*, supra, is inconsistent with an intent to give an absolute estate to the sisters.

Has he so expressed his intent, that it cannot be carried out without violating some of the "firmly fixed canons of interpretation?" We think not.

The court in the recent case of *Barry* v. *Austin*, supra, laid down four rules or canons of interpretation governing this class of cases that appear to have become "firmly fixed" from frequent applica-

tions, in its previous decisions. The second, third and fourth clearly have no application to the case at bar. Nor does the first, unless it shall be held that a devise or bequest without words of inheritance or an unqualified power of disposal in all cases, *ex proprio vigore,* creates an absolute estate.

From an examination of the authorities in this and other States we do not find that such a rule of construction has ever been actually applied when the facts are as in the case at bar. The burden of establishing such a rule is upon those who assert it.

That the first rule laid down in *Barry* v. *Austin* is not such a rule is clear from the illustrations under it. An *intent* to create an absolute estate in the first taker in each case there cited is made certain by the additions of words of inheritance or an unqualified power of disposal either express or implied. Once it appears that an absolute estate was intended in the first taker, it is no longer a question of construction and the attempted gift over is repugnant and therefore void. Sec. 19, Chap. 79, R. S., does not declare that every devise without words of inheritance conveys an absolute estate. It is clearly a matter of intent and construction. *Ware* v. *Minot,* 202 Mass., 512; *Dorr* v. *Johnson,* 170 Mass., 540. To assume, then, that a devise or gift without words of inheritance creates an absolute estate is simply begging the question. The question in all cases must be, first, what was the testator's intent? Has he in any way indicated that a lesser estate was intended?

In every case in this State where the remainder or gift over has been held void from *Ramsdell* v. *Ramsdell,* 21 Maine, 288, to *Morrill* v. *Morrill,* 116 Maine, 154, including *Shaw* v. *Hussey,* 41 Maine, 495; *Jones* v. *Bacon,* 68 Maine, 34; *Mitchell* v. *Morse,* 77 Maine, 423; *Wallace* v. *Hawes,* 79 Maine, 177; *Loring* v. *Hayes,* 86 Maine, 351; *Taylor* v. *Brown,* 88 Maine, 56; *Bradley* v. *Warren,* 104 Maine, 423; *Lord* v. *Pearson,* 108 Maine, 565, there has either been words of inheritance or a general power of disposal express or implied added to the general devise, and the intent to create an absolute estate in the first taker has been clear. For this reason they are not controlling of the present case.

The only case which has come before this court where there was a devise or gift without either words of inheritance or a power of disposal express or implied, and with a remainder over, is that of *Hopkins* v. *Keazer,* 89 Maine, 347. There the devise in question

was to children and at their death to the grandchildren of the testator. The devise to the children in that case was as bare of any words of inheritance or power of disposal either express or implied as the case at bar. The court, however, said, "so far from there being any clear intention that the children of the testatrix are to take an absolute property, it is on the contrary clearly evident that they should not have any such property, her scheme being that the fee in all her estate should finally vest in her grandchildren." Is it not equally clear in the case at bar that it was the testator's intent that the gifts to his sisters should finally vest in his two daughters? As the present learned Chief Justice of Massachusetts said in *Ware* v. *Minot*, supra: "The devise over to the lineal descendants is strong evidence that she did not intend the estate of the son to possess the incident of descent to his heirs, and that therefore it was not a fee."

In such cases the same rule appears to have been followed in other States as to the effect of a gift or remainder over following a general devise without words of inheritance or other words of limitation indicating an absolute estate. In In re will of Francis Wills, 25 R. I., 332, there was a gift to a son without words of inheritance or other words of limitation, at his death the devise was to go to his wife. The statute of Rhode Island as to the effect of a devise without words of inheritance is the same in effect as Sec. 19, Chap. 79, R. S. The court said: "It is true that the clause under consideration does not in terms limit the estate devised to Orlando to his wife. But it expressly provides if he should die then the property is to go to his wife for and during her natural life and no longer, thus showing by plain implication that the son took it for life only, as otherwise he could dispose of it and thereby deprive his wife of her interest therein."

In the case of *Schmaunz* v. *Goss*, 132 Mass., 141, there was given to a sister by appointing her his heir one-fourth of the testator's estate without words of limitation. At his death it was provided that it should go to his grandchildren. The court said: "These provisions standing alone would entitle each to an undivided quarter in fee simple of all his real estate. An estate in fee simple is not to be cut down to a less estate by the subsequent terms of the will unless they show a clear intention to that effect. The testator then directs that the portion which my sister receives shall fall

after her death to the children of a deceased son. The language here is distinct and clear and plainly restricts her interests in the real property devised to her to an estate for life with vested remainder in fee in the children of Erchard Schubert." Except for the additional provision, "And shall be left behind by my sister to these children," which the court said might be construed to mean that she should not dispose of it, this case is no different in the issue raised from the case at bar. Nor is the suggestion without force in the case at bar that the words: "At her death the same . . . together with what I previously gave to my sister, Georgie J. Bailey," there being elsewhere in the will no express or implied right in the sisters to use any part of the principal, unless, of course, the gift be held to be absolute, should be construed as indicating the principal sums given to the sisters was not to be disposed of by them, but was to be kept intact and be passed on at their death to his daughters, who under the will only received in addition to these bequests the sum of one thousand dollars each, while the sisters were made the residuary legatees.

To the same effect are the cases: In re Grover's Est., 34 N. Y. S., 474; *Rice* v. *Moyer*, 97 Iowa, 96; also see *Baxter* v. *Bowyer*, 19 Ohio St., 490.

It is suggested, however, that the court in *Mitchell* v. *Morse*, 77 Maine, 423, has indicated that a gift or remainder over should not alone be permitted to cut down the estate given to the first taker. The language of this case and of the court in *Wallace* v. *Hawes*, and *Loring* v. *Hayes*, however, should be weighed in the light of the opinion in *Hopkins* v. *Keazer*, supra.

The court said in *Mitchell* v. *Morse*, "that in a large majority of cases, both in England and in this country, it is held that a mere devise over will not cut down the estate given to the first taker." This is true, if the estate in the first taker was clearly intended to be absolute; but if by this, it is meant that the cases expressly hold that a presumptive fee under Sec. 19, Chap. 79, R. S., when viewed in the light of the other provisions of the will may not be so cut down, it is not sustained by the authorities cited in the opinion nor has any such plethora of authorities as are suggested by the language of the opinion, been called to our attention.

Upon the facts involved, this case is not an authority for the contention that such a rule of interpretation has become "firmly fixed"

in this State. In the first place it is clear in this case, under the rules of interpretation already well established, that an absolute estate was intended in the first taker. It was the "remainder thereof" that went to the children. Clearly under *Ramsdell* v. *Ramsdell*, *Shaw* v. *Hussey*, and *Jones* v. *Bacon*, above cited, there was an implied power of disposal in the wife and an absolute estate. It was so recognized in *Hopkins* v. *Keazer*, 89 Maine, 353, where it was distinguished from that case upon that very ground.

In *Wallace* v. *Hawes*, 79 Maine, 177, the language of the court followed in the main that of *Mitchell* v. *Morse*, but as in that case, it was the "residue" after the death of the first taker that went over, clearly implying an unlimited power of disposal in the first taker and an absolute estate.

In *Loring* v. *Hayes* the court said: "It is a long settled rule in this State that when by the terms of the bequest an estate in fee simple of real estate or an absolute gift of personal property is made a gift over is void." To which no exceptions can be taken. But it appears when analyzed that if the gift over in this case applied at all to the gift under consideration, there was an implied power of disposal in the first taker and hence an absolute estate. If the gift over did not apply to the gift in question, then there was nothing to indicate that a lesser estate was intended and by the statutes the absolute property passed.

When, however, the exact situation contained in the case at bar arose in *Hopkins* v. *Keazer*, supra, the court then having as members the authors of the opinions in the three cases above referred to and who all joined in the opinion, said: "Of course, we must fully recognize the familiar principles well established in this State that if a testator first bequeaths property by absolute and unconditional terms, he cannot afterwards by a different provision in the same will unless it be a full or partial revocation of the first provision carve a remainder out of what he has already disposed of. But that doctrine should be applied carefully where it manifestly conflicts with the real intention of the testator and some judges and jurists think the doctrine has already gone too far in some cases."

The court then proceeds to distinguish *Mitchell* v. *Morse* and *Jones* v. *Bacon* from the case then at bar on the very grounds we have already pointed out, viz: that wherever there was a general power of disposal added to the first gift, the intent to give an abso-

lute estate to the first taker was clear; and then quoting from *Ide* v. *Ide*, 5 Mass., 500: "Whenever it is the clear intention of the testator that the devisee shall have an absolute property in the real estate devised (the principle had not then been extended to personal property) a limitation over must be void. In *Barry* v. *Austin*, 118 Maine, 58, the court placed *Loring* v. *Hayes* in the same class of cases, where an implied power of disposal has the effect of rendering any gift over repugnant and void.

It may be suggested, however, and there is dicta to that effect, that an unqualified power of disposal adds nothing to the amount of the estate already given, "that the law presumes in such a case that a testator superadds the unlimited power of disposal to make his intention emphatic and unequivocal as possible. Where there is no remainder over, it, perhaps, serves no very useful purpose, because no question of whether a lesser estate was intended is raised; but where a question is raised by a limitation over "at the death" of the first taker, it then becomes a very important consideration in the construction of a will; and the "canon of interpretation" may be said to be "firmly fixed;" that where an unlimited power of disposal is added to a devise in general terms, an absolute estate is clearly intended and any limitation over is repugnant and void.

An examination of the authorities will disclose that it has always been given other weight than merely emphasizing the estate already granted whenever it came to the question of construction. Even in *Stuart* v. *Walker*, 72 Maine, 146, where this language as to its serving only to emphasize the estate already given and not to extend it was first used, the court said: "In *Jones* v. *Bacon* it was held that an absolute power of disposal in the first taker renders a subsequent limitation void" and that "the doctrine is truly stated in *Shaw* v. *Hussey*, supra, 'that a devise of land to another generally or indefinitely with a power of disposal of it amounts to a fee.'"

In *Shaw v. Hussey* we also find this language: "A devise to one without words of inheritance, but containing the power of disposal without qualification is treated as equivalent to a devise with words of inheritance."

Hall v. *Preble*, 68 Maine, 101: "The general rule is well settled that a devise to one without words of inheritance, but containing the power of disposal is equivalent to a devise with words of inheritance."

The cases might be multiplied almost indefinitely where the court has laid stress on the unlimited power of disposal as indicative of the intent on the part of the testator to create an absolute estate in the first taker and thereby rendering any limitation over repugnant and void. *Lord* v. *Pearson,* 108 Maine, 565; *Kelley* v. *Meins,* 135 Mass., 231; *Damrell* v. *Hart,* 137 Mass., 218; *Foster* v. *Smith,* 156 Mass., 379; *Knight* v. *Knight,* 162 Mass., 460; *Pierce* v. *Simmons,* 16 R. I., 689; *Rodenfels* v. *Shumann,* 45 N. J. Eq., 383; *Bassett* v. *Nickerson,* 184 Mass., 175; *Galligan* v. *McDonald,* 200 Mass., 299.

The Massachusetts Court in *Ware* v. *Minot,* where the remainder over was held to be strong evidence that the incident of descent was not intended to be attached to the estate granted to the first taker in general terms, "and therefore it was not a fee," differentiated that case from those cases where an unlimited power of disposal was added to the general devise in exactly the same manner that this court in *Hopkins* v. *Keazer* differentiated *Mitchell* v. *Morse* and *Jones* v. *Bacon* from the case then at bar.

Notwithstanding the sweeping terms of the opinions in *Mitchell* v. *Morse, Wallace* v. *Hawes* and *Loring* v. *Hayes,* when the facts in those cases are analyzed, and after the decision in *Hopkins* v. *Keazer,* we think it can hardly be said that a "canon of interpretation" to the effect that "a devise of real estate without words of limitation vests in the devisee an estate in fee simple, and this result is not defeated by a remainder over," has become "firmly fixed" in this State.

Have the cases since *Hopkins* v. *Keazer* gone any farther or in any way modified the principles therein laid down? We think not. In *Bradley* v. *Warren,* 104 Maine, 423, the rule there invoked is stated as follows: "In the foregoing cases (referring to citations just preceding) the court was governed by the well settled rule that a devise absolute and entire in its terms conveys an estate in fee and any limitation over is repugnant and void." But in this case and in every case referred to as "foregoing" and as being governed by the rule as stated above, it will be found that there was an unlimited power of disposal or words of inheritance, so that an absolute estate was clearly intended in the first taker, and this power of disposal was assigned by the court as the reason why the estate in the first taker was regarded as absolute and the limita-

tion over void. The rule above quoted is not a mere reiteration of the one laid down in *Mitchell* v. *Morse* and *Loring* v. *Hayes*, unless they too are understood as holding that it is the unlimited power of disposal which as a matter of construction determines that the estate in the first taker was intended to be absolute.

In *Lord* v. *Pearson*, 108 Maine, 565: "Where a testator makes an unqualified and unrestricted power of disposal, an absolute estate passes to the donee, and any limitation over of such portion thereof as remains unexpended at the donee's death is repugnant," and cites *Bradley* v. *Warren* as supporting the rule, which is all it does support.

In *Morrill* v. *Morrill*, 116 Maine, 154, the court simply quotes the rule laid down in *Bradley* v. *Warren*. But in this case there was not only an implied general power of disposal, but words of inheritance as well, and the rule as stated in the general terms of *Bradley* v. *Warren* was particularly applicable, though to fortify it the opinion quotes from *Jones* v. *Bacon*, supra, and *Gifford* v. *Choate*, 100 Mass., 343: "An absolute power of disposal in the first taker is held to render a subsequent limitation repugnant and void."

In *Barry* v. *Austin*, 118 Maine, 51, which, as has been said before, lays down those rules which can be said to be "firmly fixed," no rule is there laid down which controls the case at bar as has been already shown.

Where there are no words of inheritance, there being no fixed rule of interpretation that a gift or devise in general terms of itself conveys an absolute estate, it becomes, we think, in all cases a question of construction from the whole will to determine the testator's intent, which must control. The gift or a remainder over may alone in the light of the other provisions of the will be sufficient under the statute to rebut the presumption that follows from a general gift or devise without words of limitation that a fee or an absolute estate was intended.

If there has been any confusion as to the rule governing this class of cases, any hardship that may follow, if any will, from settling definitely the rule that shall govern in the future in this class of cases, it will, we think, be outweighed by the consideration that the actual intent of the testator will in all such cases be permitted to control and not be thwarted by an arbitrary rule of construction.

The instrument before us was crudely drawn. The paragraph giving a cross remainder to the survivor of his two sisters and fix-

ing the death of the survivor as the time when these bequests should become the property of his two daughters was obviously an afterthought; but the intent is clear.

As to the quantity of the estate taken by the sisters. If the use of the word "same" in the first and second paragraphs in describing the property that should pass to the plaintiffs and of the word "property" in the connection in which it is used in the last paragraph do not conclusively indicate that the entire principal was to be kept unimpaired and only the income used, there is certainly no language that indicates any authority for and intent that the holders of the life estate should use any part of the principal sum for any purpose. We think it must be held that the intent of the testator was that the principal sum should be kept intact and only the income used during the lives of the first takers.

As to the second prayer in the plaintiffs' bill. No language in the will indicates that the testator intended to create a trust to protect the principal during the continuance of the life estates. *Si voluit non dicit.* He was apparently content to entrust it to his sisters and rely upon their integrity to preserve it. It should be paid to them. If there are any reasons why security should be given for its protection it does not appear in these proceedings, and it must be established, if any such exists, in other proceedings. *Sampson* v. *Randall*, 72 Maine, 109, 112; *Copeland* v. *Barron*, 72 Maine, 206, 211; *Starr* v. *McEwan*, 69 Maine, 334; *Warren* v. *Webb*, 68 Maine, 133.

Bill sustained.
Decree in accordance with opinion.
Taxable costs including reasonable counsel fees for both parties to be fixed by court below to be paid from the estate.

MORRILL, J. I am unable to concur in the opinion by Justice WILSON.

In the first item of the will we have (1) a legacy in simple, terse language, of four thousand dollars without any limitation; (2) a legacy of the same four thousand dollars, likewise without limita-

tion, to the other sister. I cannot conceive of two provisions more repugnant in a legal sense, than these; and if, looking at the second paragraph, we add the gift to the daughters of "what I previously gave to my sister, Georgie J. Bailey," we have three absolute gifts of the same four thousand dollars, expressed as clearly as language can express thought.

The same result is apparent in respect to the legacy to the other sister, Frances Ann Gregg; We have (1) a direct legacy of four thousand dollars, without limitation; (2) applying the last clause of the will, a gift of the same four thousand dollars without limitation, to Georgie J. Bailey, if she survives Frances Ann; and (3) a gift of the same four thousand dollars to the daughters.

I think that these provisions are so absolutely repugnant in a legal sense that the first gifts of four thousand dollars each to the two sisters alone can stand; that the case must fall within the well settled general rule so often declared in this State, that if a gift of personal property be absolute and entire in its terms, any limitation over afterwards is repugnant and void. *Copeland* v. *Barron*, 72 Maine, 208. The same rule is applicable to devises of real estate and was laid down, as the first of four canons of interpretation, in *Barry* v. *Austin*, 118 Maine, 51, 58, in the following language: "Where an absolute gift in fee simple is followed by an attempted gift over, the latter is void. The reason is that the gift exhausted itself in the first giving and nothing remains for the second taker. A fee cannot be limited upon a fee. The attempted gift over is repugnant to the first gift and the two cannot stand together."

It is said that the attempted gift in remainder to the surviving sister and the attempted further gift in remainder to the daughters afford strong evidence that the testator did not intend to make absolute gifts to the sisters; but he did not use apt words to express that intent and give it effect. The will is singularly free from any words aptly limiting the gifts to the sisters. If the attempted gift over alone is to be considered sufficient evidence of the testator's intent, to warrant the court in limiting the first gift to a life estate, the long settled rule is in effect abrogated.

Justice Wilson's opinion is based upon the theory that while a devise or bequest to A presumptively imports a fee or an absolute estate in personality, a further limitation rebuts and overcomes

the presumption and is therefore not repugnant. This theory is opposed, I think, to the established law of the State, and the reasoning which attempts to reconcile the opinion with the earlier cases is unconvincing to my mind.

Judge Walton, speaking for the court in *Mitchell* v. *Morse*, 77 Maine, 423, denied any such legal conclusion from the fact of the attempted gift over; he said:

"The argument usually urged is that the devise over ought to be allowed to cut down or reduce the estate previously given, to a life estate, upon the ground that such must have been the intention of the devisor. And in a few cases this argument has prevailed. But in a large majority of the cases, both in England and in this country, it is held that a mere devise over of a remainder, will not cut down the estate given to the first taker.———The gift is direct, positive and absolute. And but for the devise over of a remainder, no one would doubt that under our statutes R. S., Chap. 79, Sec. 16 the terms used are sufficient to convey an estate in fee simple. The devise over is also direct and simple. It has no qualifying words or conditions whatever annexed to it. We thus have, first a devise of a fee simple estate, and then a devise over of a remainder. The two cannot co-exist. It is settled law in this State, as will be seen by the cases cited, that the latter must yield. The question is res judicata in this State, and will not be further discussed here."

So in *Loring* v. *Hayes*, 86 Maine, 351, where the testator, having made a bequest and devise of certain real estate and personal property to his wife "for her use during her natural life," made a further bequest to her of forty-five hundred dollars, and then devised and bequeathed to Jacob L. Hayes and others "all that may remain unexpended of the real and personal or mixed estate given to my wife in the second clause of this will," at the decease of his wife. The counsel for the residuary legatees contended, as appears in the opinion of the court on Page 356, that the last clause "should be taken into consideration as showing that the bequest of the sum of forty-five hundred dollars was for life only." But the court rejected the argument, saying:

"It has long been a settled rule in this State, as well as elsewhere, that where by the terms of a devise or bequest an estate in fee simple of real estate, or an absolute gift of personal property is made,

a devise or gift over is void. *Jones* v. *Bacon*, 68 Maine, 34; *Stuart* v. *Walker*, 72 Maine, 146; *Mitchell* v. *Morse*, 77 Maine, 423.

In this case the bequest of forty-five hundred dollars to the wife in cash or securities to be selected by her is absolute; there are no words of limitation that apply to that portion of the clause, and it cannot be presumed that the testator intended a life estate only when the language used clearly indicates an intention to make an absolute gift."

The controlling consideration in the instant case is the fact that the legacies to the sisters are couched in language plainly importing absolute gifts, and no apt words are used reducing those absolute gifts to life interests. The testator attempted to accomplish two or more inconsistent purposes. *Taylor* v. *Brown*, 88 Maine, 57.

A distinction is attempted in the opinion between the instant case and previous cases in this State where the rule has been applied, based upon the presence of either words of inheritance or a general power of disposal expressly added or implied.

The theory of the former cases is that a devise to "A" (no words of inheritance and no power of disposal and nothing except a further limitation appearing) is absolute, that it necessarily imports a fee and that a further limitation is repugnant and void.

We may eliminate from consideration devises to "A and his heirs" and on the other hand to "A for life," or similar words. The law governing limitations following such devises is well settled. No such words appear in the will now under consideration. It is also well settled that if the devise is to "A," with *qualified* power of disposal superadded there is no fee in the first taker and therefore no repugnancy in a further limitation.

If the power is *unqualified* the estate in "A" the first taker is a fee. Justice Wilson's opinion says that it becomes a fee *by reason* of the power.

I think otherwise. The fee exists independently of the power. The unqualified power being consistent with a fee does not operate to cut it down to a lesser estate as does a qualified power which is inconsistent with a fee. This is the point in controversy.

We may leave out of consideration that class of cases wherein express powers of disposal are treated or which discuss such forms of words as "if any remain" etc. from which a power may or may not be implied.

In the case at bar no words of inheritance appear and no words creating a power of disposal either express or implied are found. We have here a bequest to "A," presumptively a fee with nothing to cut it down to a lesser estate unless it is so cut down by a limitation over. Our court has repeatedly said that a further limitation *alone* does not have this effect and is repugnant and void.

Jones v. *Bacon*, 68 Maine, 37—(1877).

Devise to A without words of inheritance and without express power of disposal. "There would not even a question be made as to the meaning of the bequest just considered were it not for the last clause in the will which is as follows:" (Implied power of disposal).

Stuart v. *Walker*, 72 Maine, 149—(1881).

"A gives the estate to B in general terms. Stopping there, he gives an estate of inheritance. But an estate in fee *first described* may be cut down to a lesser estate by subsequent provisions." (i. e. by qualified power—not by further limitation only. Such limitation is repugnant.)

Mitchell v. *Morse*, supra—(1885).

"In a large majority of cases . . . . it is held that a mere devise over of a remainder will not cut down the estate given to the first taker."

Loring v. *Hayes*, supra—(1894).

Bequest to A.—No words of inheritance.—No power.—Like the present case.

"It is difficult to see how the testator could have used other or different words which more clearly show his intention of making an absolute general bequest."——"It has long been a settled rule that where an absolute gift of personal property is made, a gift over is void."

Taylor v. *Brown*, 88 Maine, 56—(1895).

Devise to A.—No words of inheritance.—No express power.—Limitation over held repugnant and void.

Bradley v. *Warren*, 104 Maine, 427—(1908).

It is a "well settled rule that a devise absolute and entire in its terms presumptively conveys an estate in fee without words of inheritance and that any limitation over afterwards is repugnant and void."

Morrill v. *Morrill*, 116 Maine, 154—(1917).

Quotes and approves the rule stated in last case.

Barry v. *Austin*, 118 Maine, 54—(1919).

The language of the will is "I give, bequeath and devise" to A. "all the rest residue and remainder of my estate." The court says: "Had the devise stopped there" (in the pending case it does "stop there.") "With no accompanying words to qualify or explain it, it is undoubtedly true that the legal effect would have been to give the husband (A) a fee in the realty and an absolute estate in the personal property." (A power of disposal, held to be impliedly qualified, cuts the devise to a life estate).

It is true that Justice Wilson's opinion derives some support from *Hopkins* v. *Keazer*, 89 Maine, 347 decided in 1896. There are some facts in that case tending to differentiate it, and the old rule has been three times reiterated and emphasized by the court since.

It is also true that in some of the cases there are unqualified powers of disposal contained in the will under consideration and which are referred to as strengthening the presumption that the first limitation was intended to be a fee, but I think that it has never been held in this State that such power is necessary to be superadded to a general devise (without words of inheritance) to make a further limitation repugnant.

In other words under the long established rule a general devise (though without words of inheritance) presumptively creates a fee. Nothing need be added for this purpose. It may be cut down to a lesser estate expressly, as by the words "for life," or impliedly by a qualified power of disposal. If not so cut down, a further limitation is repugnant and void.

To re-state the contention of this opinion in a single sentence, —in this jurisdiction there is a firmly established canon of interpretation that a general devise or bequest of a fee or absolute estate cannot be cut down to a lesser estate *merely* by a further limitation.

This rule was so long ago established; it has been so frequently, so recently and so strongly stated and reiterated; it has been so implicitly relied upon by counsel with such important consequences to their clients that it seems to me unwise to abandon it and establish a different, even if a better rule.

"The rule sometimes operates harshly, no doubt, in defeating the real intention of testators; but it is a safer rule than one which for want of strictness would be attended in its application with all

sorts and shades of doubt and uncertainty." *Taylor* v. *Brown*, 88 Maine, 56, 58; and the observance of it has been deemed indispensable to the required certainty and security in establishing titles to property and especially in the disposition of landed estates. *Bradley* v. *Warren*, 104 Maine, 423, 427. *Morrill* v. *Morrill*, 116 Maine, 155. The principle of *stare decisis* should be observed. *Loomis* v. *Pingree*, 43 Maine, 299, 314. *Heaton* v. *Hodges*, 14 Maine, 66, 69; *Wentworth* v. *Goodwin*, 21 Maine, 150, 155.

JOSEPH M. HUTCHINS

vs.

INHABITANTS OF PENOBSCOT.

Hancock. Opinion May 10, 1921.

The discovery of the existence of such a fire as is contemplated under R. S., Chap. 8, Sec. 29, by one of the selectmen is equivalent to discovery by the whole board within the same jurisdiction. "Discovery" means that a selectman, as a forest fire warden, either by evidence or by evidential facts leading to actual knowledge on his part, knows, or should know, of the existence of a ravaging or threatening forest fire. Negligence on his part may impose liability upon his town.

By mutual consent of opposite litigants, in virtue of R. S., Chap. 87, Sec. 37, a Justice of this court may try and determine questions both of fact and of law at other than term time, and thereupon directly enter judgment.

Under R. S., Chap. 8, Sec. 29, which must be held to relate only to fires in the woods when generally ravaging property or threatening havoc,—and this regardless of whether the fire originated by design or by accident,—discovery of the existence of such a fire by one of the selectmen is equivalent to discovery by all the selectmen within the same jurisdiction.

The discovery of which the statute speaks is not limited to direct discovery. The discovery there spoken of means when a selectman, as a forest fire warden, shall have found out, either by evidence or by evidential facts leading to

actual knowledge on his part, that there is a ravaging or threatening forest fire; when he knows, or, what in law and reason is the same thing, when he ought to know, of the existence of that kind of a fire,—negligence on his part may impose liability upon his town.

The Justice who tried this case found that one of the wardens in the defendant town had actual knowledge of the fire. He further found that that warden was guilty of negligence in not foreseeing to reasonable degree the potentiality of the fire that he left smouldering; in not foreshadowing a probable result of its flaming up; in not reasonably guarding against the danger it could do. The decision of the Justice finally settled the facts. His rulings of law were faultless.

On exceptions by defendant. This action was brought under R. S., Chap. 8, Sec. 29, by the plaintiff to recover of the defendant town, damages resulting to the premises of plaintiff by fire, alleging negligence on the part of the selectmen as fire wardens in permitting the forest fire to reach premises of plaintiff. The case was heard in vacation by a Justice without the intervention of a jury, who rendered judgment for plaintiff in the sum of two hundred dollars. Defendant filed exceptions contending that a single justice was not authorized under the statute to try the case in vacation without a jury; and further that the negligence of one member of the board of selectmen was not sufficient to make the town liable. Exceptions overruled.

Case is stated in the opinion.

Fellows & Fellows, for plaintiff.

Forrest B. Snow, for defendant.

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

DUNN, J. The argument of the defense, so far as it deals with what may be styled the main issue, is not of itself fallacious. Fallacy lies, however, in a gap between that argument and the group of facts and circumstances comprising this plaintiff's case.

A Penobscot man kindled a fire in his pasture to burn brush. He tended to and controlled it on the day that it was set. Apparently it was passive through the following night. Next day the fire became unruly; it spread over about twenty acres of the pasture, and burned several cords of wood that had been cut and piled.

At nightfall it became quiescent. But at about supper time, alarmed by the burnings of the day, the owner of the pasture had gone to a selectman of the town in which the land is, and requested him to come to the scene. The selectman did not come. Nor did suggestion, soon afterward, by the plaintiff, who owned adjacent land, to the same selectman, that the situation merited attention, actuate the latter to the performance of official duty. But failure then to act, assuming the doing of something to have been incumbent, does not feature here, for the already told reason that nature suppressed activity of the fire during the night hours. In the morning the selectman went to the place. Finding the fire, to use his own phrase, "practically out," he left. When he was gone the fire flamed again. At one o'clock in the afternoon it was raging. Leaping high and spreading wide and far, the fire ran from the land where it at first had been, and before the three selectmen, and the other men who had hastened there, had quenched it, damage was done to the plaintiff's pasture and woodland. Hence the present action against the town, based on a statute which reads:

"The selectmen of towns shall be forest fire wardens therein, and the services of such selectmen acting as said fire wardens, shall be paid for at the same rate as is paid for their other official services. Whenever a fire is discovered, fire wardens shall take such measures as may be necessary for its control and extinguishment.—If any person shall suffer damage from fire in consequence of the negligence or neglect of the selectmen of any town to perform the duties required by this section, such person shall have an action on the case to recover from the town where the fire occurs to the amount of his damages so sustained not to exceed two per cent of the valuation of said town——." R. S., Chap. 8, Sec. 29.

At the request of the parties, a Justice of this court, agreeably to statutory provision, heard and determined the case in vacation. R. S., Chap. 87, Sec. 37. Judgment was entered for the plaintiff. Defendants now argue two exceptions. One assumes to challenge jurisdiction of the Justice; the other asserts that the liability creating statute contemplates, not alone the negligence of a single warden, but the concurring neglect of a majority or more of the members of a board of wardens.

There is eccentricity in the first exception in its futile effort to raise a jurisdictional question. Still it need not be disposed of, as becomingly enough it might be, by passing notice of patent infirmity. It may be dignified sufficiently to say that the language of positive law, "Any justice—by agreement of parties, may, at any time or place, try and determine issues of fact and of law submitted to him and render any judgment therein which the court could render if in session" (R. S., Chap. 87, Sec. 37), would fail of all sensible meaning were it to be held that what was done in this case was not within its terms. The statute does not deny right of trial by jury, as defendants say that it does. Nor does it inhibit the waiving of such right. It means exactly what ordinary signification imports, and that is that, by mutual consent of opposite litigants, a Justice of this court, at other than term time, and without the intervention of a jury, may try and determine questions both of fact and of law, and directly enter judgment.

The other exception, although unavailing, is yet of greater consequence. The statute provides for recovery in case of damage suffered by reason of the negligence of the selectmen, after discovery by them of a fire. R. S., Chap. 8, Sec. 29. Literal construction would lead to irrational result. Interpretation, in a statute especially, may be considered in the light of an axiom, which need only be properly put, to become self-evident. The statute must be held to relate only to fires in the woods when generally ravaging property or threatening havoc; and this regardless of whether the fire originated by design or by accident,—by right or by wrong. Yet more pertinently it has relation solely to a forest fire discovered by the selectmen of a town, or by one of them at least, within his township. Phraseology is, "The selectmen of towns shall be forest fire wardens therein." Not that the selectmen of every town shall constitute a board of fire wardens, as defendants would read it; but, speaking for and to the whole State, every selectman shall be a forest fire warden. So read, the knowledge of one is equivalent to knowledge by all, within the same jurisdiction. In principle this is not unlike interpretation of the statute requiring towns to pay expenses necessarily incurred for the relief of paupers by an inhabitant not liable for their support, after notice and request to the overseers. R. S., Chap. 29, Sec. 41. The court held that a needy person might be succored, by another individual at his

town's expense, after notice and request to one member of a board of not less than three overseers. *Newbit* v. *Appleton*, 63 Maine, 491. There it was decided that notice to one overseer was notice to all, and that the duty of the notified one was to communicate to his colleagues that which had come to his knowledge individually. The reasoning is apposite. Having no clerk or records of proceedings, they should interchangeably, said the court, inform each other. Each meanwhile, it might well be added, acting with the alacrity and skill that the exigency of the situation would reasonably require. Assuredly the Legislature never meant that a forest fire should rage, deaf and frantic, knowing not mercy, without effort by the public officers to check its devastating course, until all the members of a board of wardens, after discovering the conflagration, should, in meeting assembled, by major vote, make decision as to what ought be done. That would lack relish of salvation.

Before a town can be made responsible in damages the fire not only must have been discovered by a warden, but a plaintiff must have suffered damage from the fire, after such discovery, in consequence of that official's negligence.

In the parlance of the woods, the word "discovered," as applied to knowledge of the existence of a forest fire, is of technical meaning. It does not necessarily mean to gain a sight of, as the helmsman discovered land to leeward. Nor is it used either in the sense that Columbus discovered America, or that real merit is sure to be discovered, or an expert discovers an error. It does not mean the discovery of what has existed but had not been known, either to men in general or to the discoverer. Perhaps find or ascertain would be more accurate symbols of the idea that the lawmakers intended to express. Find is the most general word for every means of coming to know what was not before certainly known; as, the auditor, when the matter was called to his attention, found the account to be correct. The discovery of which the statute speaks is not limited to direct discovery. The discovery there spoken of means when the warden shall have found out, either by evidence or by evidential facts leading to actual knowledge on his part, that there is a ravaging or threatening forest fire; when he knows, or, what in law and reason is the same thing, when he ought to know, of the existence of that kind of a fire,—negligence on his part may impose liability upon his town.

Negligence is a relative or comparative expression. It may lie in omission or in commission; in the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or in doing what such a person under the circumstances would not have done. It is the lack of ordinary care, taking into account the surrounding or attendant state of affairs. *Moore* v. *Maine Central Railroad Company,* 106 Maine, 297, 307; *Railroad Company* v. *Jones,* 95 U. S., 439. A good definition of negligence is given by Judge Cooley. He defines it to be, "The failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." 2 Cooley, Torts, (3rd Ed.) 1324.

Whether the fire wardens discovered the fire, and whether having made the discovery there was negligence, were questions of fact. The justice who tried this case found that one of the wardens had actual knowledge of the fire. He further found that that warden was guilty of negligence in not foreseeing to reasonable degree the potentiality of the fire that he left smouldering; in not foreshadowing a probable result of its flaming up; in not reasonably guarding against the danger it could do. The decision of the Justice finally settled the facts. His rulings of law were faultless.

Exceptions overruled.

CHARLES V. MINOTT, Jr., Trustee in Bankrupcy

vs.

GEORGE W. JOHNSON, et uxor.

Sagadahoc. Opinion May 10, 1921.

An equity proceeding by a trustee in bankruptcy in behalf of a creditor with claim of precedent date, to invalidate the title of the wife of the bankrupt in certain real estate conveyed to her by her father, alleging that the real estate was wholly or partially paid for from the property of the bankrupt. Plaintiff fails to sustain the burden of proving payment made from property of bankrupt.

Plaintiff is the trustee in bankruptcy of the estate of one of these defendants. The other defendant is the wife of the first. Asserting the evidence to show that at least partial, if not full payment therefor was made from the property of her husband, the plaintiff, in behalf of a creditor with claim of precedent date, would invalidate the wife's title, wholly or partially, as the proof might go, to a homestead that her father deeded to her.

The deed speaks prima facie in behalf of its grantee. Despite all that this plaintiff has done, the title deed remains unlessened in telling power. The findings and the rulings of the Justice who heard this case find lively mental echo on review. In deciding that the plaintiff failed to sustain the encumbent burden of proving that payment, in full or in part, for the particular real estate, was made from the property of the husband of her to whom the father conveyed it, the justice did as this court would were it passing originally on the same record.

On appeal. This bill in equity was brought under the provisions of Sec. 1, Chap. 66, of the R. S., by the plaintiff as trustee in bankruptcy of the estate of the defendant, George W. Johnson, to recover, for the benefit of such creditors as might be entitled to share therein, certain real estate conveyed to the wife of said George W. Johnson, codefendant in this action, by her father, alleging that payment for said real estate was made from the property of her husband, the said George W. Johnson. A hearing was

had upon bill, answer, replication and proofs, and the sitting Justice decreed that the bill be dismissed, from which ruling plaintiff appealed. Appeal dismissed. Decree affirmed.

The case is stated in the opinion.

Barrett Potter, for plaintiff.

Walter S. Glidden, for defendant.

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

DUNN, J. It seems fitting to say of the present bill in equity, that however well-intentioned and motived its beginning, yet upon hearing the suit was not brought within the formula of the burden of proof. *Winslow* v. *Gilbreth*, 50 Maine, 90; *Call* v. *Perkins*, 65 Maine, 439, 446; *Milliken* v. *Randall*, 89 Maine, 200, 206; *Thayer's Preliminary Evidence*, 355.

Plaintiff is the trustee in bankruptcy of the estate of one of these defendants. The other defendant is the wife of the first. Asserting the evidence to show that at least partial, if not full payment therefor was made from the property of her husband, the plaintiff, in behalf of a creditor with claim of precedent date, would invalidate the wife's title, wholly or partially, as the proof might go, to a homestead that her father deeded to her. R. S., Chap. 66, Sec. 1. A trustee in bankruptcy is clothed with plenary right to reach property available as assets of the estate. U. S. Stat. 1898, Chapter 541, Section 70 e; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S., 545; *Annis* v. *Butterfield*, 99 Maine, 181; *Woodman* v. *Butterfield*, 116 Maine, 241; *Googins* v. *Skillings*, 118 Maine, 299; *Bailey* v. *Wood*, 211 Mass., 37; *Ruhl-Koblegard Co.* v. *Gillespie*, (61 W. Va., 584), 56 S. E., 898; 10 L. R. A. (N. S.) 305.

For the purchase price of the property the grantee gave to the grantor a series of promissory notes signed by herself and husband. She and her husband say that her independent funds paid certain of those notes in full and also all of the instalments that were made on a remaining one; thus rendering to her, in such event, to the extent of payments made, immunity from successful attack. *Sampson* v. *Alexander*, 66 Maine, 182. They testify further, that when afterward her father came to live with them in the selfsame house, and they had agreed to provide him a home for the rest of his life,

he thereupon,—in regard therefor, but not in support of the joint promise he already had,—forgave to his daughter other notes which had been issued in renewal of the last of the original ones, and which then were still outstanding and unpaid.

The deed speaks prima facie in behalf of its grantee. *Winslow* v. *Gilbreth*, supra; *Call* v. *Perkins*, supra. In his effort to avoid or set aside that instrument, the plaintiff relies mainly upon testimony given by defendants themselves, either personally at the hearing or by deposition, at his instance; and upon what is shown by sundry books, accounts and papers, some relating to the defendants' own affairs and some to other businesses and concerns with which the defendants had directly or indirectly to do.

If adequate evidentiary means be incomplete juridical portrayal of a past event needs must be dim. A man may die and all knowledge of a transaction die with him. Living men may neither remember nor recollect, excepting in vague nebulosity. Perchance, now and then, self-interest may warp the memory of a witness beyond reform. Written records may have been lost or destroyed; those extant may not impart a very clear idea of the thought that someone sought to put on paper; indeed, a record may convey misleading impression or be unintelligible, unless supplemented by explanation of him who made it. None the less, the law does not relax its wise rule that, in order to give aid toward decision in his favor, the testimony of a plaintiff's case must outweigh that otherwise adduced. Supposition, conjecture, guess or mere theory will not suffice. The effect of the evidence must be more exact.

Diligently and with courageous aggressiveness has the plaintiff endeavored to establish a cause; analytically has he dealt with the evidence; acutely has he argued. But we cannot accept his estimate that the record leaves little to be desired. Regardless of the avenues that he explored, and despite all that he has done, the surpassing fact is that his adversary's title deed remains unlessened in its telling power. *Winslow* v. *Gilbreth*, supra; *Call* v. *Perkins*, supra.

The Justice who heard this case wrote out his findings and rulings at length. They are of public file in the clerk's office. Nothing has been said, or need be, in detail of them here. The simple statement that manifest error is not indicated in his findings, and that to the facts which he found he unerringly applied the law,

would not in full fairness express our evaluation of the situation. Rather let it be said, that his findings and his rulings find lively mental echo on review. In deciding that the plaintiff failed to sustain the incumbent burden of proving that payment, in full or in part, for the particular real estate, was made from the property of the husband of her to whom the father conveyed it, the Justice did as this court would, were it passing originally on the same record.

Appeal dismissed.
Decree affirmed.

CHARLES S. REED *vs.* JOHN A. STEVENS.

Franklin. Opinion May 23, 1921.

Marriage between the parties, one of whom is bringing the suit, must be strictly proved in civil actions for criminal conversation.

1. In civil actions for criminal conversation, marriage between the parties, one of whom is bringing the suit, must be strictly proved.
2. An unauthenticated and unexemplified document from another State, purporting to contain a marriage record and to be signed by a person purporting to be a city clerk is inadmissible in this State to prove the marriage.

On exceptions by defendant. This is an action for criminal conversation. The plaintiff in proving marriage was allowed to introduce a copy of the record of the marriage of plaintiff to the woman who it was alleged was guilty of the charge, in Dover, New Hampshire, certified by the clerk of that city, to be correct to the best of his knowledge and belief, and defendant excepted. Exceptions sustained.

Case is stated in the opinion.

C. C. Holman, and C. N. Blanchard, for plaintiff.

Frank W. Butler, for defendant.

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

CORNISH, C. J. Case of criminal conversation. To prove marriage the plaintiff was allowed to introduce a document which after giving the name, age, residence, occupation, etc. of the parties, the name and

official station of the person performing the ceremony, date and place of marriage, etc., concludes: "The State of New Hampshire. I hereby certify that the above marriage record is correct to the best of my knowledge and belief. Fred E. Quimby, Clerk of Dover, N. H." (Seal). Seasonable objection to the introduction of this evidence was made and exceptions taken thereto as well as to instructions as to its legal effect as contained in the charge to the jury. It is necessary to consider only the first point, its admissibility, in this action.

It is familiar law that in civil actions for criminal conversation, as in criminal prosecutions for adultery and bigamy, marriage between the parties, one of whom is bringing the suit, must be strictly proved. *Damon's Case,* 6 Maine, 148; *Snowman* v. *Mason,* 99 Maine, 490. "Positive proof of a legal marriage" is the language of the court in *Pratt* v. *Pierce,* 36 Maine, 454. If the marriage is solemnized in this State a certified copy of the record of the town or city clerk is admissible under R. S., Chap. 64, Sec. 15, viz: "A copy of a record of marriage duly made and kept, attested or sworn to by a justice of the peace, commissioned minister or town clerk, shall be received in all courts as evidence of the fact of marriage;" and also under R. S., Chap. 64, Sec. 37, which reads: "The town clerk's record of any birth, marriage or death or a duly certified copy thereof, shall be prima facie evidence of such birth, marriage or death, in any judicial proceeding." These statutes, however, apply only to records of town clerks within this State. They have no extra territorial force. They do not apply to records in New Hampshire. All legislative acts binding or conferring authority upon private persons or officials are intended to affect only those who are within the limits of the sovereignty enacting such legislative acts. *Bramhall* v. *Seavey,* 28 Maine, 45, 49; *Holbrook* v. *Libby,* 113 Maine, 389.

We have left then only a paper purporting to be the certificate of one Fred E. Quimby designating himself as clerk of Dover, N. H. and under seal, stating that "the above marriage record is correct" to the best of his knowledge and belief. It does not even state that it is a true and attested copy of the record. But waiving that technical objection and viewing the certificate as substantially meeting that formal requirement, still it is entirely unvouched for and unauthenticated. It cannot prove itself.

There is a statute in this State admitting in evidence duly authenticated copies of the records and proceedings of any court of the United

States or of any State. R. S., Chap. 87, Sec. 128. But we have no statute under which certified copies of documents and records not of a judicial nature coming from another State are rendered admissible in our courts. Only judicial records are provided for.

The Federal Law, however, deals with this subject. Under the full faith and credit clause of the Federal Constitution, Article IV, Section 1, Congress has prescribed the manner in which such public but non-judicial records may be proved and the effect thereof. It is as follows: "All records and exemplification of books, which may be kept in any public office of any state or territory, ... not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory . . . by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding Justice of the court of the county, parish or district in which such office may be kept, or of the governer or secretary of state, the chancellor or keeper of the great seal of the state or territory . . . that the said attestation is in due form and by the proper officers" etc. U. S. Comp. St. 1916, Section 1520. In a trial for bigamy in Alabama a copy of the records of a former marriage in Tennessee authenticated as required by this statute was held admissible. *Witt* v. *State*, 5 Ala., App., 137, 59 So., 715. This does not of course exclude the common law method of proving the records by an examined copy sustained by the oath of the person making the comparison. That method has always been and still is recognized. *State* v. *Lynde*, 77 Maine, 561; *State* v. *Howard*, 91 Maine, 396; *State* v. *Martel*, 103 Maine, 63; *Rumford* v. *Upton*, 113 Maine, 543, 549. But there is no claim that the copy offered in the case at bar comes under that rule. It is presented as a certified copy, but it entirely lacks the authentication required by the Federal Statute. None of the officials named certifies that the attestation by Fred E. Quimby is in due form and by the proper officer. And such certificate is a pre-requisite to the admission of the record in evidence. See cases cited in note 12 to Vol. 3, U. S. Comp. St., Sec. 1520.

But it has been held further that in order to render even properly certified and authenticated copies of non-judicial records from another State competent evidence under the Act of Congress, two preliminary facts must be proved, first, that the record is one that is required to be kept by the law of that State, and second, that a certified copy of

the record would there be received in evidence. Such records can have no greater force under the constitution and under the Act of Congress, in the State where offered than in their own jurisdiction. Therefore their force and admissibility in their own State must first be proved. This can be proved in Maine in the manner provided in R. S., Chap. 87, Sec. 130, by printed copies of the statutes of that State or if unwritten law, by the testimony of experts learned in that law and by reports of decided cases in the courts of that State. 10 R. C. L., Section 314, Page 1108; *Wilcox* v. *Bergman*, 96 Minn., 219, 5 L. R. A., N. S. 938 and note. No evidence was offered in the case at bar showing whether the city clerk was the official under the New Hampshire law whose duty it was to keep a record of marriages and therefore the proper official to make the copy, nor whether a copy of the record certified by him is admissible in evidence in the courts of that State. Because therefore of lack both of authentication and of this preliminary proof as to New Hampshire law, this certificate was improperly admitted.

It is significant that while our Legislature has not made the certified copies of marriage records in another State admissible in this State, it has provided that when residents of Maine go into another State for the purpose of marriage and it is there solemnized and they then return to dwell here, they shall file a certificate of their marriage with the clerk of the town where they each resided, within seven days after their return, under a penalty of twenty dollars in case of failure to do so, R. S., Chap. 64, Sec. 8, and the clerk shall record the marriage.

This would seem to imply that if these steps are taken the State of Maine then recognizes this certificate as prima facie evidence of marriage, and to that extent adopts the foreign records as its own. But there is no evidence that these steps were taken in this case. They should have been as the groom is stated in the certificate to be a resident of Livermore Falls, and the bride a resident of Canton, both in this State, while the marriage was performed in New Hampshire. Therefore this statute can furnish no relief.

While this decision may seem in these liberal days to be ultra technical, it must be remembered that in cases of adultery and bigamy to which this rule of strict and positive proof of marriage applies, personal liberty is at stake, and the rules of evidence should

be so strict as to prevent if possible the introduction of a false certificate. It imposes no hardship, but only the requisite diligence and care on the part of those offering the evidence of marriage, in order that no mistake be made.

Exceptions sustained.

EDWARD O. WELCH, Plaintiff in Error, *vs.* STATE OF MAINE.

Androscoggin. Opinion June 1, 1921.

A writ of error is based upon the record alone, and not upon facts dehors the record, no question of abuse of judicial discretion being involved. Sentence may be pronounced at once, or deferred by placing the case on the special docket, and the length of time during which the case may remain upon the special docket before being brought forward for imposition of sentence is within the discretion of the court. A docket entry as to what sentence is to be imposed in the future in case certain conditions are not complied with, is unauthorized and nugatory. Probation.

The plaintiff in error at the October term, 1920, of the Superior Court for the County of Androscoggin, pleaded guilty to a complaint for illegal possession of intoxicating liquors and the court without imposing sentence ordered the case placed on the special docket. At the December term, 1920, according to the recorded judgment, the case was brought forward from the special docket and sentence imposed upon the plaintiff in error, consisting of a fine of three hundred dollars and costs, and in addition thereto four months in jail, and in default of payment of said fine and costs, six months in jail additional, and stand committed in execution of that sentence.

The docket entries are as follows: "Oct. T. 22, Retracts, pleads guilty, S. D." and then follows this memorandum in pencil—"Memo. Resp. is to leave County permanently within 2 weeks. If in trouble over liquor law anywhere in State within 1 year is to be sentenced on this to $1000 and 1 year in jail."

"Dec. T. 11, Ordered forward. Sentence $300 and costs and 4 months. In default 6 months additional. Mit. issued."

Held:

1. The pencil memorandum quoted above formed no part of the sentence or judgment. It did not purport to do so. It had no binding effect upon anyone.

2. The Judge at the October term had the power to impose sentence then, to be immediately executed, or to suspend the execution of it, or to defer sentence until a future time. He could not make a binding entry as to what sentence should be imposed in the future in case certain conditions were not complied with, even if he had attempted to do so. The law recognizes no such agreement. This pencil memorandum therefore is to be disregarded as of no effect.
3. A writ of error is based upon the record facts alone, and facts dehors the record, even if true, are immaterial, and can form no basis for a writ of error.
4. The attempted probation, if any, was not in accordance with law, in that it sought to control the discretion of any other Judge who might sit at a future term, and by not placing the respondent in the actual custody of a probation officer.
5. That the broad powers as to sentence inhering in a court of general jurisdiction were not diminished or curtailed by the passage of the Probation Act of 1909.
6. That the decision of the court below that no error existed in the record and that judgment be entered for the State was correct.

On exceptions by plaintiff. This is a writ of error before the Law Court under R. S., Chap. 82, Sec. 47, based upon the following record facts. At the October term, 1920, of the Superior Court for Androscoggin County, the plaintiff in error pleaded guilty to a complaint for illegal possession of intoxicating liquors and the court ordered the case placed on the special docket without imposing sentence. At the December term, 1920, the case was brought forward from the special docket, and the plaintiff in error was fined three hundred dollars and costs, and four months in jail, and in default of payment six months additional, and was committed. The following are the docket entries: "Oct. T. 22, Retracts, pleads guilty, S. D." followed in lead pencil "Memo. Resp. is to leave County permanently within 2 weeks. If in trouble over liquor law anywhere in State within 1 year is to be sentenced on this to $1,000 and 1 year in jail." The plaintiff in error in his writ alleged seven assignments of error, the first six being based upon the contention that the judgment rendered at the October term was unlawful and void, and the seventh assignment was based upon the contention that by the action taken at the October term, the court lost jurisdiction of the plaintiff in error and could not lawfully sentence him at the December term, all of which contentions were overruled by the presiding Justice, the county attorney having pleaded nullo est erratum, and the plaintiff in error excepted, and also took three other exceptions to rulings excluding evidence. Exceptions overruled.

The case appears fully in the opinion.
H. E. Holmes, for plaintiff in error.
Benjamin L. Berman, County Attorney, for the State.

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

CORNISH, C. J. Writ of error before the Law Court under R. S., Chap. 82, Sec. 47. The record facts upon which the writ is based are these. At the October term, 1920, of the Superior Court for Androscoggin County, the plaintiff in error pleaded guilty to a complaint for illegal possession of intoxicating liquors and the court without imposing sentence ordered the case placed on the special docket. At the December term, 1920, according to the recorded judgment "the case is ordered brought forward from the special docket and it is considered and ordered by the court that the said Edward O. Welch forfeit and pay the sum of three hundred dollars to and for the use of the State and the costs of prosecution taxed at seven dollars and thirty cents and in addition thereto be imprisoned at labor in our County jail at Auburn in said County for the term of four months, and in default of payment of said fine and costs be imprisoned at labor in said jail for the term of six months additional, and stand committed in execution of this sentence."

The docket entries are as follows: "Oct. T. 22, Retracts, pleads guilty, S. D." and then follows this pencil "Memo. Resp. is to leave County permanently within 2 weeks. If in trouble over liquor law anywhere in State within 1 year is to be sentenced on this to $1000 and 1 year in jail." Then the docket entries at the December term are in the usual form. "Dec. T. 11, Ordered forward. Sentence $300 and costs and 4 months. In default 6 months additional. Mit. issued."

The pencil memorandum quoted formed no part of the sentence or judgment. It did not purport to do so. Its apparent purpose was to remind the court of the circumstances if the case should be brought forward in the future for sentence. It had no binding effect upon anyone. Even the court itself did not follow it when sentence was pronounced in December. The Judge then imposed a fine of $300 instead of the suggested $1000 and an imprisonment of four months instead of one year. The Judge at the October term had the power

to impose sentence then, to be immediately executed, or to suspend the execution of it, or to defer sentence until a future time. He could not make a binding entry as to what sentence should be imposed in the future in case certain conditions were not complied with, even if he had attempted to do so. The law recognizes no such agreement. This pencil memorandum therefore is to be disregarded as of no effect.

The points of attack made by the plaintiff in error may be reduced to two.

First, that the act of the court in imposing sentence at the December term was an abuse of judicial discretion because the plaintiff had in fact returned to the county not in violation of the restriction contained in the pencil memorandum, nor had he since the October term violated the provisions of the prohibitory law, but he had returned in order to prepare the defense of a civil suit that had been brought against him. All these facts are dehors the record and even if conceded to be true are entirely immaterial and can form no basis for a writ of error because, as before stated, the memorandum itself was void. No question of abuse of judicial discretion is involved.

The second contention is that the legal intendment of the action of the court at the October term was to put the respondent Welch on probation for one year, and that this attempted probation was not in accordance with law, first because it sought to control the discretion of any other Judge who might sit at a future term, and second because such probation can be legally effected only by complying with the provisions of R. S., Chap. 137, Secs. 10 to 24, by placing the respondent in the actual custody of a probation officer.

The fallacy of this contention lies in making the pencil memorandum a part of the judgment of the court, and then holding it void as attempting to control the action of a future court, while at the same time holding it valid as attempting probation but not in the method prescribed by statute. The answer to all these claims is that the effect of the action of the court at the October term is misconceived by the plaintiff. The court at that time simply ordered the case placed on the special docket, which is the same as placing the indictment on file. This it had unquestioned power to do under the firmly established law of this State. "There is no doubt that a permanent court of general jurisdiction, having stated terms for the trial of criminal cases, may for good cause, place an indictment on file, or

continue the case to a subsequent term for sentence. In such case jurisdiction of the person and cause is retained." *Tuttle* v. *Lang*, 100 Maine, 123, 126. The same practice obtains in Massachusetts, *Commonwealth* v. *Dowdican's Bail*, 115 Mass., 133. And the length of time during which the case can remain upon the special docket before being brought forward for the imposition of sentence is within the discretion of the court. St. Helaire, Pet'r, 101 Maine, 522. In that case three years elapsed between placing the case on the special docket and bringing it forward and imposing sentence. Here sentence was imposed at the next term, which was held within two months. No probation was attempted in the case at bar. None was necessary. The court in placing the cause upon the special docket was not compelled to place the respondent in charge of a probation officer. The broad powers as to sentence inhering in a court of general jurisdiction were not diminished or curtailed by the passage of the Probation Act of 1909. That act did not take from but added to the authority of the court. It afforded a new method in the administration of criminal law, tending toward the reformation rather than the punishment of the convicted, and placed a new and often times an effective instrumentality in the hands of the court. Its employment, however, was not rendered compulsory but discretionary. In some counties in this State there are no probation officers because the County Commissioners have not recommended their appointment under R. S., Chap. 137, Sec. 10. In others, appointments have been made. But in all, the powers of the court as to continuing for sentence and placing on special docket without probation, remain the same since the passage of that act as before.

The decision of the court below that no error existed in the record and that judgment be entered for the State was correct.

Exceptions overruled.

DELIA G. PRIME, Executrix, In Equity,

vs.

C. WALLACE HARMON, Adm'r, d. b. n. c. t. a. et als.

York. Opinion June 1, 1921.

Construction of an item in a will. Ejusdem generis rule of construction. Charitable bequests. Charitable trusts. Bequests to missionary societies for the diffusion and inculcation of the Christian religion are within the realm of public charities as defined by the court. Bequests "to other moral and useful associations" not defeated, being for charity, by failure to specify in name such associations.

Bill in equity praying for the construction of the following item in the will of Olive P. Ross: "8. to pay to the Maine Missionary Association or Society (Congregational) and to the Woman's Aid to the American Missionary Association and to other moral and useful Associations, such sums as my executor and trustee may deem advisable."

It is agreed that the Congregational Conference and Missionary Society of Maine has succeeded under reorganization to all the rights of the former, and the Women's Home Missionary Union of Maine to all the rights of the latter.

Held:

1. That the bequests to the two associations named created valid charitable trusts because missionary societies for the diffusion and inculcation of the Christian religion are within the realm of public charities as defined by this court.
2. That in the clause "to other moral and useful associations," the testatrix did not intend to give to benevolent institutions of a different kind from those specified which would not be of the charitable type, but to other institutions of the same kind and class as the two concrete examples: that is, to other missionary societies which should also be useful and moral, under the ejusdem generis rule of construction. The words were intended to describe one class of objects rather than two, and the bequest in question is valid as a gift to charitable uses.
3. The fact that the testatrix failed to specify the other charitable associations but left their selection to the trustee is insufficient to defeat the bequest, the gift being to charity.

On report. A bill in equity seeking the construction of item 8 in the will of Olive P. Ross, who died March 20, 1896, leaving as her

only heirs at law, Mark Prime, a nephew, and Hattie Nowell, a grand-niece, who, never having married, died a few months subsequent to the death of the said Olive P. Ross. The nephew, Mark Prime, died July 6, 1917, testate, and the plaintiff is the executrix. Edward P. Burnham named in said will of Olive P. Ross as trustee of the funds in question, died May 12, 1902, and the defendant, C. Wallace Harmon was appointed administrator d. b. n. c. t. a., and had settled his final account showing $2,888.34 in his hands for distribution. The question involved was as to whether said sum should be paid to the executrix of the estate of the heir at law, the plaintiff, or that said sum constituted charitable trust funds, under said item 8 in the will of the said Olive P. Ross. The cause was heard upon the bill, answer, replication and proof, and at the conclusion of the evidence, by agreement of the parties, the case was reported to the Law Court upon so much of the evidence as was legally admissible. Bill sustained. Decree in accordance with opinion.

Case is fully stated in the opinion.

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

C. Wallace Harmon, pro se, and John P. Deering, for Congregational Conference, Missionary Society of Maine, and Women's Home Missionary Union of Maine.

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

CORNISH, C. J. The testatrix, Olive P. Ross, after nominating Edward P. Burnham as executor and trustee under her last will and testament, bequeathed to him as executor and trustee all her goods, chattels, rights and credits in trust for "the following named uses and disposal." Then follow eight items designating objects of her bounty. The first seven of these have been paid and a balance of $2,888.34 is left in the hands of the defendant Harmon as administrator de bonis non with will annexed, Mr. Burnham having deceased, to be disposed of under item 8 which is treated as a residuary clause. That item is before the court for construction and is as follows:

"8. To pay to the Maine Missionary Association or Society (Congregational) and to the Woman's Aid to the American Missionary Association and to other moral and useful Associations, such sums as my executor and trustee may think advisable."

Did this item create a valid charitable trust, as claimed by the defendant associations; or did the words "to other moral and useful associations" allow the fund to be applied to non-charitable purposes and therefore render the whole clause invalid, as contended by the plaintiff who is the administratrix of the estate of Mark Prime, the only heir at law and next of kin of Olive P. Ross?

It is agreed that the Congregational Conference and Missionary Society of Maine, under re-organization, has succeeded to all the rights of the Maine Missionary Association or Society (Congregational), and that the Women's Home Missionary Union of Maine under reorganization has succeeded to all the right of the Women's Aid to the American Missionary Association, so that there is no controversy over the rights of these two existing corporations as beneficiaries if the trust is sustained.

The crucial questions are, did the testatrix intend to create a public trust of a charitable nature under item 8 and did she succeed? Both queries must be answered in the affirmative. It is unnecessary to enter upon a discussion of what is and what is not deemed a charitable trust because the proposition has been so often and so fully considered in the decided cases. The recent case of *Bills* v. *Pease*, 116 Maine, 98, treats the subject with many illustrations.

If the terms of the bequest here were "to pay to the Maine Missionary Association or Society (Congregational) and to the Woman's Aid to the American Missionary Association" there could be no doubt as to its validity. Missionary societies for the diffusion and inculcation of the Christian religion are indisputably within the realm of public charities as defined by this court. *Maine Baptist Missionary Convention* v. *Portland*, 65 Maine, 92; *Straw* v. *East Maine Conference*, 67 Maine, 494.

On the other hand if the bequest merely read: "To pay to moral and useful associations," there would be force in the plaintiff's contention that it was too broad. Many associations may be moral and useful and yet lack the requirements of a public charity. They would more nearly resemble associations established for benevolence only, as in *Murdock* v. *Bridges*, 91 Maine, 124; *Chamberlain* v. *Stearns*, 111 Mass., 267, or deemed "deserving" as in *Nichols* v. *Allen*, 130 Mass., 211. These are not of the required charitable type.

When, however, we adopt the approved method and take item 8 as a whole and not in fractional parts, the meaning of the testatrix

seems clear. In specifying two associations which are obviously within the rule, she makes plain her own idea as to the kind or class of associations which she desires to benefit. She names two concrete examples, and then it occurs to her that there may be others of the same general kind that might be equally worthy. Therefore she adds as a part of the same sentence and without raising pen from paper "and to other moral and useful associations," that is other moral and useful associations of the same class as she has specified, others of like kind with the Maine Missionary Society and the Woman's Aid to the American Missionary Society. True, in her own view she characterizes these associations as moral and useful and so they are. But that characterization is only partial and does not deprive them of their inherent charitable quality. It does not remove them from the class of public charities, nor does it remove similar associations although they too may be moral and useful. These adjectives emphasize the worth of these organizations without changing their legal status.

This ejusdem generis rule is of frequent application. "In ascertaining the real intention of a testator there is a rule applicable in the construction of wills as well as of statutes that when certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things of a like kind with those enumerated. This is because it is presumed that the testator had only things of that kind in mind." *Andrews* v. *Schoppe*, 84 Maine, 170; *Merrill* v. *Winchester*, 120 Maine, 203.

That presumption here is greatly strengthened by the fact that in the preceding item (7) is another gift for missionary purposes, viz. $500 to the Womans Board of Missions, a Massachusetts corporation, and there is no specific bequest to any other kind of association or corporation in any part of the will, except to these missionary societies, one in Massachusetts and two in Maine, followed by the general clause under consideration. The testatrix was evidently interested in that particular form of charity. In *Andrews* v. *Schoppe*, supra, and *Merrill* v. *Winchester*, supra, the rule of ejusdem generis was applied to the nature of the articles bequeathed. We see no reason why it should not apply with equal force to the character of the beneficiaries receiving the bequest. And the cases so hold.

In the case of In re Sutton, 28 Ch. Div., 464, the bequest was to "charitable and deserving objects." The English Court in the course of the opinion said, that if the gift was to charitable objects it would be valid; if to deserving objects it would be invalid; and the question was one of English rather than of law, namely whether the words were intended to describe one class of objects or two, and it was held to cover one.

In *Staines* v. *Burton*, 17 Utah, 331, a certain sum was bequeathed to the bishop of a church in trust, the income to be devoted to the benefit of the members of the church "whether it be for public schools, parks, watering cities, acclimatizing foreign plants or anything else whereby the members may be benefitted." In determining the force of "anything else," the court said: "By the general expression, 'anything else whereby the members may be benefitted,' we are authorized to assume the testator meant enterprises similar to those mentioned in the same connection and if those were charitable we may infer he intended charitable objects by his general expression."

In *Coffin* v. *Atty. General*, 231 Mass., 579, a bequest to "missions and like good objects" was held valid. The phrase "missions and like good objects," is not far removed from the missionary associations specifically named and "other moral and useful associations," as expressed in the will under consideration. A liberal interpretation would find them quite similar, and it is liberal interpretation which must be employed in construing charitable trusts. They are favorites of the court in equity. This was the policy announced in the earlier cases, *Tappan* v. *DeBlois*, 45 Maine, 122; *Preacher's Aid Society* v. *Rich*, 45 Maine, 552, and that policy has been constantly and consistently maintained. *Fox* v. *Gibbs*, 86 Maine, 87.

In the case last cited, in which the whole subject was exhaustively treated, the language of the will was, "benevolent and charitable objects and associations," "worthy and deserving charitable and benevolent associations and objects," "worthy educational, charitable and benevolent objects and purposes." The court held that the word benevolent was inserted to intensify the word charitable rather than otherwise, that the two words were coupled as one expression and that it cannot be believed that either the scrivener or the testator supposed he was constructing any but charitable bequests. Nor in our opinion did the testatrix in the case at bar, and her words expressed her thought.

The fact that the testatrix failed to specify the other charitable associations but left their selection to the trustee is insufficient to defeat the bequest, the gift being to charity. *White* v. *Ditson,* 140 Mass., 351; *Minot* v. *Baker,* 147 Mass., 384; *Weber* v. *Bryant,* 161 Mass., 400; *Coffin* v. *Atty. Gen.,* 231 Mass., 579; *Everett* v. *Carr,* 59 Maine, 325; *Dunn* v. *Morse,* 109 Maine, 254.

It is therefore the opinion of the court that the bequest in question is valid as a gift to charitable uses. Inasmuch as the executor and trustee named in the will failed to make the selection, in accordance with the duty imposed upon him, it is now the duty of the Probate Court of York County to appoint a new trustee who shall carry out the terms of the trust.

Costs and reasonable counsel fees to be fixed by the sitting Justice and paid out of the estate.

Bill sustained.
Decree in accordance with opinion.

WINNIFRED DUTCH

vs.

THE GAMAGE BROKERAGE COMPANY AND W. J. GAMAGE.

Washington. Opinion June 1, 1921.

Rescission and cancellation of a written contract on the ground of fraud and misrepresentation, and the further ground that it was unconscionable. Allegations not sustained.

Bill in equity to obtain the rescission and concellation of a written contract on the ground of fraud and misrepresentation and on the further ground that it was unconscionable. On appeal by defendant from decree of the sitting Justice sustaining the bill it is,

Held:

1. That the representations of the plaintiff so far as material were based upon facts.
2. That the contract was drafted by the plaintiff's attorney at her request and in accordance with her instructions.
3. That the plaintiff was a young woman of intelligence and some business experience and must have fully comprehended the meaning of the contract.
4. That the contract was not unconscionable, that both parties worked under it for a period of three years and even up to the day before the trial. Had there been ground for rescission the right was not exercised within a reasonable time.

On appeal by defendant. A bill in equity praying for the cancellation of a written contract entered into by plaintiff and defendant on the ground of fraud and misrepresentation, and a further ground that it was unconscionable. The cause was heard upon bill, answer, replication, and proof before a single Justice who sustained the bill, and defendant appealed from such finding. Appeal sustained. Decree reversed. Bill dismissed with costs.

Case is stated in the opinion.

Herbert J. Dudley, for plaintiff.

Charles E. Gurney, for defendant.

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

CORNISH, C. J. Appeal in equity by defendant. The bill was brought in November, 1919, to obtain the rescission and cancellation of a written contract entered into between the parties on October 9, 1916. The ground is fraud and misrepresentation on the part of the defendant, the plaintiff alleging that she unwittingly signed the agreement without foreseeing or comprehending its effect, and the further ground that the consideration was grossly inadequate and the agreement in itself so unconscionable that it should not be allowed to stand.

By the terms of the contract the plaintiff appointed the Gamage Brokerage Company her sole agent in the States of Maine, New Hampshire and Vermont to sell home made candies known as Dutch Dainties for a term of ten years and agreed to appoint no other agent in any of these States but reserved to herself the right to continue to sell these candies in Calais, Eastport and Woodland, Maine, without payment of any commission to the defendant. A commission of fifteen per cent was to be paid on all Dutch Dainties sold by the defendant either directly or by mail order elsewhere in these three States, settlements to be made on or before the tenth of each month, the price at all times to be fixed and controlled by the plaintiff and the right to accept or reject any orders received through the defendant directly or indirectly to be reserved to her. The defendant on his part agreed not to handle or sell any other home made sweets in these three States.

The false representations set forth in the bill as the basis of rescission are as follows, quoting the language of the bill itself:

"That she entered into said agreement on the day following her twenty-first birthday, and that she was at that time wholly without experience in business matters; that said defendant represented that he had been a travelling salesman in the candy business for many years, and that he did a tremendous business in the States of Maine, New Hampshire and Vermont, and that he visited his customers in all said States once every ten days; that he gave the closest attention to his said business, and that he sold goods only to the best stores in each town, and that it would be greatly to the advantage of the plaintiff to enter into the agreement set out in said plaintiff's exhibit

"A", and influenced by the shrewdness of the defendant, and reposing confidence in him, and moved by his representations of the volume of his business, and his broad experience in the sale of candies, and the many advantages to accrue to her, she was thereby induced to sign said agreement, and did unwittingly sign the same, the effect of which she did not intend, foresee or comprehend. That the said representations made by the said defendant for the purpose of inducing her to sign said agreement were known by said defendant on said October 9th, 1916, to be false, and the same were at that time believed by the plaintiff to be true, but she now knows and alleges that they were false and fraudulent and made by the defendant for the purpose of taking advantage of the simplicity and credulity of the plaintiff, and to induce her to enter into said agreement."

Applying what might be termed the uncontradicted testimony to these allegations, we find that so far as material they are proven to be true rather than false. Mr. Gamage had been a traveling salesman for many years, more than fifteen years in fact, when the contract was made; he had done a large business in Maine, New Hampshire and Vermont, his sales in 1916 aggregating approximately $100,000; he visited his customers frequently, though not as often as once in ten days, which apparently would be impossible; he gave close attention to his business, and won a competitive prize in 1916 for the amount of business done. He sold to the best customers in each town, parties of financial responsibility. The charge of false representations of material facts is absolutely without foundation.

That the plaintiff unwittingly signed the contract is equally unsupported. From her own testimony it appears that she had been carrying on the home made candy business in Calais since the Spring of 1914, selling from 300 to 400 pounds a month through her own efforts. She was desirous of extending her sales into other territory and of increasing her business. She met Mr. Gamage in response to a telephone call from him in the spring or summer of 1916, and they talked over the situation. He told her what agreement he was willing to make, and she said she would think it over. They then separated. She did think it over and apparently was satisfied with the plan because subsequently she went to her own attorney in Calais and employed him to draw up the contract which is in the case embodying the terms she had talked over with Gamage. Gamage had no part whatever in drafting the agreement. He was not even in Calais

at the time. It was done at her solicitation and by her attorney in accordance with her instructions. After it was completed she kept it in her own possession until Gamage came again to Calais in October, 1916, and then it was executed. The only blank left in the instrument by the attorney was the number of years it should continue in force. The plaintiff wanted it for one year, the defendant for ten, and ten was inserted.

Under these circumstances it is idle to claim that the plaintiff executed the contract unwittingly and without comprehending its effect. She was a young woman twenty-one years of age, of intelligence and of two years experience in this business. She was not hurried into the contract by a designing party but took her own time for consideration and had the instrument drafted in accordance with her views. It may be that it has not proven quite as remunerative as she expected, but that fact affords no reason for destroying the contract itself.

The case is barren of any facts showing fraudulent acts or statements on the part of the defendant that induced the plaintiff to make the contract, and considering the fact that she practically dictated its terms she cannot now be permitted to effectively claim that she did not intend, foresee or comprehend its effect, and that she supposed the defendant would sell all her product outside of the three towns named. This contention under the circumstances carries little weight. *Metcalf.* v *Metcalf*, 85 Maine, 473; *Eldridge* v. *Railroad Co.*, 88 Maine, 191.

"If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew or had an opportunity to know the contents of an agreement or other instrument, cannot defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole or any of its provisions." Pomeroy's Eq. Juris., 3rd Ed., Section 843. Contracts ultimately unsatisfactory must not be confounded with contracts originally fraudulent and therefore voidable. Otherwise the making of a contract would be an idle ceremony.

Nor is there merit in the plaintiff's claim that the consideration was grossly inadequate and the agreement unconscionable. Inadequacy of consideration if it exists, may bear strongly upon the question of fraud, but here it would seem that the defendant's efforts have

produced the publicity and the sales which the plaintiff had in view. In 1917 his sales amounted to about $5,000; in 1918, to 5,226 pounds in Maine, 627 in New Hampshire, and 293 in Vermont, a total of 6,146 pounds; while in 1919, the total was 5,942 pounds or about $7,000 in value. The plaintiff admits that she has twenty-four regular customers in Maine, New Hampshire and Vermont that have come to her through the defendant, and ten in Maine through her own effort. She also sells in Massachusetts, New York, Pennsylvania and Canada, and of her total output about one-fourth is the result of the defendant's labors, and three-fourths, of her own. Having worked up his portion of this trade on a commission basis, it would hardly seem equitable now for the court to divorce the defendant from all further connection with it and give the plaintiff the benefit of these years of publicity free from all commissions. That is what the bill asks.

Another fact must not be overlooked. This contract was made October 9, 1916. This bill was brought in November, 1919, and heard in February, 1920. More than three years elapsed between the making and the would-be breaking, and during all that time the defendant was securing customers and trade and the plaintiff was accepting the orders. Even up to the very day before the trial orders were sent in by him and accepted. What is a reasonable time for rescission when the facts are undisputed is a question of law. *Hotchkiss* v. *Coal & Iron Co.*, 108 Maine, 34. Under the undisputed facts in the case at bar there can be no doubt that had there been ground for rescission it was not seasonably exercised. Neither law nor equity permits such playing of fast and loose with the rights of the adverse party.

In sustaining this appeal we do not overlook the force given to the finding by a single Justice in a cause in equity. But where there are few contradictions over material facts and the credibility of witnesses is not involved, the force of the finding is necessarily lessened. The plaintiff and defendant are the only material witnesses in this case and their recollection is not greatly at variance.

Appeal sustained.
Bill dismissed with costs.

STATE OF MAINE *vs.* JESSE C. SCOTT.

Piscataquis. Opinion June 30, 1921.

Immediate flight from the scene of the commission of a crime, and silence, and failure to divulge at first opportunity all knowledge of such crime, are but circumstances only, which may be shown, and may be evidence of guiltiness, when weighed with other evidence, but alone are not evidentiary circumstances, as such acts might be prompted by an impulse to avoid arrest or embarrassment, which holds in abeyance the performance of one's duty in the furtherance of justice.

Proof made that a crime has actually been committed, flight to avoid arrest may be shown in evidence as a circumstance having tendency to prove consciousness of guilt on the part of him who fled. Flight, however, is but a subsidiary inferential fact, counting for much or for little in the balance of justice, as the other evidence in the particular case may weight with it.

On the principle that natural impulse would prompt a person, free to do so, to deny that which another to his knowledge speaks, and he does not intend tacitly to admit, silence, in the absence of adequate actuating reason therefor, may be evidence of guiltiness. Still silence, in the same manner as flight, is nothing but a circumstance.

On appeal by respondent. At the September term, 1920, of the Supreme Judicial Court sitting in the County of Piscataquis, the respondent was jointly indicated with one William Pomeroy, for murder, and they were tried together and both convicted. The respondent filed a motion for a new trial which was denied by the presiding Justice, from which denial an appeal was taken. Appeal sustained. Motion granted.

The case is fully stated in the opinion.

R. W. Shaw, Attorney General, and H. M. Hayes, County Attorney, for the State.

M. L. Durgin, and W. H. Monroe, for respondent.

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

DUNN, J. At the September sitting of this court in Piscataquis, in the year 1920, William Pomeroy and Jesse C. Scott were jointly indicted and together tried for the murder, on March 13 of that year, of one Robert C. Moore, known also as Robert Cudmore. Both were convicted. Scott upon this moved the presiding Justice for a new trial. Appeal from denial of his motion brings the record here.

Counsel argue in behalf of Scott that, growing out of the evidence in the case, and upheld by the authority of reason, is such a doubt as to his guilt, as would cause just and impartial men, sitting oath-sanctioned as triers of fact, to hesitate and pause. The argument instills conviction.

For almost four years immediately preceding the commission of the crime, the murdered man had lived with his wife in a house situate in an unincorporated township called Little Squaw Mountain. This house is some ten rods distant, as it usually is reached by pedestrians, from the Greenville Junction station of the Canadian Pacific Railway. Up the railroad location approximately seven rods, and turning and going therefrom for about three rods, is the accepted way from the station to the lonely site of the Moore home. The main part of this house consists of two rooms, one above the other, each measuring some 12 x 20 feet in size, connected by a staircase leading from the southwest corner. The family sitting or living room is below. In the one above the Moores slept. Opening from the ground-floor room, in the order of their use, is a dining room, a kitchen, and a shed, all of one story constuction. Some three-fifths of a mile from the Moore place, toward and beyond the station, by the traveled route, is the Young Men's Christian Association building.

Acquaintance between Pomeroy and the Moores began soon after the latter had removed to the house. The acquaintance, if it did not ripen into friendship, certainly became well defined. From soon after its beginning, for a period of two years or thereabouts, Pomeroy was a frequent caller. Then he went away from Little Squaw Mountain and the Junction. He was of roving habits. Indolence seems to have been more or less congenial to him. Yet he was not altogether an idler, for he would work as a laborer, in the woods or elsewhere, until he had gathered a little hoard, and then cease from toil until his money was gone. In the course of his wanderings Pomeroy arrived at Boston. There, one Monday two years or so from the

time he left the Mountain and the Junction, he engaged in an employment agency to go to work near Rockwood in this State as a lumberjack. On the same day, and through the same agency, Scott also agreed to labor at the same place for the same employer. These two men did not then know each other. They left Boston by railroad train in the night of that day, as part of a woods-going crew, still unacquainted. Next morning, after the train had stopped at the Portland station, they exchanged glances, and then spoke. Much would a clinical study of their natures likely show them to have in common. And still, there are marked differences between the characters of the two. Scott, like Pomeroy, has roamed. He likewise is thriftless and improvident. But he is the more industrious. He has worked, with slight intervening interruptions, from boyhood on, in and about Boston and Lynn stores, as a teamster in the lumber woods, about livery and racing stables, at odd jobs here and there, on board ocean-plying ships and, let it be recorded, that he volunteered as a soldier in the War with Spain, and afterwards was in the regular army, an honorable discharge ending each military service.

Pomeroy and Scott soon were on intimate terms. Pomeroy, by reason of his distinctive qualities or traits, was the dominating or controlling personality. Neither looked forward with eagerness to performance of the contract he had made, or, at least, Scott so testifies. As the two rode along in the train they mutually agreed to breach their respective Boston given assurances and, when they should have arrived at Rockwood, surreptitiously to leave their fellows. If there were hesitancy on the part of Scott in this regard it was attributable alone to the fact that his impecuniosity stood in prohibitive degree. He so told Pomeroy. Pomeroy replied that he had funds sufficient for them both. So they determined to withdraw stealthily from the company of the others, and to proceed on their own account on another train, to Greenville Junction. Their setting out was not until after dining at a Rockwood hotel, at the expense of the company that had employed them. Arriving at the Junction, between nine and ten of the clock that night, Pomeroy suggested that they go to Moore's, where Scott was a stranger, and there they went. Pomeroy was joyfully received. Indeed, his coming was celebrated by the drinking of copious draughts of a liquor colloquially called and, perhaps, accurately enough designated as, "homebrew." This appellation also was sometimes applied, in satirical

implication, to the Moore establishment itself. Midnight was past when Pomeroy and Scott left. Scott went directly to the Y. M. C. A. for lodging. Pomeroy, at first, went to a former boarding place of his, but shortly he came to the Y, registering by the name of Kelly. In the morning they repaired to Moore's for breakfast. There they loitered away the forenoon; they stayed to dinner; they went down town; back they came to supper; they again remained until late, "talking and drinking home-brew," and then to the Y to lodge. Thus, essentially, the days were whiled, until the fateful night at the end of the week. There were variations, to be sure, but none of them boded good. At noontime on Thursday, while Pomeroy and Scott were eating with the Moores, conversation turned to chicken as an article of diet. Pomeroy announced that he would provide such fowl for food. When it was night he and Scott went after the chickens. They designed to gain them by theft from the caretaker at an inn a mile off. On the way, Pomeroy called at the house of a man named Mike McCarville, and from him borrowed a revolver and cartridges explaining, aside to Scott, that he intended to use the weapon for chicken shooting. Soon after leaving McCarville's, deep, untrodden snow was encountered. At the initiative of Pomeroy they abandoned their purpose, and turning about, went back to Moore's, Pomeroy retaining the revolver. Later they went, as usual, to the Y. M. C. A.

Coming to Saturday evening, the pair came to the Junction, where Pomeroy bought two glass bottles each containing about one pint of whiskey. They drank freely and, not far from ten o'clock, returned to Moore's. Mrs. Moore had gone upstairs before they came. Moore furnished "brew" or "beer" for them, and himself drank of the remaining whiskey that Pomeroy had brought. He invited Pomeroy and Scott to pass the night at his house. His invitation was accepted. A cot for Scott to sleep on was brought in from the shed; Mrs. Moore thrusting clothing for it down the stairs. Pomeroy, when Moore and his wife should have retired for the night, was to occupy a cot in the room with them. Scott's cot was made up. Moore went on his way to bed. While Pomeroy was waiting, he and Scott talked over their plans, the latter stating that he felt to go to an adjoining town in search of work; Pomeroy said that he should remain about the Junction. Fifteen minutes passed. If Pomeroy then meditated the doing of a dreadful deed there was no external

manifestation of it. He arose from his chair near the foot of the stairway and, hallooing "Already?" or "Are you ready?" proceeded up the flight. On or near the third tread from the top he stopped and, taking aim, he shot Moore with bullets from the McCarville revolver, inflicting wounds that caused his death the next afternoon. Mrs. Moore also was shot, but not fatally.

At the sound of the shooting Scott made ready to run from the house. He had reached the woodshed door and was fumbling its catch when Pomeroy came directly from the stairs. Profanely swearing and with the evident glee of a boisterous roisterer, Pomeroy expressed great satisfaction at a tragic act accomplished. He bade Scott obey him and Scott says that he did as he was bidden, being afraid of Pomeroy. They went into the shed; there Pomeroy reloaded the revolver; thence they hurriedly departed from the shed to the railroad track, Pomeroy following close after Scott and pointing the gun in his direction. Boarding or jumping a westbound freight train they rode to Jackman, forty miles away, for most of the distance in a gondola coal car. At Jackman, scantily clad and suffering from exposure to cold and falling wind-driven snow, they were arrested. Pomeroy denied all knowledge of what had occurred at Moore's; Scott, though present and hearing, neither affirmed nor denied this statement. Next day, to the deputy sheriff, Pomeroy volunteered the information that four armed men had driven Scott and himself from the Moore house to and onto the train. Scott was silent; in the concise and graphical phrase of the sheriff's deputy, "he didn't say a word." More recently, at Greenville Junction, en route to the county jail, Scott talked without reserve to officers whom he personally knew. He told of the crime, the effort to escape, and where Pomeroy threw the gun, which later was found where he said. He talked with the officials at the jail; he testified at the trial; none of his stories are materially contradicted; in certain essentials they find corroboration; he sustained himself on the cross-examination.

Pomeroy did not testify as a witness. What led or tempted his mind, unless it were inherent cruel wickedness accentuated by dissipation, to do foul and midnight murder in that house on the borderland of the forest country, is hard to appreciate. But, whatever may have motived Pomeroy to the commission of heinous crime, rational interpretation of the record shows that Scott is not otherwise

related thereto than by his presence in the house, his subsequent flight, and his silence. The State dwells especially on his fleeing and upon his being still or mute. Proof made that a crime has actually been committed, flight to avoid arrest may be shown in evidence as a circumstance having tendency to prove consciousness of guilt on the part of him who fled. Flight, however, is but a subsidiary inferential fact, counting for much or for little in the balances of justice, as the other evidence in the particular case may weigh with it. Doubtless many an innocent man, with adversity hovering about and endangering him, has taken to flight to escape the clutches of accusation, and to avoid becoming, as he imagined he unjustly might be made to become, what the master dramatist terms a "fixed figure for the time of scorn to point his slow unmoving finger at."

On the principle that natural impulse would prompt a person, free to do so, to deny that which another to his knowledge speaks, and he does not intend tacitly to admit, silence, in the absence of adequate actuating reason therefor, may be evidence of guiltiness. Still, silence, in the same manner as flight, is nothing but a circumstance. A situation may readily be conceived in which a blameless man might, for protection real or fancied, wrap himself in a mantle of reticence.

Scott says that what he did and what he failed to do, after the assassinous assault and until he felt his own safety secure, must be attributed to the fear which then obtained within him,—that if he dared do otherwise, he himself would be plunged unbidden into eternity.

The conclusion is inescapable, on the evidence here, that there is a doubt for which valid reason may be given regarding Scott's responsibility for the crime; a doubt which settles and lodges in judgment. Scott's guilt was not established by proof beyond a reasonable doubt, and, therefore, his conviction constitutes injustice.

Appeal sustained.
Motion granted.

LORE ALFORD, Trustee, In Equity *vs.* WILLIS RICHARDSON et als.

Penobscot. Opinion July 2, 1921.

A bequest to A in trust of certain personal property, to pay the net income thereof to B during his natural life, and at his death to his wife if she survives, for their support and maintenance, with discretionary power to sell a part of said personal property and apply the proceeds for said purposes if necessary, invests the trustee with the right to use his own discretion and judgment in determining whether or not the conditions specified in the will exist or not in fact, and as to how much relief may properly be given. So long as he acts within his power, honestly and in good faith, not arbitrarily or capriciously, his determination is conclusive and his judgment will not be reviewed.

A testator bequeathed to a trustee certain shares of the capital stock of three corporations, in trust to pay the net annual income thereof to his brother, W, during his natural life; and further provided as follows: "If, during the life of said W the income from said trust estate is insufficient for his comfortable support and maintenance, the trustee may in his discretion sell the stock of the A company, or so much thereof as may be necessary and of the proceeds thereof pay such amounts to the said W from time to time as may in his judgment be suitable and proper. I leave the whole matter to the sound judgment and discretion of the trustee. If the aforesaid funds prove insufficient for the comfortable support of the said W, then in that event, if it is absolutely necessary for his support and maintenance, I authorize and direct the trustee to dispose of so much of the stock of B company as in his judgment may be suitable and proper for the aforesaid purpose." If W's wife survived him, the net annual income was to be paid to her during her natural life. The trust was to terminate upon the death of W, if he survived his wife; if the wife survived, then upon her death.

Held:

That it was the intention of the testator to interpose between the principal of the fund and W, and W's creditors, the discretion of a trustee in whom he had implicit confidence.

That as to the stock of A company the discretionary power was conferred in the broadest terms; as to the stock of B company the power was limited to absolute necessity; as to the stock of C company no authority to sell was given, and

such sale, if advisable, must rest upon authority to be granted by a court having jurisdiction of testamentary trusts, upon special application therefor.

That such a trust is valid and does not confer an absolute estate in the principal of the fund to the beneficiary.

A bill in equity brought by Lore Alford, as trustee under the provisions of the will of George H. Richardson late of Old Town, deceased, seeking the interpretation of paragraph 8 of said will. Upon a hearing, at the close of the testimony, by agreement of the parties, the case was reported to the Law Court, upon bill, answers and replications and so much of the evidence as was legally admissible. Bill sustained.

Case stated in the opinion.

George H. Worcester, for plaintiff.

Charles H. Bartlett, Joseph F. Gould, John Wilson, Ryder & Simpson, and C. D. Bartlett, for defendants.

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

MORRILL, J. This bill in equity is brought by a testamentary trustee for instructions as to the execution of his trust. George H. Richardson late of Old Town, died September 26, 1915; his will dated May 17, 1912, in which the plaintiff was appointed executor and trustee, was allowed at the November term 1915 of the Probate Court for Penobscot County. The plaintiff qualified as executor and undertook the administration of the estate; he qualified as trustee May 2, 1917; an order of distribution of the estate was issued November 26, 1918.

The testator first created a trust of his entire estate for the benefit of his mother, who pre-deceased him; the estate was therefore distributed under nine provisions of the will, the last of which bequeathed and devised the residuary estate in equal shares to his sister, Rose B. Bowman and to his brother, Willis Richardson.

The eighth clause of the will reads, as follows:

"8—I give and bequeath to the Trustee hereinafter named six shares of the capital stock of the Bickmore Gall Cure Company, ten shares of the capital stock of the Old Town Canoe Company, and fifteen shares of the capital stock of the Massachusetts Lighting

Companies, in trust, however, for the following uses and purposes, that is to say: The net annual income thereof to be paid to my brother, Willis Richardson, during the term of his natural life. If, however, during the life of said Willis the income from said trust estate is insufficient for his comfortable support and maintenance, the Trustee may in his discretion sell the stock of the Massachusetts Lighting Companies, or so much thereof as may be necessary and of the proceeds thereof pay such amounts to the said Willis from time to time as may in his judgment be suitable and proper. I leave the whole matter to the sound judgment and discretion of the Trustee.

If the aforesaid funds prove insufficient for the comfortable support of the said Willis, then in that event, if it is absolutely necessary for his support and maintenance, I authorize and direct the Trustee to dispose of so much of the stock of the Old Town Canoe Company as in his judgment may be suitable and proper for the aforesaid purpose. In the event of the necessity of selling the stock of the Old Town Canoe Company, I desire that it at first be offered to my associates, the present stockholders in the said Canoe Company, and that they may be given the first opportunity to purchase said stock at its fair market value; and for the purpose of determining the value, the Trustee should have full opportunity to examine the books and papers of the Canoe Company. In case said associates do not purchase the stock, then in that event it may be sold upon the open market.

If the said Willis' wife survives him, then in that event I direct the Trustee to pay the net annual income thereof to his said wife, Gussie M. Richardson, during the term of her natural life. At the death of the said Gussie, in case she survives her husband, this trust shall thereupon cease. In case said Gussie dies before the said Willis, then in that event the trust shall terminate upon the death of said Willis."

At the date of the bill, March 18, 1919, the plaintiff was the custodian of a trust fund manifestly designed by the testator for the benefit of his brother, Willis; the testator had reason to believe, and evidently relied upon the belief, that the fund would yield an income sufficient for the comfortable support of Willis and his wife. But contrary to that expectation, the major part of that fund had been invested by the testator in the stock of two apparently highly prosperous private corporations, the Bickmore Gall Cure Company,

later called The Bickmore Company, and Old Town Canoe Company, which were not paying dividends; in their management his representative had no part; for this stock there was no open market; nor was any assurance to be had as to payment of dividends in the future. The treasurer of the Old Town Canoe Company testified that it had never been the policy to pay a dividend, although the company had paid dividends ten or twelve years before. While vested with authority to sell the stock of the Old Town Canoe Company, the Trustee was directed by the terms of the will to first offer it to the other stockholders, who were in control of the company and directed its non-dividend paying policy. In both corporations George A. Gray and his family held controlling stock interests.

The trustee was further embarrassed by transactions between George A. Gray, a former associate of the testator in the above named corporations and president of both companies, and Willis Richardson, pending the settlement of the estate. The share of the latter in the residuary estate was $13,226.88 at inventory values, of which $978.35 was in cash. In the period between Mr. Richardson's death and December 1, 1919, some of this residuary estate had been sold and the balance, valued by Mr. Gray at $7,820, was pledged to the latter as security for a balance due for advances during that period amounting on December 1, 1919 to $6,509.17. On February 7, 1919 Willis Richardson, in consideration of past advances and promised future advances, executed in favor of George A. Gray an assignment of "all my right and claim in and to the enjoyment of any and all part of the principal of said trust fund, with full power and authority to demand, collect and receive of said trustee, or his successor, the proceeds of any stock held by him as part of the trust fund and disposed of in accordance with the terms of the will as aforesaid, which proceeds I hereby pledge as security for the present and future advances made to me as aforesaid."

In this situation, although the trustee had broad discretionary powers under the will, he was fully justified for the protection of the trust fund and the interests both of life beneficiaries and remaindermen, in seeking the direction of the court as to his duties relative to a sale of the stock, and as to proceedings to compel payment of dividends thereon.

On December 31, 1919, during an adjournment of the hearing of this cause a dividend of fifty per cent was declared upon the outstanding

stock of Bickmore Company. Since the cause was argued the court has been informed that the shares of stock in Old Town Canoe Company and in the Massachusetts Lighting Companies have been sold pursuant to an agreement between the parties. The court is thus relieved of the necessity of instructing the trustee as to the sale of the stocks and as to action to enforce payment of dividends.

It remains for us to consider certain inquiries as to payments of income and principal of the trust fund by the trustee.

It is very clear from reading the entire will in the light of the conditions surrounding the testator at the time the will was executed that, after devoting his estate to the care of his aged mother, his next thought was to provide for his brother, Willis, and the latter's wife, against want in their declining years. Willis was about sixty-five years of age when the will was made; he and his wife had come to Old Town in 1908 to live with the testator and his mother, and to care for the mother during her declining years; this, Mrs. Gussie Richardson did most devotedly until the mother's death in 1914; after the latter's death they continued to live in the house at the testator's request; Mrs. Richardson to quote her language—"just looked after the house and made the home as he asked me to—took his mother's place at the table and everything." Neither Willis nor his wife had available property of any substantial amount; the former was unable to work except at light tasks about the house; the attitude of the testator towards him is thus described by Mrs. Richardson: "He said he never would be able to do anything in his opinion . . . . and that he never should have any further money troubles, and seemed—his whole manner seemed to be to make him comfortable and happy and keep him contented during life."

Although bequeathing to Willis one-half of the residuary estate, which, as we have seen, amounted to $13,226.88, and included one undivided half of the homestead, the testator unquestionably created this trust fund as a safeguard, an insurance fund, against improvidence and want after his death. The net annual income of the fund is to be paid to Willis during his life, and after his death to his wife, Gussie, if she survives him; but it was likewise unquestionably the intention of the testator to interpose between the principal of the fund and Willis, and Willis' creditors, the discretion of a trustee in whom he had implicit confidence. As to the stock of the Massa-

chusetts Lighting Companies the discretionary power was conferred in the broadest terms; as to the stock of The Old Town Canoe Company the power was limited to "absolute necessity," thus safeguarding the principal; and as to the stock of The Bickmore Company no authority to sell was given; nor was any authority given to use principal for the benefit of Gussie, after the death of Willis. Such a trust is valid and does not confer an absolute estate in the principal of the fund to the beneficiary. *Brown* v. *Lumbert*, 221 Mass., 419, 420. 1 Perry on Trusts, 5th Ed. Sections 386a, 386b.

The will invests the trustee with the right to use his discretion, to use his own judgment, in determining whether or not the conditions specified in the will exist or not in fact, and as to how much relief may properly be given. So long as he acts within his power, honestly and in good faith, his determination is conclusive. "He may use, but must not abuse, his trust." *Huston* v. *Dodge*, 111 Maine, 246, at Page 253. *Wright* v. *Blinn*, 225 Mass., 146, 148. *Leverett* v. *Barnwell*, 214 Mass., 105, 108.

"The power conferred upon the trustee was the exercise of reasonably sound judgment. No arbitrary or capricious power was conferred even though honestly exercised. A trustee vested with discretionary power to distribute a fund in whole or in part is bound to use reasonable prudence. The possession of full power or wide discretion by a trustee means the kind of power and discretion which inheres in a fiduciary relation and not that illimitable potentiality which an unrestricted individual possesses respecting his own property. There is an implication, when even broad powers are conferred, that they are to be exercised with that soundness of judgment which follows from a due appreciation of trust responsibility. Prudence and reasonableness, not caprice or careless good nature, much less a desire on the part of the trustee to be relieved from trouble furnish the standard of conduct." *Corkery* v. *Dorsey*, 223 Mass., 97, 101.

These principles are applicable to the instant case and the application of them will afford answers to the questions submitted by the trustee. The trustee is accordingly advised:

1. Payments made by the trustee from the trust funds are to be made to Willis Richardson during his lifetime. The case shows that on December 30, 1919 said George A. Gray executed a release of all rights to said trust fund acquired under the assignment of February

7, 1919, and was dismissed as a party defendant in the cause. After the death of Willis, if his wife, Gussie M. Richardson, survives him, payments of income are to be made to her during her lifetime.

2. If the trustee in the exercise of a sound discretion makes payments to Willis Richardson from the principal of the trust fund, he is not in duty bound to see that such payments are applied for the comfortable support and maintenance of Willis Richardson.

The third, fourth and fifth questions may be answered together.

We think that it was clearly the intention of the testator that Willis Richardson and his wife, during their joint lives, should have the means to live comfortably according to their degree and station in life. To what extent this purpose was to be assured by expenditure from the principal invested in stock of the Massachusetts Lighting Companies, he committed to the discretion of the trustee. "The trustee may in his discretion sell the stock . . . . and of the proceeds thereof pay such amounts to said Willis from time to time as may in his judgment be suitable and proper. *I leave the whole matter to the sound judgment and discretion of the trustee,*" in his language. The right to exercise this discretion cannot arise unless the income is insufficient for the comfortable support and maintenance of Willis and his wife.

In the exercise of this discretion the trustee undoubtedly has the right to, and should, take into consideration the amount and availability of Willis Richardson's private estate, as well as all other facts and circumstances. The support and maintenance of Gussie M. Richardson, not of Willis Richardson *alone,* is to be considered, and in the discretion of the trustee provided for; but of no other person. The rights of the remainder-men are to be respected and guarded. The trustee may refuse to make any payments from the proceeds of the stock of the Massachusetts Lighting Companies, or he may make such payments more liberally than the demands of absolute necessity may require. But in the exercise of his discretion he must act reasonably, with sound judgment, appreciative of the responsibility, and not arbitrarily or capriciously; conforming to that rule, his judgment will not be reviewed. *Wright* v. *Blinn,* supra.

When, however, the funds derived from the sale of stock of the Massachusetts Lighting Companies are exhausted, the expenditure from the proceeds of sale of stock of the Old Town Canoe Company is limited to what is "absolutely necessary" for the support and

maintenance of Willis and his wife during his lifetime, and expenditure of principal for that purpose is authorized and directed.

It should always be remembered that Mrs. Richardson, if she survives her husband, will be dependent upon income alone, and that payments from principal will reduce the income to which she will be entitled.

6. The trustee may make, but is not in duty bound irrespective of his own discretion and judgment, and may refuse, to make payments from principal for the past support and maintenance of Willis. He should not reimburse Willis from principal for payments made by the latter from his private estate, for support and maintenance.

It appears that during the administration of the estate certain income from the trust fund was used by Mr. Alford, with the knowledge of Willis, for the purpose of settlement of the estate. Upon receipting for the final payment on his distributive share, Willis signed the following acknowledgment, as a part of the receipt: "I hereby acknowledge that as such residuary legatee I have received the equivalent of such income in the property turned over to me as my share of the residue." He must abide by this acknowledgment. There is no illegality in the cestui que trust authorizing or ratifying an act which otherwise would be a breach of trust towards himself. *Pope* v. *Farnsworth*, 146 Mass., 339, 344.

Moreover there is an entire absence of evidence of caprice, misconduct, bad faith, or inefficiency on the part of the trustee in delaying a sale of the stock under the circumstances with which he was confronted when the bill was filed. He seems to have acted with entire appreciation of his responsibility toward the beneficiaries for life as well as toward the remainder-men.

7. This question is no longer important, in view of the sale of stock effected since the cause was argued.

8. We have already pointed out the distinction to be observed between the exercise of the discretionary power of the trustee relative to the proceeds of the stock of the Massachusetts Lighting Companies, and his power as to the proceeds of the stock of the Old Town Canoe Company.

We need only add that no authority is given to the trustee to sell the shares of stock of The Bickmore Company. Such sale, if advisable, must rest upon authority to be granted by a court having jurisdiction of testamentary trusts, upon special application therefor.

The action of the plaintiff having been taken to protect the trust, as well as for instruction as to its execution, and being fully justified by the circumstances, we think that his costs, expenses and reasonable charges of counsel, to be allowed by the justice who settles the final decree, should be a charge upon the proceeds of the sale of the stock of the Massachusetts Lighting Companies.

Bill sustained.
Decree in accordance with this opinion.

MRS. JOSEPH DULAC

vs.

PROCTOR & BOWIE COMPANY, Employer,

AND

FEDERAL MUTUAL LIABILITY INSURANCE COMPANY.

Kennebec. Opinion July 7, 1921.

Compensation not permissible to widow claiming for death of husband, who produced an epigastric or ventral hernia by heavy lifting, having at the same time and prior thereto an inguinal hernia, who died from an operation for both hernias at the same time. Respondents responsible for the epigastric hernia, but not for the inguinal hernia. Decedent might have lived if not operated upon for inguinal hernia. Evidence does not show that death resulted from operation on epigastric hernia alone, the direct result of the injury, which is imperative to recover, and not be left to uncertainty and conjecture.

This is a petition by a widow, claiming compensation for the death of her husband, who suffered an epigastric or ventral hernia caused by heavy lifting. Prior to this injury decedent had suffered from an inguinal hernia, but there was no evidence that the inguinal hernia was in any way aggravated by the accident which produced the epigastric hernia. Death resulted from an operation for the epigastric hernia, for which the defendants were responsible, and at the same time for the inguinal hernia for which the defendants were not responsible, as it was neither caused by the accident nor operated on with the knowledge

and consent of the defendants. Decedent contributed to the proximate cause of his death by directing the surgeon to operate on the inguinal hernia, the cause without which he might not have died.

The only ground upon which the petitioner can recover is upon the death as a direct result of the injury. Had there been no operation decedent might have lived and received compensation under Section 1, Paragraph IX.

Had he been operated upon for epigastric hernia only, for which the respondents were responsible, he might have lived and received compensation under the same paragraph. The inguinal hernia clearly was not effected by the accident. The operation on it was entirely independent of the ventral operation and done at the express request of the deceased. That decedent would have died from the shock of the ventral hernia, is not supported by evidence, but is left to uncertainty or conjecture.

The evidence fails to show any causal relation between the injury and the death of the plaintiff's decedent, hence she can not recover.

On appeal. Joseph Dulac while in the employ of Proctor & Bowie Company as a foreman in a woodworking mill, at Winslow, Maine, received an injury by producing an epigastric hernia by heavy lifting. Prior to and at the time of this injury he had an inguinal hernia. The injury occurred on December 16, 1919, and on February 25, 1920, he was operated upon for both the epigastric hernia, which was caused by the accident, and the inguinal hernia, which was not caused by the accident.

On February 27, 1920, he died from the effect of the operation. The petitioner, his widow, claims compensation for his death. The Chairman of the Industrial Accident Commission granted compensation at the rate of fifteen dollars per week for a period of three hundred weeks or until such time as said compensation so paid shall amount to $3,500.00, and a decree in conformity therewith was entered, from which decree an appeal was taken. Appeal sustained. Petition dismissed. Compensation denied.

Case stated in the opinion.

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

J. Frank Scannell, and Hinckley & Hinckley, for defendants.

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

SPEAR, J. The petition in this case of Mrs. Joseph Dulac, widow, is in the usual form and describes the accident from the result of which she claims compensation for the death of her husband as

follows: "He was lifting a heavy machine which caused hernia of the abdominal wall in the epigastric region." No other injury is described nor does the evidence, when all considered, nor any finding of the chairman of the commission, disclose any.

Besides the epigastric hernia, also called the ventral hernia, which the evidence shows was produced as claimed, it also appears that the deceased had previously suffered from an inguinal hernia, that is a hernia in the groin. But neither the evidence when all considered, nor the finding of the chairman, attribute any appreciable aggravation of the inguinal hernia to the accident which produced the epigastric hernia. On the direct examination of Mrs. Dulac the inguinal hernia was not mentioned.

In one part of his opinion, the chairman incidentally says: "For many years, this inguinal hernia had not bothered Mr. Dulac, but during and after the lifting in December and January, it bothered him some." Later, he says: "Mr. Dulac had worked for years, suffering no ill effects from inguinal hernia and so far as the evidence shows, could have continued working, so far as it was concerned."

Mrs. Dulac, in speaking of the inguinal hernia says: "He never wore it (the truss) when he was hurt, because he calculated he was all healed up of that and he sent the truss back. He said it was healed up." She further says: "That it was way down from the ventral hernia." While her testimony was somewhat confused, it is nevertheless true that when she was speaking of the hernia as being bad she referred to the ventral hernia as she finally says:

"Q. When he went to the hospital, both hernias were bothering him?

A. The lower one. He didn't complain. He said he could work with that."

Doctor Gousse who was first called says that he found only the ventral hernia and when asked, what was the condition of the lower hernia he said.

A. "I didn't examine the lower hernia.

Q. Didn't examine that?

A. He consulted me for the hernia in the epigastric region only." It is significant that, soon after the accident, the attention of his attending physician was not called to the lower hernia at all.

Doctor Fish, who was later called into the case and who performed the operation says, with reference to the lower hernia, "that by ques-

tioning Mr. Dulac, he learned that he had been injured about three weeks before and that by further questioning, he brought out the fact that he had had a similar injury twelve or fifteen years previously and that it had disappeared so that he had considered that he was cured. This is all the history there was."

We are therefore, of the opinion from the testimony that the only injury of which the decedent complained or from which he suffered was the one described in his petition as what is called the epigastric or ventral hernia located in the pit of the stomach just below the breast bone.

A further analysis of the testimony shows the following undisputed conclusions.

1. Dulac met with his accident and injury on the 16th of December, 1919, and lived and worked, to a degree, at least up to February 22nd, the Saturday before his operation on Tuesday, February 25th.
2. He was injured at two different times by heavy lifting.
3. As a consequence, he received an epigastric hernia.
4. He was also some afflicted with an inguinal hernia of long standing.
5. The respondents had no knowledge, whatever, of the inguinal hernia before or at the time of the operation.
6. Upon their consent and responsibility, he was to be operated upon for the epigastric hernia.
7. Of his own volition, on an independent contract for a new consideration without notice to the defendants, he employed the surgeon, who was to operate in the employ of the defendants upon the epigastric hernia only, to perform a separate operation on the inguinal hernia under the same anesthetic and in addition to the epigastric operation.
8. That these two operations were entirely separate and distinct from one another, the epigastric being located in the pit of the stomach, just below the breast bone, and the inguinal, in the groin.
9. That there were two independent operations, in the surgery employed, as two distinct incisions were made absolutely necessary by the distance separating the location of the two hernias; and two incisions were made.
10. That no reason was found in connection with the epigastric hernia that "should cause an operation on the inguinal hernia; they were entirely disassociated."

11. That if Mr. Dulac had not broached the subject to the surgeon, there would have been no inguinal operation.

12. That the epigastric operation was performed first and occupied a period of thirty minutes; the inguinal followed and took from fifty-five to sixty minutes.

13. That the operation was performed on the 25th of February, 1920 (the doctor says 24th) and the patient died on the 27th of February from "post-operative surgical shock . . . ." a condition in which the patient's resisting powers had not been able to withstand the severity of the operation.

14. That the shock of the first operation in the opinion of the surgeon might or might not have proved fatal.

To verify the correctness of the foregoing conclusions, it may be well to quote briefly from the testimony of Doctor Fish.

"Q. So, that if the operation had ceased with the epigastric hernia, would you have expected Mr. Dulac would have died of post-operative surgical shock?

A. I would consider his chances of living were better with one operation than two.

Q. That is, 30 minutes duration?

A. Yes.

Q. Now Doctor, I would like to put this question. What is your opinion as to whether Mr. Dulac suffered a post-operative surgical shock during the operation in reference to the epigastric hernia? Which caused his death?

A. You want me to answer as to which of the two parts of the operation I think caused his death?

Q. Yes, sir.

A. My answer would be in view of the fact that the inguinal hernia prolonged the operation, naturally of course it would have contributed towards his death.

Q. Does your answer also include the opinion that it did cause his death?

A. That is what I said. I said it contributed.

Q. By 'contributed' you use that in the sense of cause?

A. Yes."

The Doctor then further testified with reference to the relative effect of the shock from the two operations as follows:

"Q. There is no reason from what you saw of the epigastric hernia that should cause you to operate on the inguinal hernia?

A. No.

Q. Entirely disassociated?

A. Yes.

Q. And if Mr. Dulac hadn't broached the subject to you, there would not have been any operation on the inguinal hernia?

A. No.

Q. That was the result of your conversation with him on the morning of the operation?

A. Yes.

Q. And can you state, Doctor, whether or not surgical shock, post-operative surgical shock, always follows an operation?

A. No. Perhaps there is more or less surgical shock in every operation, but not enough so it is obvious.

Q. At the time you finished with the epigastric hernia, there was no evidence of any surgical shock at that time?

A. No more than in the average patient.

Q. Nothing to cause any alarm?

A. No.

Q. If Mr. Dulac had been returned to his room after that operation, would you have expected any serious results?

A. You mean after the epigastric?

Q. Yes?

A. No. No more than in the ordinary case of 30 minutes duration.

Q. You would expect there would be no disastrous or fatal results?

A. No."

When his attention was called directly to the question whether the operation on the epigastric hernia caused Mr. Dulac's death, Dr. Fish testified:

"Q. Are you able to state here, Doctor, with positiveness that if you had stopped after the first operation, as my brother calls it, that Mr. Dulac would have lived?

A. Why, no, I wouldn't be able to state positively that he would.

Q. You can't state positively here or as your opinion that the surgical shock, if there was one, which followed the operation for the epigastric hernia resulted in the death of Mr. Dulac?

A. Not positively.

The question was repeated.

Q. Speaking of the epigastric, you can't state positively nor is it your opinion, if any surgical shock followed the operation, that the epigastric hernia was the cause of Mr. Dulac's death?

A. No."

Upon the foregoing facts are deduced the following results:

1. If there had been no operation at all, it is evident that Mr. Dulac as far as the injury was concerned might have lived and received compensation to be computed under the provisions of Section 1, Paragraph IX.

2. If he had been operated on for the epigastric hernia only, for which the respondents were responsible, he might have lived and received compensation under the same paragraph.

3. By employing and directing the surgeon to operate on the inguinal hernia, he himself contributed to the proximate cause of his death, that is, the cause without which he might not have died.

By the process of elimination then, it is apparent that the only ground upon which the petitioner can recover is upon the death as a direct result of the injury, and the chairman of the commission so found as follows: "That Mr. Dulac died as a direct result of the injury sustained on or about December 16, 1919."

We find no evidence to support the finding. The inguinal hernia clearly was not affected by the accident. The operation on it was entirely independent of the ventral operation and done at the express request of the deceased, and was not necessary at that time. The accident only required the ventral operation, and even if the post surgical shock of the ventral operation together with the post surgical shock of the inguinal operation did contribute to his death, still the accident cannot be said to have contributed to his death, because the inguinal operation was not required by reason of the injury received by the accident, but was the independent act of the deceased and without which it is not certain his death would have occurred.

But if it was certain that he would have survived the ventral operation, then certainly death was not the result of the accident, because he voluntarily ordered an independent operation without which he would have lived; and, if the post-surgical shock of both operations did contribute to the death it was not due to the accident, but entirely to his own voluntary act.

But counsel contend in their brief that: "Should this Court be unable to accept as proven that the respondents were also responsible

for so much of the result as was contributed by reducing the inguinal hernia, the Finding of the Chairman would not necessarily be changed. In this event, there would be two independent causes contributing to the same result. The respondents being responsible for one and not responsible for the other."

The fallacy of the above contention in its application to the present case, is found in the fact that the statutory ground, upon which the plaintiff may recover, is proof that the decedent died as a direct result of the injury sustained. Accordingly, inasmuch as the evidence fails to show that the injury affected the inguinal hernia, at all, the plaintiff then leaves it to uncertainty or conjecture whether the decedent would have died from the shock of the ventral hernia, and cannot then recover, because she must prove that fact. In *Westman's Case*, 118 Maine, 138, it is said: "It is undoubtedly true, and has been frequently so held, that the burden of proof rests upon the claimant to prove the facts necessary to establish a right to compensation under the Compensation Act." In *Mailman's Case*, 118 Maine, 172, it is said: "There must be some competent evidence. It may be 'slender.' It must be evidence, however, and not speculation, surmise, or conjecture." Both the above cases cite *Sponatski's Case*, 220 Mass., 528, in which it is said: "The dependent must go further than simply to show a state of facts which is equally consistent with no right to compensation as it is with such right. They can no more prevail if factors necessary to support the claim are left to surmise, conjecture, guess or speculation, than can a plaintiff in the ordinary action in tort or contract. A sure foundation must be laid by a preponderance of evidence in support of the claim before the dependents can succeed."

However, as before seen, both operations were performed. The patient did not survive. The evidence leaves it in doubt whether the post-operative shock of the ventral hernia caused the death, but without any doubt that the operation upon the inguinal hernia contributed thereto. Under the plaintiff's legal contention, therefore, that the post-operative shock of both operations contributed to the death, for one of which the defendant was not responsible, it still remains in the realm of surmise, guess or conjecture whether the accident, which did not affect the inguinal hernia, was the direct cause of the decedent's death.

Counsel for petitioner however contends that the rule applicable to this case was declared by the Appellate Court of Indiana in Puritan Bed Spring Co., 120 N. E., 417, as follows: "Appellant concedes, and correctly so, that where an employee affected with disease receives a personal injury under such circumstances that the act in question would entitle him to compensation had there been no disease involved, and such disease is materially hastened to a final culmination by the injury, there may be an award, if it is shown that such injury was the result of accident; that in such cases the court will not undertake to measure the degree of disability due respectively to the disease, and to the accident, but the consequence of the disease will be attributed solely to the accident."

In this case, previous existing disease was the contributing cause which helped produce death. We entirely agree with the doctrine of this case. This court would not for a moment undertake to differentiate between a direct cause and a contributing cause, where a pathological predisposition to infirmity or disease was aggravated or brought into activity resulting in death by reason of the contributing injury. Although a man may be very weak from predisposition, it is none the less homicide to inflict violence sufficient to kill him, though similar violence might not seriously affect a well and vigorous man.

But the above is not the case before us. It cannot be said that the post-operative shock of the epigastric operation would have produced death; it is not so claimed. In other words, the operation upon the epigastric hernia would not have affected, nor have been affected by the existence of the inguinal hernia at all, as a predisposition to weakness, if the latter had been let alone.

The chairman cites as the legal basis of his finding, *Hoffman* v. *Pierce Arrow Motor Car Co.*, a case decided by the Industrial Accident Commission of New York, but upon appeal the decision was reversed as will appear in 183 N. Y. Supp., Page 766.

We are unable to find that any causal relation between the injury and the death of the plaintiff's decedent is shown.

Appeal sustained.
Petition dismissed.
Compensation denied.

FRANK E. MANSFIELD, Adm'r *vs.* T. E. GUSHEE.

Knox. Opinion July 11, 1921.

Assumpsit on account annexed supported by affidavit, R. S., Chap. 87, Sec. 127, entitles plaintiff to judgment, unless rebutted. Delivery or performance to be shown by best evidence obtainable. Shopkeeper's books of account must be identified by person making entries, if living, not insane, and within jurisdiction of court. Books and suppletory oath not admissible until defendant's liability established, if delivery was to, or services rendered for, third parties. If person making entries is the only person with knowledge of delivery, or performance, and is dead, insane, out of jurisdiction, or unable to testify, proof of handwriting, that books kept in regular course of business, such entries made in line of his duty or practice, and that they were made at or near time of delivery, or performance, may be sufficient proof of delivery or performance. In actions between living parties, any person having personal knowledge is a competent witness as to delivery or performance. The testimony of any party, in an action between a living party and the representative of a deceased person who made the entries, except in case of bulky articles, and services requiring assistance, if he has knowledge of the fact, whether the living party or not, is admissible on the question of delivery or performance, but if assistance was required in delivery, or performance, such assistant, if living, sane, and within jurisdiction of the court and able to testify, should be called. Statute of limitation can not be invoked unless there has been a period of at least six years, during which there are no items, either debit or credit.

The plaintiff in an action of assumpsit on account annexed supported by the affidavit provided under Sec. 127, Chap. 87, of the R. S., is entitled to judgment unless rebutted by competent and sufficient evidence.

Shopkeeper's books of account are not admissible unless identified by the clerk or servant who made the entires, when it is not shown that such clerk or servant is dead, insane, or absent from the jurisdiction of the court. Failure to carry out the amount of any item does not effect the competency of the entries if they are otherwise unobjectionable.

Where goods are delivered to, or services rendered for third parties, and there is a question about the defendant being chargeable, the book and suppletory oath are not admissible unless proof of the defendant's liability is furnished aliunde.

(a) Except as qualified by rule (c), a book of original entries supported by a suppletory oath, but without an evidential statement as to delivery of the goods or performance of the services, is not sufficient evidence of delivery or performance.

(b) The delivery of goods sold or performance of services rendered must be shown by the best evidence obtainable, and if the person making the entries has no personal knowledge of delivery or performance it must be proved by other competent evidence.

(c) Where the person making the entries is the only person having knowledge of the delivery of the goods or the performance of the services, and he is dead, insane, or out of the jurisdiction of the court, or unable to attend court to give his testimony or give his deposition, upon proof of his handwriting and that the books were kept in the regular course of business, and that it was his duty or practice to make such entries at or near the time of delivery of goods or performance of services, the books themselves, if they otherwise appear to be regularly and fairly kept may be sufficient proof of delivery of goods or services performed.

(d) In actions between living parties, any person having personal knowledge of the delivery of the goods or the performance of the services, whether he be a party, clerk, servant or agent, and even though the goods or the services be of such a nature as to require aid in their delivery or performance, is a competent witness upon the question of delivery or performance.

(e) In actions between a living party and the representative of a deceased person, except in the case of bulky articles and services of such a nature as to require assistance in delivery or performance, the person making the entries, whether he be the living party or a clerk, servant or agent, if he has knowledge of the fact, may make oath to the delivery or the performance of the services.

(f) In actions between a living party and a representative of a deceased person, if the entries were made by the living party and the goods were of such a bulky nature or the services rendered were of such a character as to make it impossible that delivery was made without aid or the services performed without assistance, then the person rendering such aid or such assistance, if living, sane, within the jurisdiction of the court, and able to attend and give testimony should be called under the best evidence rule.

8. Under the provisions of R. S., Chap. 86, Sec. 90, the statute of limitations does not operate until there has been a period of at least six years during which there are no items, either debit or credit, and until such six year period expires the entire account is alive and suable.

On report. An action of assumpsit on account annexed brought by plaintiff as the administrator of the estate of John C. Curtis, late of Camden, to recover $1,345.16, alleged to be due intestate at the time of his decease. Defendant pleaded the general issue and the statute of limitations. The case was referred to an auditor. Plaintiff filed with the auditor the affidavit provided in R. S., Chap. 87, Sec. 127. A report was made by the auditor, and by agreement of

the parties the case was reported to the Law Court to render such final judgment therein as the legal rights of the parties require. Judgment for plaintiff for $736.22 with interest thereon from date of writ.

Case is fully stated in the opinion.

Charles T. Smalley, for plaintiff.

J. H. Montgomery, for defendant.

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

PHILBROOK, J. The plaintiff, a resident of Boston, is the administrator of the goods and estate of J. C. Curtis, deceased, the intestate in his lifetime having been a shopkeeper in Camden, Maine. This action is brought to recover an alleged balance due for goods sold and delivered according to an account annexed which extended over a period of more than fifteen years. In the court below, an auditor was appointed to investigate accounts, examine books and vouchers, hear the testimony and state the account. After considering the evidence offered, and the legal controversies of the parties, the auditor made several alternative reports, the amounts varying according as certain legal contentions should or should not obtain, and thereupon the case was reported to this court with the stipulation that the Law Court, upon so much of the evidence as is legally admissible is to render such final judgment as the rights of the parties require.

Plaintiff's Affidavit. In support of the entire account, the plaintiff offered the affidavit provided by R. S., Chap. 87, Sec. 127 which provides that:

"In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the suit, with all proper credits given, and that the prices or items charged therein are just and reasonable, shall be prima facie evidence of the truth of the statements made in such affidavit, and shall entitle the plaintiff to the judgment, unless rebutted by competent and sufficient evidence. When the plaintiff is a corporation, the affidavit may be made by its president, secretary or treasurer."

We have had occasion to discuss this statute recently in *Haswell* v. *Walker,* 117 Maine, 427, where the plaintiff was the living party, and the defendant was the representative of a deceased person, and we there held that such an affidavit of the living party could not be introduced in evidence because of other provisions of statute and common law excluding the testimony of such living party when the lips of his real opponent were sealed in death. But that is not the situation in the case at bar. Here the representative party seeks to testify by use of the affidavit provided by statute. The rule relating to testimony which may be given in suits by or against executors and administrators is not a bar to his right to speak. R. S., Chap. 87, Sec. 117, relating to evidence which is admissible or inadmissible in such suits provides that:

"In all cases in which an executor, administrator or other legal representative of a deceased person is a party, such party may testify to any facts admissible upon the 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 leads to further examination of the evidential effect of the statute just quoted, which makes the affidavit of a plaintiff prima facie evidence in actions brought upon an itemized account annexed to the writ. Counsel for defendant declares it to be sweeping legislation and says that if full play is given to the language in which it is clothed it is capable of "iniquitous transformations and fantastic accomplishments." But more than fifty years ago, in *State* v. *Hurley,* 54 Maine, 562, our court declared that the power of the Legislature to change or modify existing rules of evidence, or to establish new ones, has been exercised too long to be a matter of doubt. In a still earlier case, *Berry* v. *Lisherness,* 50 Maine, 118, the court said that the Legislature may prescribe what evidence shall be received in courts and the effect of that evidence, and may restrict or enlarge such rules. In *Wade* v. *Foss,* 96 Maine, 230, this power was held to be such that even Congress could not interfere with it so far as its application to state courts was concerned, a doctrine which was affirmed in *Wade* v. *Curtis,* 96 Maine, 309. But in *State* v. *Intoxicating Liquors,* 80 Maine, 57, referring to a statute making the payment of a special tax as a retail liquor dealer prima facie evidence that the person paying such tax is a common seller of intoxicating liquor, the court said:

"We have many similar statutes, in some of which the words used are 'prima facie evidence,' and in others the words are 'presumptive evidence.' We cannot doubt that these phrases are intended to convey the same idea. . . . We are not aware that either of them has ever been construed as making it obligatory upon the jury to find a defendant guilty, whether they believe him to be so or not. They mean that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does, in fact, satisfy them of his guilt beyond a reasonable doubt, and not otherwise. It would not be just to the members of the Legislature to suppose that, by any of these enactments, they intended to make it obligatory upon the jury to find a defendant guilty whether they believe him to be so or not."

In the last analysis, therefore, the probative effect of the evidence declared by statute to be prima facie, is the touch stone of the principle thus laid down, and this test is in harmony with text book writers and courts of highest authority. Starkie (1 Starkie on Ev., 479) says that prima facie evidence is that which raises such a degree of probability in its favor that it must prevail, if it be credited by the jury, unless rebutted or the contrary proved. In *Kelly* v. *Jackson*, 31 U. S., (6 Pet.) 622; 8 L. Ed., 523; a case frequently cited, the court held that:

"In a legal sense, prima facie evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive, to found their verdict as to the fact."

It is therefore apparent why the probative effect of the affidavit above referred to must always be considered, even though it be declared by statute to be prima facie evidence. In the case at bar the affidavit is made by the plaintiff, because he is the only person authorized by statute to make it, except in case of a corporation, but there is nothing in the record to show that he, a resident of Boston, ever had the slightest opportunity to acquire any familiarity with the business of the decedent carried on at Camden. How then could he state, as of his personal knowledge, that the account annexed to the writ is "a true statement of the indebtedness existing between the parties to the suit, with all proper credits given, and that the prices or items charged therein are just and reasonable?" Such affidavit, we hold to be admissible under R. S., Chap. 87, Sec. 117, and its

offer and admission would entitle the defendant to testify under the limitations of said chapter and section; but in view of the conditions of this particular case we cannot concede that because of it, or the statute authorizing it, we, sitting with jury powers, under the stipulations accompanying the report, are obliged to find a full verdict for the plaintiff whether we believe him to be entitled to such verdict or not. Before we leave this branch of the case it should be observed that the defendant laid much stress upon the order of procedure, claiming that the affidavit should have been presented before pleadings were filed. This claim is not well founded. If properly admissible it constitutes part of the evidence and should follow the pleadings.

The suppletory oath. From the report of the auditor, it appears that the suppletory oath was made by J. T. Smyth, who had been in the employ of the decedent during the entire period of time covered by the account and whose duties had been general about the decedent's store. He makes oath that the books offered "are the original books of account kept by the said J. C. Curtis in his lifetime; that part of the entries therein made were made by me at or near the time they purport to have been made, and that the others were written by clerks working with me at the time, and that the articles therein named were then delivered at the several times therein stated."

To the form of this oath, and the competency of the witness to testify under it in such form, the defendant seasonably objected. If this oath appeared alone we should be forced to hold that it does not satisfy the rules of law relating to admission of shop books which require identification by a suppletory oath.

"It is well recognized that the mere production of books of account, without identification, is not sufficient to entitle them to admission. They must be accompanied by the oath of the party who made the entries, or by the oath of some person who knew the entires to be correct. The general rule in this respect is that the entries in the book should be proved by the clerk or servant who made them, if he is alive and can be produced. If the entries are not so verified by the person who made them, and it is not shown that such person is dead or absent from the country, they are inadmissible." 10 R. C. L., Page 1175, and cases there cited. *Dunn* v. *Whitney*, 10 Maine, 9; *Tebbetts* v. *Haskins*, 16 Maine, 283; *Kent* v. *Garvin*, 1 Gray, 148; *Miller* v. *Shay*, 145 Mass., 162; *Gould* v. *Hartley*, 187 Mass., 561;

Delaney v. *Framingham Gas Co.*, 202 Mass., 366; *Atlas Shoe Co.* v. *Bloom*, 209 Mass., 563.

If it be shown that the clerk making the entry is dead, and his handwriting is proved, the books are admissible if, on inspection, they appear to have been kept fairly, and the entries to have been made as he had occasion to make them in the way of his agency, and relate to the matter in controversy between the parties. *Dow* v. *Sawyer*, 29 Maine, 117; Chamberlayne on Evidence, Vol. IV, Section 3069, and cases cited. The same rule that proof may be made of the handwriting of the entrant when deceased, is applied when he has become insane, is unable to attend court on account of illness, is beyond the jurisdiction of the court, or when for any cause it is impossible to procure his testimony. Chamberlayne, supra, Section 3070, and cases cited. *Mitchell* v. *Belknap*, 23 Maine, 475.

But we find from the report of the auditor, to which no objection upon this point appears, that the parties, by their counsel, agreed that the testimony of the other clerks of the decedent, in whose several handwritings the other charges were made, would be of like character as Mr. Smyth's testimony, under a like suppletory oath, and subject to the same objection; and that the auditor might give it like consideration. In other words it would appear that the suppletory oath in this case might be regarded as a composite oath, so to speak, made up from the identifying ability of all the clerks whether present or absent. If all the entries had been made by Smyth, and he had so testified, he would be the proper person to make the suppletory oath under the rules of law already referred to, and under this agreement of counsel as to absent clerks we think the form of the oath could not be successfully objected to.

The defendant, further objecting as to a portion if not all of the balance alleged to have been due, under the testimony before the auditor, raises four questions, the answers to which are essential in determining the rights of the parties.

Question 1. Are such accounts, with the suppletory oath, sufficient to charge the defendant with liability when no prices are carried out in the books.

Question 2. Are such accounts, with such oath, sufficient to charge the defendant with liability when delivery had been made to persons other than the defendant.

Question 3. Are such accounts, with such oath, sufficient to charge the defendant with liability when made directly to the defendant without any accompanying evidence as to delivery.

Question 4. What part of the account, if any, is affected by the Statute of Limitations.

Before attempting to answer these several questions we desire to make a few general observations. We must never lose sight of the fact that the admission of shop books in evidence, when supported by suppletory oath, far antedates the statute provisions regarding testimony admissible in suits by or against administrators. The rule goes back to the common law of former time when a party was incompetent to be a witness in his own behalf. The value and importance of the shop book rule in those early days was readily perceived. In many cases the book would be, not alone the only evidence, but would be the best evidence of sale and delivery of goods, or the rendition of services, which could be offered. As time passed the value of the rule was recognized by all courts in their gradual extension of its application beyond the narrow confines of the earlier days. This extension has given rise to the claim of inconsistency in judicial decisions. The limits of an opinion would prevent extended review of the development of these applications, or modifications of the early shop book rule, but a full and interesting discussion thereof may be found in Chamberlayne's Modern Law of Evidence, Vol. IV, beginning with Section 3054. Hence it is not our purpose or intention to provide rules applicable to all objections which may arise under the much discussed shop book rule. We shall only attempt to answer the four questions above stated, as raised in the case at bar.

Question 1. In *Witherell* v. *Swan*, 32 Maine, 247, a suit brought by a surveyor of lumber to recover for his services it was held that "the book must also show the amount of the claim." Aside from this case, decided in 1850 when the shop book rule was more rigid than now, we are not aware of any case in which our court has passed upon this question. On the other hand in a note to *Post* v. *Kennison*, 52, L. R. A. at Page 575, it is held that the fact, that in items for goods sold and delivered, or for labor performed, no prices are carried out, does not affect the competency of the entries if they are otherwise unobjectionable. The fair presumption is that when the sale was made, or the labor performed, no price was agreed upon; and hence its value may be established by proof independent of the books.

This note is based upon the authority of *Remick* v. *Rumery*, 69 N. H., 605; 45 Atl., 574; *Jones* v. *Orton*, 65 Wis., 9, 26 N. W., 172; *Steele* v. *Manufacturing Co.*, 4 Kulp, (Luzerne Legal Register), 414. Upon the reasoning in these cases, especially in *Remick* v. *Rumery*, we think this is the correct rule, and so decide, although a contrary view is held in a very early New Jersey case, *Hagerman* v. *Case*, 4 N. J. L., 424, decided in 1817 when the rules regarding shopkeeper's books as evidence were much more restricted than now.

According to the report of the auditor, there appeared charges in the account annexed, where no prices had been carried out in the original book of entries, amounting to $184.74 and it does not appear that there was any proof independent of the books to show what those prices should have been. This amount, therefore, we deduct from the total amount which the plaintiff seeks to recover.

Question 2. This question has been answered in the negative in *Silver* v. *Worcester*, 72 Maine, 322, where it was held that in cases where the goods are delivered to third parties, or the services rendered at the call, or for the apparent benefit, of third parties, and the controversy between the litigants is not merely as to amount and quantity, but whether the defendant is chargeable, the book and suppletory oath are held not to be admissible, unless proof of the defendant's liability is furnished aliunde. In *Mitchell* v. *Belknap*, supra, the same doctrine was announced in an action of assumpsit for goods sold and delivered where it was admitted by the plaintiffs that the defendant did not personally receive any of the articles nor was he present at the delivery thereof. In *Soper et al* v. *Veazie*, 32 Maine, 122, where the plaintiff offered the book of accounts with the suppletory oath of one of the plaintiffs, William R. Soper, who testified that none of the articles charged were delivered to the defendant but to three other persons, the shop book was excluded. But it was there held that the book would not have been objectionable on account of the articles therein charged not having been delivered to the defendant personally if there had been evidence tending to show that they were received by any one who was his agent authorized for that purpose. It does not appear that there was any evidence presented to the auditor outside of the book of original entries which would tend to show that the portion of goods now under consideration were either delivered to the defendant or to any one who was authorized to receive them in his behalf. The items in the account annexed

which would come in this class amount to $393.65 and this sum also is deducted from the amount for which the plaintiff brought suit. It might with propriety be added that the rule which we adopt, and which our court has heretofore adopted as shown by the citations just above given, is also the rule in other New England States; *Webster* v. *Clark*, 30 N. H., 245; *Somers* v. *Wright*, 114 Mass., 171; *Churchill* v. *Hebden*, 32 R. I., 34, as well as by the great weight of authority in other jurisdictions.

Question 3. This involves the inquiry as to whether shop books, containing proper charges against proper parties, accompanied by the suppletory oath of the entrant, are sufficient to prove delivery of the goods, or performance of the services, for which the charges are made. Two of the leading text book writers on the Law of Evidence have answered the question with certain qualifications. Greenleaf on Evidence, Vol. 1, Section 117 says that:

"In such cases the books are held admissible as evidence of the delivery of the goods therein charged, where the nature of the subject is such as not to render better evidence attainable."

Chamberlayne on the Modern Law of Evidence, Vol. IV, Section 3113, says:

"The relevancy or regularity being established, books of account are admissible to prove a charge for merchandise sold and delivered. Not only are such books prima facie evidence of the sale and delivery of goods, but also of the prices for which the same were sold."

This statement is supported by a very large number of authorities, but in Section 3114 of the same work, the author further says:

"An entry in a shop book may be inadmissible to show a sale and delivery where the article was so bulky that it would be impossible to have delivered it without some aid. In such a case, the book is not regarded as what is called the best evidence of the fact to be proved. This may be better established by the testimony of those who assisted in the delivery when their presence can be procured."

The rule seems to be well established in the Massachusetts Courts that the shop books accompanied by the oath of the entrant are not evidence of delivery where the one actually making delivery is a person other than the entrant, holding that the knowledge of the entrant is hearsay evidence obtained from the one who actually delivered the goods and that the oath of the latter is necessary to prove delivery. *Atlas Shoe Co.* v. *Bloom*, 209 Mass., 563; *Kent* v.

Garvin, 1 Gray, 148; *Gould* v. *Hartley,* 187 Mass., 561; *Miller* v. *Shay,* 145 Mass., 162.

Because it is claimed that there is lack of harmony in the decisions of our own court touching this question of proof of delivery by shop books and suppletory oath, we have examined with some care all the reported cases in this State in which reference has been made to this question. We trust that in the discussion immediately following it will be constantly borne in mind that we are considering only the question of proof of delivery of goods sold or services performed, where the shop book rule with suppletory oath is under consideration.

The earliest case considered by our court is *Dunn* v. *Whitney,* 10 Maine, 9. The case was decided in 1833, which was at a time when, under the common law, a party could not be a witness but the ancient shop book rule was in force as an exception to this rule of disability of a party to testify. The court used the following language from the case just above referred to:

"The general principle of the common law, that the best proof should be produced which the nature of the transaction will admit of, is still adhered to in all cases with unyielding pertinacity. But it was early settled that the admission of tradesmen's books, to a certain extent, and fortified by the oath of the party by whom they were kept was no violation of this salutary principle. When the tradesman had a clerk who delivered the articles, his testimony was the best evidence and, if obtainable, could not be dispensed with. In such a case the oath of a party could under no circumstances be received. In England, therefore, where trade has for centuries been carried on mostly if not entirely in large establishments where disinterested evidence relating to the ordinary business of the tradesman may be easily obtained through the clerks and others by him employed, the oath of the party in support of his books is never admitted. It is not considered the best evidence which can be produced. But in a country where every tradesman is his own clerk and from his limited business and profits must necessarily be so, as was generally the case in the early settlements of this country and still continues to be the case in the new settlements, the sale and delivery of the usual articles of merchandise cannot ordinarily be proved in any other manner than by the books and suppletory oath of the party. Such evidence is considered the best in the power of the party to produce, or which the nature of the case will admit of, and

to require more would have a ruinous effect upon his business. Still, however, as the evidence is from the interested party himself and repugnant to the general rules of evidence, it is to be admitted under every possible guard and security, and is never to be received in support of such demands as in their nature afford a presumption that better evidence exists. Whenever it does appear from the nature of the transaction or from disclosures in the case, that other evidence is obtainable the law requires its production. If the articles were delivered by a clerk, by him must the fact be proved. If delivered to an agent or servant, he is the proper witness. And if sold and delivered in large quantities the presumption is that persons other than the party making the sale would be likely to have knowledge of it and, therefore, the books of the seller are inadmissible."

In *Leighton* v. *Manson*, 14 Maine, 208, after discussing with approval *Dunn* v. *Whitney*, supra, the court remarked:

"The necessity, then, for the oath of the party in aid of his books seems to exist only where he delivered the articles himself. If the articles are of such bulk or weight that the person making the entry could not reasonably be supposed to have delivered them without assistance, the presumption would arise that better evidence of delivery might be produced; and the reason for admitting his own testimony would cease. Perhaps no better rule for the guidance of judicial tribunals will be found than for the Judge to decide upon inspection of the items of the account, whether the articles charged could ordinarily have been delivered without the assistance of other persons, and admit or reject the testimony according as he may conclude that the articles could or could not have been so delivered."

In *Mitchell* v. *Belknap*, supra when discussing *Dunn* v. *Whitney*, supra, the court differs from the latter case in holding that it is not necessary to summon as a witness, the servant or agent of the purchaser of the goods to prove delivery and we think this is the better doctrine. In this case also the court says that in this State the books and oath of the party have been admitted, on appearing to be regularly kept, to prove the delivery of goods to the other party, notwithstanding he may have had a clerk in his shop or others may have been present at the time of the delivery. But the learned Justice making this statement did not cite cases or authorities in support of his declaration. In *Dwinel* v. *Pottle*, 31 Maine, 167, the plaintiff relied solely upon a charge made upon his shop book and his supple-

tory oath. As he did not, however, swear to a delivery of the articles charged by him the court held that he did not present a case in which his book was competent evidence to be submitted to a jury. In *Codman* v. *Caldwell,* 31 Maine, 560, where a party produced his book with suppletory oath, the court distinctly said that the plaintiff may testify to the delivery of goods. In *Soper* v. *Veazie,* supra, the plaintiff in addition to his suppletory oath was permitted to testify as to delivery, although as we have seen, this was one of the cases where delivery to a person other than the defendant without knowledge or consent of the defendant was insufficient to charge the latter with liability. In *Furlong* v. *Hysom,* 35 Maine, 332, the court used this language:

"In the absence of other testimony, the shop books of the plaintiff with his suppletory oath were competent evidence for the consideration of the jury to prove the sale and delivery of the goods."

This is stating the proposition somewhat differently than it had been stated by our court up to that time and perhaps might seem a somewhat conflicting statement, but the expression "in the absence of other testimony" may have been intended to relate to the "better evidence rule" referred to in previous cases. In *Towle* v. *Blake,* 38 Maine, 96, Mr. Justice Cutting said that it was unnecessary to narrate the rise, progress, application and extent of the rule of law admitting account books, with suppletory oath, as competent evidence, and quaintly added "Curiosity can be abundantly gratified upon that point on examining the following cases." He then gave a fairly representative list of cases decided in the New England Courts up to that time. The learned Justice was evidently not in sympathy with the growing leniency of the courts toward the shop book rule declaring it to be one of a dangerous nature and which should be limited as the necessity diminished. He summarizes the rule in these words:

"It should appear that the book is the original book of entries and the charges made therein at or near the time of the delivery of the articles or performance of the services, and of such a nature that they could not ordinarily be proved by other evidence."

Soon after this opinion was handed down, the Legislature by Chapter 266, Public Laws 1856, enabled parties to suits and other interested persons to become witnesses, a radical departure from common law rules of evidence, but care was taken to provide that

the act should not apply to suits by or against executors or administrators. In other words, the plaintiff or defendant being a living party and the other party a representative of a dead person, the living one was still excluded from testifying generally but the ancient shop book rule still applied to his testimony. Hence we find in *Kelton* v. *Hill*, 58 Maine, 116, a suit brought by an administrator against a living person, the court remarked that as the defendants could not testify generally, their testimony must be restricted to what could be proved by their books and suppletory oath.

An oft-cited case is *Silver* v. *Worcester*, 72 Maine, 322. This was a suit brought by a living person against the representative of a deceased person. The learned Justice who delivered the opinion in that case discussed the ancient shop book rule as affected by the rule which disqualified parties in suits by or against representatives of deceased persons and, referring to limitations of testimony in such cases, declared that in certain directions those limitations are distinct and clearly established, while in others there is a border land of debatable questions which is constantly enlarging, notwithstanding the repeated declarations of courts that such enlargements should not be extended unless in cases of necessity and are not to be favored. He concedes that there are some apparent discrepancies in the decisions of the courts touching these matters but holds that they have seldom gone beyond the requirements of necessity.

We believe that we have thus brought to attention all the cases to be found in our reports bearing upon the question of proof of delivery of goods sold, or performance or services rendered, as charged in shop keeper's books which are supported by the suppletory oath of the party presenting the books or of someone in his behalf; and conclude that except as hereinafter stated, in addition to his books, evidence of delivery of goods or of services performed must always be furnished; that a party to a suit, even before the removal of the disqualification of parties as witnesses, has always been permitted to testify as to delivery of goods or the performance of services when he kept the books and was cognizant of the facts, except in the case of bulky articles or where the services of necessity would require assistance in the performance; and that he was permitted to give such evidence as a part of the suppletory oath or as a further modification of the common law rule disqualifying parties as witnesses. This last question is now important only in actions between living parties

and the representatives of deceased persons. If the action is between living parties, either party may now testify in chief to all the facts within his knowledge and relevant to the issue.

Without attempting to explain or harmonize some apparent differences in the decided cases, the court is of the opinion that the following rules should now obtain in our jurisdiction as to proof of delivery or of services performed in connection with the use of shop books as evidence.

(a) Except as qualified by rule (c) a book of original entries supported by a suppletory oath, but without an evidential statement as to delivery of the goods or performance of the services, is not sufficient evidence of delivery or performance.

(b) The delivery of goods sold or performance of services rendered must be shown by the best evidence obtainable, and if the person making the entries has no personal knowledge of delivery or performance it must be proved by other competent evidence.

(c) Where the person making the entries is the only person having knowledge of the delivery of the goods or the performance of the services, and he is dead, insane, or out of the jurisdiction of the court, or unable to attend court to give his testimony or give his deposition, upon proof of his handwriting and that the books were kept in the regular course of business, and that it was his duty or practice to make such entries at or near the time of delivery of goods or performance of services, the books themselves, if they otherwise appear to be regularly and fairly kept may be sufficient proof of delivery of goods or services performed.

(d) In actions between living parties, any person having personal knowledge of the delivery of the goods or the performance of the services, whether he be a party, clerk, servant or agent, and even though the goods or the services be of such a nature as to require aid in their delivery or performance, is a competent witness upon the question of delivery or performance.

(e) In actions between a living party and the representative of a deceased person, except in the case of bulky articles and services of such a nature as to require assistance in delivery or performance, the person making the entries, whether he be the living party or a clerk, servant or agent, if he has knowledge of the fact, may make oath to the delivery or the performance of the services.

(f) In actions between a living party and a representative of a deceased person, if the entries were made by the living party and the goods were of such a bulky nature or the services rendered were of such a character as to make it impossible that delivery was made without aid or the services performed without assistance, then the person rendering such aid or such assistance, if living, sane, within the jurisdiction of the court, and able to attend and give testimony should be called under the best evidence rule.

Question 4. This relates to the effect of the statute of limitations upon the rights of the parties. The last item proved in the account was under date of July 17, 1917, and the action was begun October 18, 1918. The defendant claims that no recovery can be had for any items charged on any date earlier than July 17, 1911, that being six years prior to the last item proved in the account. Under the provisions of R. S., Chap. 86, Sec. 90, and the interpretation of that statute by this court in *Rogers* v. *Davis*, 103 Maine, 405, this contention cannot prevail. Referring to the revision of the statutes in 1857, Chap. 81, Sec. 99, we find it provided that:

"In all actions of debt or assumpsit to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to accrue at the time of the last item proved in such account."

In 1867, by the Public Laws of that year, Chapter 117, the Legislature passed "An Act defininining a mutual and open account current" in which it amended the statute just cited by adding the following words:

"And it shall be deemed a mutual and open account current when there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both."

The statute in this amended form, with slight verbal changes, has been retained through all subsequent revisions of the statute, and appears in the latest revision, that of 1916, Chap. 86, Sec. 90.

In *Rogers* v. *Davis*, supra, the court expounded this statute in the following words:

"The statute begins to run with the last item of the account, and it makes no difference whether it is a debit or credit item, or which party kept or proved it, or whether it appears in the plaintiff's credits or in the defendant's debits, if only it be on account of mutual dealings between the parties which have not been settled. It is no longer a question of the recognition of the account and of the renewal of the

promise to pay it by making a partial payment on account of it. . . . The statute was evidently intended to preserve the right of action upon a mutual unsettled account for six years after the last item, no matter how far back the account commenced. Until there has been a period of at least six years during which there are no items, either debit or credit, the account is alive and suable."

It appears from the auditor's report that there were some items in the account annexed which appear on the books as "Bal. on Mdse." and "Mdse" amounting to sixteen dollars and seventy-four cents ($16.74), which he very properly disallowed, and which we disallow.

Finally, by the application of the doctrines herein declared, and from examination of the auditor's findings, we determine the amount due from defendant to plaintiff to be as follows:

Deducting credits allowed by the auditor, $492.85 and the sum of $16.74 on account of "Mdse." charge, we have a balance of	$1,314.61
Deducting from this balance the sum of $184.74, explained in answer to Question 1, and the sum of $393.65, explained in answer to Question 2	578.39
Leaves a balance of	$736.22

and for this sum, together with interest thereon from date of the writ, the plaintiff shall take judgment.

CARLTON O. GRANT et al. *vs.* LEWIS DALTON.

Aroostook. Opinion July 12, 1921.

A real estate broker until he has brought negotiations to a successful conclusion according to the terms given by the owner by producing a customer willing and prepared to pay the price on terms given, or if no terms given, on terms satisfactory to the owner, is not entitled to any commission. The owner, if acting in good faith, may withdraw the property for sale from the broker's hands any time before completion of negotiations to a successful conclusion, even though the owner receives some benefit from the results of the broker's efforts.

A real estate broker to be entitled to a commission must produce a customer not only willing, but prepared to purchase and pay for the property at the price and on the terms given by the owner to the broker; or if no terms were then made, on terms satisfactory to the owner.

Until a broker produces such a customer the owner may at any time, if acting in good faith, withdraw the property for sale from the broker's hands; and even though he sells the property later to a customer produced by the broker and thereby avails himself of some of the results of the broker's efforts, he is not liable to the broker for a commission on the sale, if the property was withdrawn by him in good faith and before the broker had brought the negotiations to a successful conclusion.

A broker's right to a commission is fixed at the time of his discharge, if done in good faith. If at the time of his discharge his efforts have not been successful, he has not earned a commission.

On motion by defendant. An action of assumpsit on account annexed to recover commission as real estate brokers, plaintiffs alleging that they entered into an arrangement with defendant to sell for him his house at a stipulated price, and that it was further stipulated that their commission was to be $200. The question involved was as to whether plaintiffs produced a customer willing and prepared to purchase and pay for the property at the price and on terms given by defendant. A verdict of $208 was returned by the jury, and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

Case is stated in the opinion.

W. S. Lewin, for plaintiff.

Herschel Shaw, for defendant.

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

WILSON, J. An action to recover a broker's commission for the sale of real estate. The jury found for the plaintiffs in the sum of two hundred and eight dollars. The case comes before this court on a motion for a new trial on the usual grounds. The motion must be sustained.

The defendant placed certain real estate in the hands of the plaintiffs who were real estate agents for sale at the price of forty-four hundred dollars, to net the defendant forty-two hundred dollars, the plaintiffs to retain two hundred dollars as commission or compensation for their services.

On April 3rd, 1920, the plaintiffs introduced to the defendant one Robert Haley who was acting for his mother and who together with her examined the property on the following day. The property and price were satisfactory to them but they were not able to pay cash. On the same or the following day Haley acting for his mother offered to pay down five hundred in cash and secure the balance of the purchase price by a mortgage of the property and by other collateral which was refused by the defendant.

On the following day or the day after, the defendant notified the plaintiffs that he had decided not to sell the property. Later by a few days Haley with plaintiff again called on the defendant and offered to pay an additional sum in cash and give a satisfactory mortgage for the balance. The defendant, however, while raising no objections to the terms offered, told Mr. Haley that he and his wife had decided not to sell. All negotiations through the plaintiffs thereafter ceased.

A few days later the defendant was approached by another real estate agent then acting for the same customer and a sale was later consummated at the price of forty-five hundred dollars upon terms satisfactory to both parties.

Upon this state of facts the verdict cannot stand. The jury, we think, must have found its verdict on the grounds that a later sale to their customer entitled the plaintiffs to their commission. Such is not always the case.

A broker to be entitled to commission must produce a customer not only willing but prepared to purchase and pay for the property

at the price and on the terms given by the owner to the broker. *Smith* v. *Lawrence,* 98 Maine, 92, 94. The defendant testified in this case that he talked cash with the plaintiffs, which was not denied. In absence of other terms being stated, a cash sale would be presumed. The plaintiffs to be entitled to a commission in this case were obliged to produce a customer who was prepared to pay cash or who offered and was prepared to purchase on terms satisfactory to the defendant.

Until a broker produces such a customer the owner may at any time withdraw the property from the broker's hands, and if he acts in good faith, the selling later to the same customer whether on the same or other terms does not entitle the first broker to a commission even though the seller may have thereby availed himself of the fruits of the broker's labors. *Smith* v. *Lawrence,* supra; *Garcelon* v. *Tibbetts,* 84 Maine, 148; *Hartford* v. *McGillicuddy,* 103 Maine, 224.

No question is raised in this case but that the withdrawal of the property from the plaintiffs was done in good faith. No effort was made by the defendant to sell the customer direct in order to save a commission, which is the usual indication of bad faith in such cases. On the other hand it appears to have been sold through another broker to whom it must be presumed a commission was paid.

That it was withdrawn before negotiations were successfully completed by the plaintiffs is, we think, clear from the testimony. The defendant so testified. He is corroborated by the witness Haley who testified for the plaintiffs, and the plaintiff Grant's own testimony, while not clear, appears on the whole to corroborate the defendant on this point, at least it is not inconsistent therewith. He also testified that if the property had not later been sold to the customer he should not have considered that they were entitled to a commission, thereby in effect admitting that at the time of the withdrawal the negotiations were not successfully completed.

A broker's right to a commission is fixed at the time of his discharge if done in good faith. If at the time his efforts have not been successful, he has not earned his commission. *Cadigan* v. *Crabtree,* 186 Mass., 7, 12, 13. The property having been withdrawn in good faith from the plaintiffs' hands before they had brought the negotiations to a successful conclusion by producing a customer willing and prepared to meet the defendant's terms, they cannot recover.

Motion sustained.
New trial granted.

JOHN F. SPRAGUE *vs.* WILLIAM L. SAMPSON.

Piscataquis. Opinion July 12, 1921.

Exceptions to the direction or omission of a presiding Justice must be noted before the jury retires. Exceptions lie only to some ruling by the presiding Justice. Remarks by counsel in addressing the jury are not themselves subject of exceptions, but if prejudicial should be taken advantage of by motion for new trial. Evidence of the effect of an alleged private nuisance on adjoining property as bearing on reasonable use, is admissible. Exceptions lie to the admission of a conclusion based on hearsay, if bearing on a material fact, being as objectionable as hearsay itself.

In an action for maintaining a private nuisance caused by noise and dust from a surfacing machine operated by a compressor in finishing granite bases for monuments, exceptions were presented by the plaintiff; (1) to the admission of evidence as to the effect or absence of any effect from noise and dust upon adjoining property and occupants other than that of plaintiff; (2) to the admission of a statement by the defendant in reply to a question whether he had investigated to determine whether there was any device on the market for lessening the noise and dust from such machines, that he had learned there was nothing; (3) to certain remarks of counsel for the defendant in his argument before the jury; (4) to certain instructions to the jury in response to an inquiry by one of the jurymen.

Exceptions to the direction or omission of a presiding Justice must be noted before the jury retires. A bill of exceptions allowing such exceptions as were seasonably taken does not properly bring before this court as a court of law an exception to a direction by the presiding Justice noted after the jury had retired.

Exceptions lie only to some ruling by the presiding Justice. Alleged improper remarks by counsel in addressing the jury are not themselves the subject of exceptions. Any prejudice resulting therefrom must be taken advantage of by a motion for a new trial.

The admission of evidence of the effect of noise and dust on adjoining property in an action for maintaining a private nuisance as bearing on the reasonableness of the use of the property alleged to be a nuisance is not error.

The admission of a conclusion based on hearsay, however, is just as objectionable as hearsay itself, and if bearing on a material fact cannot be excused as unprejudicial.

On motion and exceptions. This is an action on the case to recover damages resulting from an alleged private nuisance maintained by defendant on premises adjoining those of the plaintiff. Dust and noise produced by defendant's granite and marble works, constitute the alleged nuisance. Defendant pleaded the general issue. A verdict for defendant was returned. Plaintiff took four exceptions, and also filed a general motion for a new trial. Motion for new trial not considered. Exception sustained.

Case is fully stated in the opinion.

Hudson & Hudson, for plaintiff.

C. W. & H. M. Hayes, for defendant.

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

WILSON, J. The defendant conducts a monumental business in the Village of Dover, and since 1886 has occupied small buildings or sheds situated in the rear of buildings fronting on the main street of the village and surrounded chiefly by buildings devoted to business purposes, several of which, however, including the plaintiff's having the upper stories used as dwellings.

The building of the plaintiff was constructed in 1920. The lower story is used for offices and the second story as a residence. The plaintiff occupies the office on the first or ground floor fronting on the street and the office immediately in the rear as a law office and for literary work, he being a historical writer of note. The remainder of the first floor being also used for law offices.

At the time of the construction of the plaintiff's building the defendant was doing the lettering of monuments and the cutting of granite bases at the same place, but was doing the work with hand tools. In 1914 in keeping with the progress made in conducting such business, he installed a small surfacing machine for finishing the granite bases which is operated by compressed air supplied by another machine commonly known as a compressor.

The operation of both these machines of necessity causes considerable noise and dust especially the surfacing machine, which by reason of the dust resulting and its effect upon the workmen must be operated in an open shed or with open doors and windows.

The plaintiff contends that the operation of these machines in such close proximity to his building, the compressor being within

thirty-six feet and the surfacing machine within fifty-five feet, and being operated in a shed or building with the doors and windows open, with the attendant noise and dust, materially and unreasonably interferes with the reasonable use of his property and the "physical comfort of his existence," and is therefore a nuisance.

The case was submitted to a jury which found for the defendant. The case is now before this court on a motion for a new trial on the usual grounds and on plaintiff's bill of exceptions.

Four exceptions are presented for consideration: (1) to the admission of evidence as to the effect or absence of any effect from the noise and dust upon adjoining property and occupants other than that of the plaintiff; (2) to the admission of a statement by the defendant in reply to a question whether he had investigated to determine whether there was any device on the market for lessening the noise and dust from such machines, that he had learned there is nothing: (3) to certain remarks of counsel for defendant in his argument before the jury; and (4) to certain instructions to the jury in response to a question by one of the jurymen.

The last exception does not appear to be properly before us. No exception was taken to the instruction of the presiding Justice before the jury retired as required by Rule XVIII of this court. The bill of exceptions show that only such exceptions as were seasonably taken under this rule were allowed by the presiding Justice, hence the exception is not before this court for consideration; *Poland* v. *McDowell,* 114 Maine, 511.

The third exception must be overruled. Exceptions can only be taken to a ruling by the court. Improper remarks by counsel before the jury are not the subject of exceptions, and can only be taken advantage of by motion for a new trial by the party claiming to be prejudiced. In this case the court immediately instructed the jury to disregard the alleged improper remarks and no further requests in relation thereto were made by the plaintiff. Clearly there was here no ruling by the court to which exceptions would lie. *Sherman* v. *M. C. R. R.,* 86 Maine, 422, 424; *State* v. *Martel,* 103 Maine, 63; *Webster* v. *Calden,* 55 Maine, 165.

As to the first and second exceptions which are the only ones we may properly consider, the first should be overruled. The evidence as to the effect of the noise and dust on the adjoining property and occupants, or rather the absence of any effect from it was properly

admitted, not upon the question of whether the plaintiff and his property was affected, but upon the question of whether the use of such machines in the defendant's business under all the circumstances was a reasonable one, to which purpose it was limited by the presiding Justice.

The second exception, however, we think must be sustained. The question of whether there were devices on the market to lessen the noise and dust caused by such machines and whether the defendant had made all reasonable efforts to investigate this question was early raised in the trial of the case. If there were no such devices, the use of such machines, even with the noise and dust necessarily resulting, might be reasonable in the conduct of the defendant's business under the circumstances which the jury found to exist in the case, but if there were practical devices on the market which would lessen the annoyance to the occupants of adjoining property, the use of such machines without such devices might under the same circumstances be an unreasonable use and the noise and dust therefrom constitute a nuisance.

The defendant was properly allowed to testify that he had made inquiries whether any such devices existed, but in response to a question as to what he learned, said: "I learned there is nothing."

He might properly have been allowed to testify that he learned of nothing, since the failure to gain any information would have been a fact within his knowledge, and the only question then would be whether he had used reasonable diligence in prosecuting his inquiries. His answer, however, went farther and involved a conclusion based on hearsay, which is just as objectionable as hearsay itself; *Mason* v. *Tallman*, 34 Maine, 476; *State* v. *Butler*, 113 Maine, 1, 3. To permit evidence to go to the jury that there was no such device may have removed entirely from their minds the question as to whether the defendant's conduct of his business by the use of these machines in the manner in which they were used, if there was some practical means by which the noise and dust could be materially lessened, was a reasonable one, or as to whether the defendant had taken all reasonable steps to determine whether such a device was on the market, there being evidence in the case that a device was in use for removing the dust at least in larger plants.

It is urged that his testimony on this point was in the nature of expert testimony, but the defendant, if skilled in any trade, so far as

the evidence shows can only be regarded as a marble worker or granite cutter. He at least did not qualify as an expert in the operation of such machines and especially as to devices for the lessening of the noise or dust caused thereby. His testimony on this point must stand or fall on the same basis as that of any witness and if his statement appears to have been based on hearsay it should not have been allowed to stand.

The sustaining of this exception renders it unnecessary to consider the motion. It may be said, however, that while the question of whether noise and dust from these machines constitutes a nuisance is a question of fact peculiarly proper for determination by the jury under all the circumstances of the case, an inquiry by one of the jurymen of the court as to the necessary elements of a private nuisance indicated a lack of comprehension of the previous instructions of the court on this point, and the instruction read to the jury by the court in reply inadvertently contained a sentence which may have further added to the apparent confusion in the mind of this juryman. It was to this instruction that the plaintiff's fourth exception related, which was not seasonably taken. While the verdict may have resulted from this misunderstanding of the court's instructions, there was sufficient evidence upon which it might rest and this court is unable to say it was the result of misapprehension or is clearly wrong. The exception sustained while it does not go to the most vital part of the case, does involve a question out of which prejudice by the court's ruling very likely may have resulted to the plaintiff. *Pease* v. *Burrowes*, 86 Maine, 153, 170.

Entry will be,

Exception sustained.

SAMUEL COHEN *vs.* ALEXIS MORNEAULT.

Aroostook. Opinion July 14, 1921.

As a general rule a person is liable in damages for non-performance of an unqualified contract to do a lawful thing, nothwithstanding the performance may have been rendered impossible by inevitable accident subsequent to making of contract. But a contract may be qualified expressly or impliedly, depending on the intention of the parties as disclosed by the contract, as to constitute a defense. The measure of damages is the difference between the contract price and the market value at place of delivery at time of breach.

The defendant agreed to sell to the plaintiff a carload of potatoes to be delivered at the Harlem River. The car that he shipped for the evident purpose of performing this contract, while in the possession of the railroad company at Etna, Maine, was through accident totally destroyed by fire. The defendant did not offer the plaintiff any other potatoes to take the place of those destroyed but in effect disclaimed any obligation to do so.

Held:

1. That the destruction of the consignment did not relieve the defendant from liability to perform his contract.
2. That the plaintiff is entitled to judgment for damages measured by the difference between the contract price and the market value of the potatoes at the place fixed for delivery at the time of the breach.

On report. An action on breach of contract. January 3, 1920, the defendant residing at Grand Isle, Maine, entered into an agreement to deliver to the plaintiff at Harlem River, New York, a carload of potatoes in bulk at $3.65 per cwt., and on January 6, 1920, the defendant shipped a car of potatoes consigned to Harlem River, New York, in pursuance of such agreement. On January 7, 1920, while the car of potatoes was at Etna, Maine, in custody of the Maine Central Railroad Company, in transit, it was destroyed by fire through accident without any fault of defendant, and defendant refused to ship another car relying on the proposition that the destruc-

tion of the car of potatoes by fire relieved him from any further liability under the contract. By agreement of the parties the case was reported to the Law Court on an agreed statement of facts for full determination of the rights of the parties. Judgment for plaintiff for $575.66 with interest from date of writ.

Case is stated in the opinion.

A. B. Donworth, for plaintiff.

Shaw & Cowan, for defendant.

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

DEASY, J. The defendant contracted to sell to the plaintiff a carload of potatoes. To recover damages for non-delivery of these potatoes this suit is brought.

The contract was entered into through the agency of one A. F. Heald, a produce broker doing business in Boston.

It is evidenced by the following three communications all dated Jan. 3, 1920.

Telegram from Heald to Morneault. "Ship car bulk Sam Cohen Bronx Pro House New York Three sixty-five cwt. delivered Harlem River quick acceptance—"

Telegram from Moreault to Heald. "Message received accept offer will ship Tuesday."

Confirmation by mail. Heald to Cohen. This communication specifies the kind and quality, confirms the quantity as one car and the price as $3.65 cwt. delivered Harlem River. It contains these phrases "Shipping instructions prompt shipment delivery Harlem River allow inspection."

In sending the above quoted telegram to the defendant Heald was acting as agent for the plaintiff. In mailing confirmation he was acting as agent for the defendant. In both cases he was duly authorized. These facts are shown by stipulation.

On Jan. 6, 1920 the defendant shipped a car of potatoes consigned to order of Alexis Morneault destination Harlem River, New York. The bill of lading contained the direction "notify Sam Cohen at Bronx Prod House, N. Y." On Jan. 7, while the car of potatoes was at Etna, Maine, in custody of the Maine Central Railroad Company, in transit, it was through accident and without any fault of the

defendant totally destroyed by fire. It does not appear that the plaintiff had any knowledge of the accident until Jan. 28 when the defendant informed him by telegraph.

It is undisputed that the plaintiff has ever been ready to receive the potatoes and pay the agreed price, but that he has been offered none under the contract.

The facts as above recited are undisputed. The defendant does not claim that at the time of the fire the title to the potatoes had passed to the plaintiff. He contends, however, that the destruction of the consignment making it impossible to perform the contract according to its terms relieved him from liability.

The general rule is that when a person enters into an unqualified contract to do a lawful thing he will be held liable to pay damages for non-performance, notwithstanding an inevitable accident occurring after the making of the contract renders performance impossible.

The old and oft-cited case of *Paradine* v. *Jane*, Aleyn, 26 states the principle thus:

"Where the law creates a duty or charge and the party is disabled to perform it without any fault in him the law will excuse him,—but where the party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." 9 Cyc., 628.

"When a party voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen it becomes impossible to do the act or thing which he agreed to do." *Lorillard* v. *Clyde*, 142 N. Y., 462. See also to same effect the following cases:—*Chicago R. Co.* v. *Hoyt*, U. S. S. C., 37 L. Ed., 625; *Bigler* v. *Hall*, 54 N. Y., 167; *District* v. *Dauchy*, 25 Conn., 530; *Stevens* v. *Lewis Co.*, (Ky.), 185, S. W., 873; *Northern Co.* v. *Dodd*, (Tex.), 162 S. W., 946; *Oakland Co.* v. *Union Co.*, 107 Maine, 285; *Adams* v. *Nichols*, 19 Pick., 276.

But a contract may of course be so expressly qualified that impossibility of performance resulting from some unforeseen accident will constitute a complete defense; or it may be impliedly so qualified. It depends on the intention of the parties as disclosed by the contract. *Berg* v. *Erickson*, 234 Fed., 820; *District* v. *Dauchy*, 25 Conn., 536; *Hall* v. *District*, 24 Mo. App., 213; L. R. A. 1916 F. (Note), 52.

Contracts for personal service are generally by implication conditioned upon the continued life and health of the person who agrees to render the service. The death or disabling illness of such person excuses performance and provides a complete defense to an action for non-performance. *Dickey* v. *Linscott*, 20 Maine, 453; *Lakeman* v. *Pollard*, 43 Maine, 463; *Chapin* v. *Little Blue School*, 110 Maine, 415.

The authorities also generally hold that a contract to sell and deliver certain specific articles of personal property is impliedly conditioned upon the continued existence of the specific property which is the subject of the contract, and that an accidental destruction of it without fault of the vendor will excuse performance.

Dexter v. *Norton*, 47 N. Y., 65. (Sale of certain specific bales of cotton).

Walker v. *Tucker*, 70 Ill., 543. (Contract to work mine,—mine exhausted).

McMillan v. *Fox*, (Wis.), 62 N. W., 1052. (Contract for sale of specified piles of lumber).

Howell v. *Coupland*, L. R., 9 Q. B., 462. (Contract for sale of potatoes to be grown on certain land).

But the authorities next above cited do not apply to the instant case.

The defendants counsel quotes at length and relies upon *Dexter* v. *Norton*, 47 N. Y., 62. But this case involved a contract for the sale of certain bales of cotton, specific, definite, marked and described. The delivery of no other cotton would have satisfied the contract.

In the pending case the agreement was not to sell and convey a particular car of potatoes, but a car of any potatoes answering a certain description. The contract contained no condition express or implied. The defendant made an unqualified agreement. He failed to perform it. The destruction of a car of potatoes did not render its performance impossible. The defendant is liable in damages. The rule of damages is plain. It is the difference between the contract price and the market price at the time of breach at the place fixed for delivery. On Jan. 28 the defendant notified the plaintiff that the car had been destroyed by fire. No other potatoes were offered under the contract. The telegram seems to have been understood by the parties as a repudiation by the defendant of any obligation to make the loss good.

At that date the plaintiff could have protected himself from further loss by purchasing potatoes in the market. Before that time he had no reason to so protect himself. The market value on Jan. 28 must be taken in determining damages. *Boyd* v. *Dunn Co.*, 41 N. Y. S., 391; *Ashmore* v. *Cox*, 1 Q. B., 436; 2 Sedgwick on Measure of Damages, 737.

Taking as a basis the weight of a car of potatoes, and the market value on Jan. 28 these facts being shown by stipulation, the plaintiff's damages are five hundred seventy-five dollars and sixty-six cents.

Judgment for the plaintiff for $575.76 with interest from date of writ.

THE DEVEREUX COMPANY *vs.* FORREST O. SILSBY.

Hancock. Opinion August 3, 1921.

An attaching officer may attach an indivisible article of personal property, though of much greater value than the amount he is directed to attach, if debtor has no other property, or no other property is shown to him by debtor, or if insufficient property to satisfy his precept is shown to him by debtor, provided he acts in good faith and not with an intent to harass or oppress.

Where no other property belonging to the debtor exists or is shown to the attaching officer, he may attach an indivisible article of personal property though of much greater value than the amount he is directed to attach under his precept.

Where insufficient property to satisfy his precept is shown to the attaching officer by the debtor and the attaching officer acts in good faith with no intent to harass or oppress, he may attach an indivisible article of personal property though of much greater value than the amount he was directed to attach under his precept.

The failure of the attaching officer to search the record for real estate in the name of the debtor, or to inquire for other property to satisfy his precept or to take property of doubtful value, and not shown to be of sufficient value to satisfy his precept, is not sufficient evidence of bad faith, especially when he was

expressly ordered to attach a specific article of personal property though of greater value than required by his precept, to warrant a finding in the absence of other evidence, that he acted unreasonably or with an intent to harass and oppress.

On report. An action on the case for "malicious" and "oppressive use and abuse of writ or process" in which plaintiff claims damages resulting from alleged excessive attachment. Norris L. Grindle, a Deputy Sheriff of Hancock County, under the defendant as sheriff of said county, attached upon a writ against plaintiff a small passenger steamer as the property of plaintiff, and also placed two other attachments subsequent to the first attachment on the same property on writs against the plaintiff in this action, the value of said steamer being much greater than the amount the deputy sheriff was directed to attach under his precept. Plea, the general issue. Upon completion of the evidence, by agreement of the parties, the case was reported to the Law Court. Judgment for defendant.

Case is stated in the opinion.

D. E. Hurley, and Emery G. Wilson, for plaintiff.

Fellows & Fellows, for defendant.

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

WILSON, J. An action to recover damages for an alleged abuse of process by reason of an excessive attachment of personal property. It comes before this court on report. In May, 1915, a writ of attachment in the common form in favor of Benjamin R. Arey, in which the plaintiff company was named as defendant directing the officer serving the process to attach the property of the Devereux Company to the amount of five hundred dollars was placed in the hands of the defendant as sheriff of the County of Hancock, and forwarded by him to one of his deputies who was specially instructed by the attorney for Arey to attach the steamer "Corinna" as the property of the plaintiff company. On May 5, 1915, said steamer with her "tackle, apparatus and furniture" was duly attached and a keeper placed on board. On September 15th following and while in the custody of the attaching officer, the steamer was burned and so far as this case is concerned may be regarded as a total loss.

As we view the case it is not necessary to determine the actual value of the steamer. For the purpose of deciding this case it is sufficient to say that from the evidence we are satisfied that a fair value of this steamer, having in mind the well known appreciation of this class of property during the war, was considerably in excess of thirty-five hundred dollars.

The suit and attachment of Arey was the second in order of time of three attachments placed on this steamer by the same officer and by direction of the same attorney to secure the payment of claims aggregating around two hundred and fifty dollars. The amount claimed as due in the suit prior to the Arey attachment was at least one hundred and fifty dollars. The amount of the attachment in the prior suit does not appear from the printed case. Although the writ was introduced in evidence, it was not printed. From the well known practice in this State, however, and from the amount of the attachment in the Arey suit as compared with the amount of the claim, we may fairly assumed that the attachment in the first suit was not less than three hundred dollars and from the evidence appears to have covered the steamer and her "tackle, apparatus and furniture." The amount of the third attachment is immaterial in the decision of this case, as the plaintiff's allegations are confined solely to the alleged abuse of process in connection with the Arey suit.

The plaintiff company at the time of the attachment had an interest in certain real estate, of sufficient value the plaintiff claims, to have satisfied the precept in the Arey suit, but it is not contended that this was made known to the officer making the attachment or that he or the defendant had any knowledge thereof. It appears that the plaintiff company also owned certain other personal property consisting of piling and boards amounting in value as it claims to approximately one hundred and fifty dollars, but it is not claimed that this was in any way brought to the attention or knowledge of either the defendant or the attaching officer.

The plaintiff also offered evidence to show that on the steamer at the time of the attachment were life boats, life preservers, compass and binnacle, cables, ballast, anchor, settees and the other ordinary equipment necessary for the operation of such a vessel, and of the value, as it claims, of approximately eight hundred dollars.

The plaintiff contends that the officer should have attached sufficient of this equipment and furniture to satisfy his precept, or

should have searched the records and discovered the real estate, and to have attached the steamer itself of the value, as it claims, of more than fifteen thousand dollars was unwarranted and unauthorized by the precept under the circumstances and rendered him a trespasser *ab initio* and that the defendant, as the then sheriff, is liable to the full value of the steamer for failure to return her on demand.

The right of an officer to attach a single indivisible article of personal property, like a vessel, though of much greater value than the amount he is directed to attach on his precept must be sustained of necessity where no other or sufficient property to satisfy his precept can be found, or is shown to him by the debtor, *Moulton* v. *Chadborne*, 31 Maine, 153; otherwise creditors to small amounts might be without adequate relief to secure their claims. Such an attachment would, of course, create a lien only to the amount required to be attached under the precept and could be released by a bond in the penal sum of the *ad damnum* of the writ.

The question presented here is not the same, we think, as where the officer has a choice and his precept could have been fully satisfied with less than he attached. In such cases the real question is the good faith of the officer as shown by all the circumstances, Sher. & Red. Neg. Par. 523, Hitchcock, Sheriffs and Constables, Par. 37. This court has frequently held that attachments less or exceeding the directions in the precept do not render the officer serving the precept liable for an abuse of process where he acted in good faith and in the exercise of a sound discretion. *Merrill* v. *Curtis*, 18 Maine, 275; *Strout* v. *Pennell*, 74 Maine, 265; *Jensen* v. *Cannell*, 106 Maine, 447.

As the court very aptly puts it in *Davis* v. *Webster*, 59 N. H., 473; "To make an officer a trespasser for exceeding or abusing his authority he must be shown to have committed acts which persons of ordinary care and prudence would not under like circumstances have committed and made such a departure from duty as to warrant the conclusion that he intended from the first to do wrong and use his legal authority as a cover for an illegal act."

We are not impressed with the contention of the plaintiff that there was other property in the form of life boats, life preservers, cables, compass, anchor, coal and other equipment and furniture of sufficient value to warrant the officer in violating the express direction of the plaintiff or his attorney and attaching those alone to satisfy his precept.

It appears from the printed case that they were already under attachment in the prior suit, and were of such a nature that their value on a forced sale was not clearly sufficient to satisfy his precept. On the contrary the court is of the opinion that they were clearly insufficient to warrant the officer relying on them alone to satisfy his precept in the face of its general direction to attach property of the value of five hundred dollars and the special direction to attach the steamer itself. Neither was any of these special articles pointed out to the officer or any request made that they be attached instead of the vessel.

Admitting the several articles like life boats, rafts, life preservers, anchors, cables and other similar items were attachable under the circumstances, *Briggs* v. *Strange*, 17 Mass., 404, 408; *Richardson* v. *Clark*, 15 Maine, 421, 423, the issue here is not whether the officer abused his process by an excessive attachment where sufficient other property than that attached was pointed out to him, but whether in the absence of other property of sufficient value to satisfy his precept, he may attach a single indivisible article of property though of much greater value than the amount he is therein directed to attach.

If an officer may attach such an article where no other property exists, we think, he may where insufficient other property is found or pointed out to him to satisfy the directions of his precept. Where any question arises as to the sufficiency of the other property available for attachment or as to the officer's failure to look for other property before attaching the larger and more valuable articles, it must be left to the jury or the tribunal agreed upon by the parties as the trier of facts and be determined by his good faith in the matter.

We do not regard the failure of the officer in this case to discover piling or other lumber located in West Penobscot and Bucksport or to search the records for real estate as indicative of an intent to oppress and harass or to wilfully do an unlawful act, especially in the face of an express direction to attach certain personal property and in the absence of any suggestion on the part of the plaintiff company that it owned any real estate or other property, *Moulton* v. *Chadborne*, supra.

Nor do we think the evidence discloses any intent on the part of the officer to act oppressively or to abuse his authority under color of the process in his hands. Without such evidence we must assume that he acted in good faith. Under all the circumstances as disclosed

by the printed case we are of the opinion that he may be fairly said to have exercised that sound discretion and conservative judgment which a prudent and discreet business man would have exercised under like circumstances in the management of his own affairs. The steamer was not in commission and had not been for nearly a year. There is no evidence that the officers of the plaintiff company anticipated at the time of the attachment that they would within any definite period of time place her in commission. They could have released her at any time on giving bond in the amount of the attachment which, with her as security, they could undoubtedly have secured at any time.

The loss of this boat by fire was no doubt a hardship, but we see no reason why it should fall on the sheriff or his deputy, or their sureties. A jury has said the loss was not due to any lack of care on their part in preserving the property while under attachment. The hardship ensuing appears rather to be due to the lack of foresight on the part of the plaintiff in failing to insure its property. The officer obeyed the special instructions given him by the attorney from whose office the writ was issued and we do not find that acts of the officer under all the circumstances were either unreasonable or intentionally oppressive.

Judgment for defendant.

WILLIAM R. BENNETT *vs.* HIRAM T. THURSTON.

Lincoln. Opinion August 3, 1921.

The specific acts of alleged negligence by a bailee in repairing a bailment, must be proved by plaintiff by competent evidence, and not left to inference based on probabilities or on evidence too vague and indefinite to support a verdict. Inferences must be drawn from facts proven and not based on other inferences or on mere probabilities.

Under the allegations of negligence by a bailee in repairing a bailment the burden of proving the specific acts of negligence alleged is on the plaintiff who must sustain such proof by competent evidence.

The failure of the plaintiff in this case to show that the cylinders of his engine were not cracked when left with the defendant for repairs or to prove that the defendant's servant actually used improper tools or unnecessary force leaves the proof of these essential elements to the maintenance of his case to inference based on probabilities or on evidence too vague and indefinite to support a verdict.

When it is sought to establish a case by inferences drawn from facts, such inferences can only be drawn from facts actually proven. They cannot be based on other inferences or on mere probabilities.

On motion by defendant. An action to recover damages caused by alleged negligence of defendant as bailee. A gasoline engine used in a motor boat of plaintiff was taken to the shop of defendant at Boothbay Harbor for repairs, defendant being a machinist doing general machine work including manufacturing and repairing gasoline engines. Plaintiff claims that the engine while in the possession of the defendant was injured by cracking the two middle cylinders and bases. Defendant filed a plea of the general issue, and a verdict was returned for plaintiff for $191.93, and defendant filed a motion for a new trial. Motion sustained. New trial granted.

Case is stated in the opinion.

George A. Cowan, for plaintiff.

C. R. Tupper, for defendant.

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

WILSON, J. An action to recover damages for negligence in the repairs of a gasoline engine. The jury found for the plaintiff and awarded damages in the sum of one hundred and ninety-one dollars and ninety-three cents. The case come before this court on a motion for a new trial on the usual grounds.

We think the motion must be sustained. The plaintiff was the owner of a motor boat in which was installed a four cylinder engine originally designed for use in automobiles, but was later adapted for use in motor boats. The first summer it was installed in the plaintiff's boat it stripped the gears and a second time the following summer. It was then shipped back to the makers and new and heavier gears substituted and in the spring of 1920 was installed again in the boat by parties at South Bristol. Trouble in operating it appeared at once. After running a short time it would become "stiff" and could be turned over with difficulty. It was attributed to the oiling system.

It was then taken to the defendant for inspection and repairs to remedy this trouble. Upon trying it the defendant expressed the opinion it was getting water in the cylinders. An employee of the defendant was directed by him to take off the cylinder heads in order that it might be examined inside. The employee later came to the defendant and reported that the cylinder heads were stuck on and he needed something with which to take them off. Whereupon the defendant went down to the boat and upon examination found a nut concealed by a cap which the employee had not removed, and upon the removal of this nut and the insertion of a small screw driver under the heads they came off without difficulty. Water was found in the second and third cylinders.

The defendant thereupon oiled the cylinders thoroughly and thinking the leaking might be due to a defective gasket, made a new gasket for at least one of the cylinder heads and tried it out. It was found, however, that after a few movements the same trouble developed as before. The cylinder heads were then examined and tested by water pressure and for warping and the engine removed from the boat, the pistons taken out and polished and the engine again installed. The defendant did not discover any cracks in the cylinder walls and did not examine for them. The same trouble as before, however,

appeared upon use in the boat. It was then thought there might be trouble with the ignition system and the plaintiff had a new one installed, but with no better results.

Another mechanic was then employed to examine the engine and upon taking off the cylinder heads and examining the insides of the cylinders he discovered small cracks in the walls of the second and third cylinders through which, when in use, water was entering from the water jacket. An attempt was made to cement these cracks in order that the boat might be used during the summer, but to no avail, and additional trouble also developed, in that the gaskets after a little time would "blow" as it is termed. Leaks would appear around them; and some six or seven new ones were put on by different parties during the summer of 1920.

The contention of the plaintiff in this action is that the defendant's servant in removing the cylinder heads when it was taken to him for inspection was guilty of negligence in not discovering the nut underneath the cap, and used some improper instrument and unnecessary force in attempting to pry them off before the discovery of the concealed nut by the defendant himself, thereby causing the cracks in the cylinder walls.

The burden of establishing these contentions is on the plaintiff, *Sanford* v. *Kimball*, 106 Maine, 357, and by competent evidence, *Seavey* v. *Laughlin*, 98 Maine, 517, 518; *Alden* v. *R. R. Co.*, 112 Maine, 515, 518. No evidence was offered by the plaintiff that the cracks were not in the cylinders when the engine was first brought to the defendant for examination. It was left to inference from the fact alone that it was a comparatively new engine. The defendant, however, found positive evidence, which was not denied, that water was finding its way into the cylinders prior to the cylinder heads being removed by his servant, and the results in operation were almost exactly the same before as after the alleged negligence occurred. Again neither is there any positive evidence that the defendant's servant used anything but a small screw driver in trying to remove the cylinder heads. A tool too small with which to have done the damages claimed by the plaintiff. The testimony of the plaintiff's witness as to marks upon the gasket reported to him to have been taken off when the cylinder heads were first removed is entirely too vague and indefinite to have any weight unsupported against the positive testimony of the defendant's servant that the only instru-

ment he used was the small screw driver and that he did not apply sufficient force to have caused the damage claimed. Both these contentions of the plaintiff are based on mere inferences and probability and not on proven facts. We think the foundation too weak to support the conclusion arrived at by the jury and that the verdict upon the evidence is clearly wrong.

When it is sought to establish a case by inferences drawn from facts, such inferences must be drawn from the facts proven. They cannot be based upon mere probabilities, *Alden* v. *Railroad Co.*, supra, *Seavey* v. *Laughlin*, supra.

Motion sustained.
New trial granted.

MARY LOUISE MAHAN, Adm'r'x

vs.

WALKER D. HINES, Director General of Railroads.

Penobscot. Opinion October 22, 1921.

Unless a case where negligence is presumed from the nature of the accident, there must be some competent evidence of the defendant's lack of care and that it contributed as a proximate cause of the injury, unless the case comes within the rule of res ipsa loquitur. But this rule does not go so far as to supply the necessity of proof as to how an injury occurred. Where it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict.

The evidence discloses that the plaintiff's intestate was clearly guilty of contributory negligence in case his injuries resulted from attempting to alight or falling from the train in which he was riding.

Unless a case where negligence is presumed from the nature of the accident, there must be some competent evidence of the defendant's lack of care and that it contributed as a proximate cause of the injury. This case is barren of evidence that any lack of care on the part of the Railroad Company contributed to the deceased's injuries and the plaintiff must therefore fail unless she can bring the case within the rule of *res ipsa loquitur*.

But this rules does not go so far as to supply the necessity of proof as to how an injury occurred. It is only when the circumstances are known that the thing itself can speak. The mere proof that an accident occurred raises no such presumption, or if occurring under conditions in which persons are frequently injured without negligence on the part of the defendant.

This rule is not modified in a case where the plaintiff is by statute presumed to be himself in the exercise of due care. An arbitrary rule as to the burden of proof does not change the common experience of mankind on which the presumptions of negligence as a basis for this rule are founded.

And since the deceased's exposure to the peril which resulted in his death was in the first instance due to his own negligence, it would be extending the doctrine of "last clear chance" too far to apply it to a case where the only proof of later and independent negligence on the part of the defendant is the bare inference that since a fatal accident occurred through the deceased being struck by a locomotive running in the usual manner on a track where persons were not accustomed or allowed to use as a thoroughfare, even though the servants of the Railroad Company operating the locomotive were aware that a man had disappeared from a train which had but a short time before passed over the track on which they were then running, the Railroad Company must or in the exercise of due care should have discovered the deceased's peril in time to have avoided the accident, especially when the case is entirely devoid of evidence as to what the real nature of that peril was.

When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict.

On motion for new trial by defendant. This is an action on the case for alleged negligence on the part of the defendant, under Chap. 87, Sec. 48 of the R. S., and the jury returned a verdict for plaintiff for $5000 in the Superior Court in Penobscot County.

Motion sustained. New trial granted.

Case is fully stated in the opinion.

Clinton C. Stevens, and Sidney Stevens, for plaintiff.

Frank P. Ayer, Henry J. Hart, and George E. Thompson, for defendant.

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

WILSON, J. The plaintiff's intestate, somewhat under the influence of liquor, was riding on a passenger train on the Bangor and Aroostook Railroad from Patten to Millinocket where it arrived about 9 P. M. He left his seat in the smoking car, when the train stopped

by reason of a semaphore or block signal just outside the railroad yard and about a mile north of Millinocket station, and made his way to the vestibule in the rear of the smoking car. With the exception of the forward baggage car, it was what is known as a full vestibule train, and consisted, in addition to the engine and tender, of two baggage cars, the smoking car, a passenger coach, and Pullman car. The side vestibule doors of the smoking car closed at the top of the steps with a common catch or fastening, and were secured by a bar which was raised or lowered from the inside.

As he passed out, he was advised by friends who saw his condition, not to go out there. But disregarding this advice, he went out into the vestibule and was last seen alive just as the train was starting, standing facing the side vestibule door which was closed, with his hands on each side, and looking out.

The train stopped at the semaphore but a few seconds, and soon after it started it was discovered he had disappeared.

His friends went back into the vestibule to look for him and there met the brakeman who was then coming through the train from the rear where it was his duty to go with a flag or lantern whenever the train stopped between stations, and was announcing Millinocket as the next station, the train being then in the railroad yard and nearing the station.

One of the friends of the deceased asked the brakeman if he had seen the deceased, to which the brakeman replied, he had not. Then the friend said: "If he is not in there," referring to the passenger coach, "he has gone off," meaning that he had jumped or fallen from the train.

The brakeman then went back through the passenger coach, and not finding him on the arrival of the train at Millinocket station, notified the assistant yard master who was then in charge of the yard, that it was reported that a man had jumped or fallen from the train at the northerly end of the yard. The railroad yard according to the evidence which is somewhat vague on this point, at least extended northerly from the station about three-quarters of a mile to Millinocket stream, crossed by a bridge, the semaphore being about one-fourth of a mile farther north.

Two engines, "running light," that is, without cars attached, were waiting the arrival of the passenger train before proceeding north over the main line. The assistant yard master, with another

employee, taking a lantern, walked as far as the bridge at the northern end of the yard, the engines following slowly behind them. The engineers and firemen had been apprised of the purpose of the yard master's journey up the yard. On finding no traces of the deceased, the yard master gave the signal for the engines to proceed on their way.

Shortly afterwards friends of the deceased who had been notified of his disappearance, went up the track beyond the bridge, and for nearly a mile beyond the semaphore, but found no traces. They, however, had no light, and while it was clear, there was no moon, nor any lights above the bridge.

They were followed by an undertaker and his assistant who had also been notified, who with a lantern and searchlight made a more careful search, which resulted in finding a short distance north of the semaphore, estimated by them to be about one hundred feet, the deceased's hat and one rubber. About a quarter of a mile still farther north of the semaphore, they found just inside the right hand rail two drops of blood, and from this point on northerly they continued to find parts of his body, until at a distance of two or three miles beyond the semaphore they found the remains horribly mangled. Along the right hand rail at each joint were mute evidences indicating clearly that his body either dead or alive had been struck or picked up about a quarter of a mile north of the semaphore by the engines running north, and had been dragged along the track until it had been shaken loose at a switch some two or three miles beyond.

The conductor of the train on arriving at Bangor examined the running gear of the passenger and Pullman coaches, and found considerable blood and flesh frozen on the rear trucks of the passenger coach and on the forward trucks of the Pullman car which was next in the rear, but whether animal or human was not shown.

The case was submitted to the jury which found a verdict for the plaintiff in the full sum allowed by the statutes of the State, and the case now comes before the court on a motion for a new trial on the usual grounds. We think the motion must be sustained.

While the plaintiff in the case is relieved under the statutes of the burden of proving that no lack of care on the part of the deceased contributed to his injury, she still has the burden of showing by some competent evidence that it was due to the negligence of the defendant. A verdict of a jury on matters even within their own province

cannot be the basis of a judgment where there is no evidence to support it. *Day* v. *Railroad,* 96 Maine, 207, 216. A verdict cannot stand based on mere conjecture.

The plaintiff's contention is that hearing the announcement at the last station before the stop at the semaphore that the next station was Millinocket, the deceased had a right to assume that he had arrived at his station when the stop was made at the semaphore; and as he was attempting to alight, the sudden starting of the train either threw him off, or he jumped and was in some way left injured or dazed beside the track and in a helpless condition, and was picked up by one of the engines going north and thus came to his death. If the jury's verdict was based on such a theory it is clearly wrong.

There was nothing which could be properly construed as negligence on the part of the railroad prior to the deceased's disappearance. On the other hand, the evidence clearly shows that he was himself guilty of contributory negligence, and if his death resulted from an injury received when he jumped or fell from the train, the plaintiff, was not entitled to a verdict.

If he was not killed by the passenger train when he went off, but was killed by one of the engines while lying in an injured or dazed condition beside the track, his negligence must be held to have continued, and the plaintiff would be precluded from recovering, unless some independent negligence of the Railroad intervened under the doctrine of the "last clear chance."

So far as there is any evidence in the case, however, it indicates that he jumped or fell from the train almost immediately after it started. The location of his hat and rubber approximately within one hundred feet of the semaphore fairly warrants the conclusion that he did not get off at the point where the rear of the smoking car stood when the train stopped, there being two baggage cars and the engine ahead of the smoking car, and, further, if he was not then injured beyond the power of locomotion, he was at least somewhat shaken up and dazed or was even more under the influence of liquor than his friends realized. One does not, when normal, wander about long, hatless, in January, with the thermometer registering below zero, as the evidence discloses the weather conditions were on the night of the accident.

The careful examination of the ground between the point where the first blood spots were found and the bridge, by the undertaker and his

assistant, indicates quite conclusively that the flesh and blood found on the trucks of the passenger coach and Pullman car was not that of Thomas Mahan, and the finding of the first traces of any severe injury nearly a quarter of a mile north of the stopping place of the train would seem to indicate so far as the evidence permits, the drawing of any inference not based solely on conjecture, that he had in some way made his way up the track to this point and had either fallen on the track or was struck by one of the engines going north and thus came to his death.

His going off the train being the result of his own negligence, the Railroad no longer owed to him the same duties as when a passenger in the exercise of due care. Still it is urged it owed him the duty, after notice of the manner of his disappearance, of taking proper precautions to avoid injuring him in case he had fallen on the track or in a dazed condition might stray thereon and be hit by later passing trains. *Cincinnati, I. & St. R. Co.* v. *Cooper*, 120 Ind., 469; *Cincinnati, H. & D. R. Co.* v. *Kassen*, 49 Ohio St., 230. *Brice* v. *So. Railway Co.*, 27 L. R. A. (N. S.), 768. This duty on the part of a railroad may be fulfilled by stopping the train, if notice of the accident is immediately communicated to the trainmen, and can be done without jeopardizing the safety of the other passengers, or by reporting it at the next station in order that other trains may be notified, and take proper precautions.

We think the Railroad was not remiss in its duty in this respect. The accident occurred, at farthest, within a mile of the station. It does not appear that the deceased's disappearance was reported to the brakeman until the train was in the railroad yard and nearing the station. It was then reported conditionally. By the time the brakeman had been through the passenger coach, it was a sufficient compliance with the Railroad's duty to the deceased to report the affair to the yard master on the arrival at the station.

It is further urged that under all the circumstances the brakeman should have connected the disappearance of the deceased with the stop at the semaphore, but the report was made to him after the train had arrived in the yard, and not that he, the deceased, had stepped off while the train was stopped, but that he had "gone out," or as one of the witnesses put it had "fallen off." But assuming that he should have inquired more particularly and should have told the yard master that it might have occurred up near the semaphore, there

is no evidence, and it is, therefore, only a matter of conjecture, that the communication of that information could have averted the fatal injury.

At least a half-hour must have elapsed after the plaintiff's intestate's disappearance from the train before the yard master could have reached the semaphore, if he looked about with any degree of care. Where Mahan was at that time is likewise a matter of conjecture upon the evidence in the case. He may have been lying beside the track a quarter of a mile farther north, or walking about in a dazed and aimless way. It cannot be presumed that the yard master would have even found his hat and rubber. Others searching for traces overlooked them.

In short, the case is absolutely barren of proof of that essential element that the deceased met his death through the negligence of the servants of the Railroad Company. Unless a case where negligence is presumed from the nature of the accident, there must be some competent evidence of the defendant's lack of care, and that it contributed as a proximate cause to the injury complained of. In the case at bar, proof of any remissness on the part of those operating the engines running north is entirely wanting, as is all direct evidence of how the unfortunate accident actually occurred.

Lacking proof of negligence on the part of the Railroad that contributed to the injury, the plaintiff must fail unless she can bring the case within the class of cases where negligence is presumed from the fact of the injury, and the rule of *res ipsa loquitur* applies. This presumption does not really arise so much from the fact of injury, but rather from the manner in which the injury occurred. Where the injury arises from some unusual occurrence which ordinarily would not happen if due care is observed, the probabilities that such an occurrence would not have happened, if ordinary care had been observed, are held to be strong enough to support a presumption of negligence without further proof on the part of the plaintiff, unless, of course, rebutted. 20 R. C. L. 187. *Guthrie* v. *M. C. R. R. Co.*, 81 Maine, 572. But this doctrine does not go so far as to also supply the necessity of proof as to how the injury occurred. It is only when the circumstances are known that the thing itself can speak. The mere proof that an accident occurred raises no such presumption, or if occurring under conditions in which persons are frequently injured without negligence on the part of the defendant. *Smith* v. *M. C. R. R.*,

87 Maine, 339, 347. Certainly it is not the common experience that when persons are injured on the tracks of a railroad, where they have no right to be, that it is due to the negligence of the Railroad Company.

Nor do we think this rule is modified in a case where the plaintiff is by statute presumed himself to have been in the exercise of due care. An arbitrary rule as to the burden of proof does not change the common experience of mankind on which the presumptions of negligence in this class of cases are based. In any event, the deceased's exposure to the peril which resulted in his death being clearly due to his own negligence, it would be extending the doctrine of the "last clear chance" too far we think, to apply it to a case where the only proof of any later and independent negligence on the part of the defendant is the bare inference that, since a fatal accident occurred through the deceased being struck by a locomotive running in the usual manner over a track which persons were not accustomed or allowed to use as a thoroughfare, even though the servants of the Railroad Company operating the locomotive were aware that a man had disappeared from a train recently passing on the track on which they were then running, the Railroad Company must or, in the exercise of due care, should have discovered the deceased's peril in time to have avoided the accident; especially when the case is entirely devoid of evidence as to what the real nature of that peril was.

When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict. *Alden* v. *Railroad Co.*, 112 Maine, 515; *Nason* v. *West*, 78 Maine, 253, 256.

Motion sustained.
New trial granted.

DELIA M. SMITH *vs.* HUBERT O. SMITH.

Cumberland. Opinion October 22, 1921.

A libel for divorce may be inserted in a trustee process for service in this State as it is a writ of attachment. The residence of the trustee may limit its use, but it is an appropriate process whenever the court may obtain jurisdiction of all the parties.

The trustee process in this State is a writ of attachment and a libel for divorce may be inserted therein for service.

The use of it may be limited by the residence of the trustee, but it is no less an appropriate process whenever the court may thereby obtain jurisdiction of all the parties.

A proceeding for divorce is not a real action. It is not necessary to decide in this case whether it is a personal action within the meaning of Sec. 1, Chap. 91, R. S., as the Legislature might authorize its use in other cases at any time which it is held was done under Chap. 122, Public Laws, 1862, now Sec. 3, Chap. 65, R. S.

Not decided whether want of proper service may be waived or cured in divorce proceedings by general appearance and pleading to the merits of the libel.

On exceptions by libellant. This is an action of libel for divorce. The libel was inserted in a trustee writ which was served on the alleged trustees and subsequently service of the writ and libel was made upon the libellee. Libellant also filed a petition praying for an allowance, which was duly served upon the libellee who entered a general appearance through his attorney upon return day, and upon a hearing on said petition libellee was ordered to pay to the libellant for the support of herself and child twenty dollars per week pending the libel, and fifty dollars for counsel fees. There being no funds of libellee in the hands of the alleged trustees, they were discharged before the entry of the writ and libel.

The writ and libel were entered at the return term and the libellee, through his attorney, filed a general appearance and answered to the libel, denying the allegations therein. Upon a hearing on the writ and libel at which the libellee appeared, the Justice presiding granted

a divorce, and gave to the libellant the custody of the minor child, and ordered libellee to pay to libellant as alimony twenty dollars per week. At the same term of court libellee filed a motion that the decree be vacated and the action be dismissed for want of jurisdiction on the ground that the libel for divorce was inserted in and begun by a trustee writ and process. The Justice presiding granted the motion, vacated the decree and dismissed the action for want of jurisdiction, to which ruling the libellant excepted. Exceptions sustained.

Case stated in the opinion.

Frank H. Haskell, for libellant.

Henry Cleaves Sullivan, for libellee.

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

WILSON, J. A libel for divorce was begun by the libellant and inserted in the form of writ prescribed in this State for what is termed trustee process. The writ and libel were then duly served and entered at the return term in September, 1920, at which term the libellee appeared generally and answered.

At the October term following, a hearing was had, at which time the libellee appeared and contested the libel on its merits. No question of jurisdiction was then raised. A decree of divorce was made, and the libellee was ordered to pay alimony to the libellant. At the same term, after the decree of divorce was filed, the libellee filed a motion that the decree be vacated and the libel be dismissed, on the ground that the court was without jurisdiction of the libellee there not being proper service of the libel, inasmuch as it was inserted in a trustee writ, which mode of service, it was contended, is not authorized by the statutes of this State, and which lack of service in divorce proceedings, it was also contended, is not cured by a general appearance and pleading to the merits, or even by participating in a hearing on the merits of the charges.

The court after hearing sustained the motion, vacated the decree and dismissed the action for want of jurisdiction, to which ruling the libellant excepted and presents her bill of exceptions to this court.

We are of the opinion that the libel was properly served. R. S., Chap. 65, Sec. 3, provides that a libel for divorce may be inserted in a writ of attachment. The purpose of the Act authorizing this mode

of service, Public Laws, 1862, Chapter 122, was to give to both parties the right to attach both real and personal property to secure the enforcement of any decree the court might make in such proceedings. It was substituted for a method which allowed the wife to secure a lien on the real estate only of the husband by inserting a prayer to that effect in her libel under Sec. 12, Chap. 60, R. S., 1857.

The libellee's contention is based on the theory that the writ of attachment referred to in this Act is the one in common use when property is attached, which is described in the Works on Practice as a writ of summons and attachment, Spaulding's Practice, Pages 48-52, Howe's Practice, Pages 54-58, Colby's Practice, Page 64, in distinction from the other original processes provided for in the first Act regulating civil processes in this State, Chapter 63, Public Laws, 1821, i. e.: the simple summons, the writ of capias and attachment, and the trustee writ of attachment.

The common law writ of attachment known as the "*pone*" from the language of the writ itself, "*pone per vadium et salvos plegios*," i. e. put by gage and safe pledges the defendant, 3 Blackstone Com. *Page 280, though it has no place in our practice is the precursor of the various forms of writs of capias and of attachment now in use to secure the appearance and conformance of the defendant to the judgments of the court, as the custom of Foreign Attachment anciently in use in the City of London is the origin of our present trustee process, Drake on Attachment, Section 1.

All civil processes in use in this State, however, are the creation of statute; and according to the course of practice and the origin of the civil processes in use here, the phrase, writ of attachment, which in the Act of 1862 was used, we think, in a generic sense, can have no other meaning than any mesne civil process in the nature of a writ on which property may be attached. The issue then is, whether the process known in this State as the trustee process is a writ of attachment within the meaning of this Act.

Whatever may be the nature of this process in other jurisdictions, it is clearly recognized as one of attachment in this State under the statute authorizing its use and prescribing its form. Sec. 1, Chap. 61, Public Laws 1821, provides that the plaintiff in any personal action may cause the goods and effects of the defendant "to be *attached* in whose hands or possession soever they may be found by an original writ . . . . in the form prescribed by law." This court in

Pettingill v. *Andros. R. R. Co.*, 51 Maine, 370, said: "But if he had goods or effects of the principal debtor deposited in his hands liable to attachment, the service of the writ operates as an attachment of the specific articles in his possession." And Sec. 6, Chap. 63, Public Laws 1821, prescribing the form of this process describes it as a trustee writ of attachment.

Inasmuch, then, as the purpose of the statute authorizing attachment in divorce proceedings as expressed in the Act of 1862 is to secure the execution of the decrees of the court through acquiring liens on either the real or personal property of the libellee by attachment on the original process as it were; and this purpose may be attained by the use of any appropriate process on which property may be attached; and the libellant's means of obtaining this security would be materially restricted by denying the right of attachment by the familiar method of trustee process; and the trustee process provided in this State being a writ of attachment in fact and in name, we are of the opinion that it is a proper mode of service of libels for divorce under the Act of 1862, Chap. 122, and now contained in R. S., Chap. 65, Sec. 3, to insert them in a trustee writ of attachment.

This view is confirmed by a practice of the Bar of this State for nearly sixty years. A practice, so far as we know, heretofore unquestioned. The consequences of now declaring its use unauthorized and the defective service incurable, even by a general appearance and pleading to the merits, are so far-reaching, affecting the social and legal standing of so many innocent parties, that unless it was made to appear that the contrary view was clearly intended, the interests of society require that the construction placed upon this statute in practice since its enactment be confirmed by this court, and especially so, since it seems to accord with a fair construction of the language and purpose of the Act itself.

The use of it may be limited by the residence of the trustee, *Linscott* v. *Fuller*, 57 Maine, 406, 409, but we think it no less an appropriate process whenever the court may thereby obtain jurisdiction of all the parties.

Against this construction, it is urged that the trustee writ being a statutory process, the original Act of 1821, Chap. 63, and R. S., Chap. 91, Sec. 1, relating to trustee process only authorizes its use in personal actions. This, however, is beside the mark. While a divorce action may in part partake of the nature of an action *in rem*,

it is in no sense a real action within the meaning of the statute last referred to. As to whether it is a personal action, it is unnecessary to determine, as special use of this process in other cases might at any time be authorized by legislative act which, we think, was the effect of Chapter 122, Public Laws 1862.

It is further suggested that the Act of 1862 was in effect, at least, an adoption of the Massachusetts Statute relating to attachment in divorce proceedings and that the Commonwealth afterwards expressly added to its statute the authority to attach by trustee process. Not so. The Massachusetts Statute prior to 1862, see Gen. Statutes, 1860, Chap. 107, Secs. 51, 52 was similar to Sec. 12, Chap. 60, R. S., 1857 in that it authorized in certain cases the attachment of the husband's property on the libel of the wife. No writ of attachment of any kind in the ordinary sense of that term was required under the Massachusetts Statutes. It was done upon the summons or order of notice issued by the court. The addition of the authority to attach property in the hands of an alleged trustee by inserting such direction in the summons issued for service of the libel as was done in Massachusetts in 1866, see supplement to Gen. Statutes 1860-66, Chap. 148, has no significance, we think, as bearing on the question of whether the trustee writ of attachment was intended to be included within the term "writ of attachment" in the Act passed by the Legislature of this State in 1862. Massachusetts still retained the method of attaching upon the summons issued in connection with a libel and, of course, required additional authority to attach property in the hands of an alleged trustee by this method. As bearing on the issue in the case at bar, the Massachusetts Act of 1866 amounts to no more than a recognition of the need of such process to more fully accomplish the purpose of the previous statutes authorizing the attachment of property in divorce proceedings. Hence, the law-making body of this State may well have had the trustee process in view when it used the broad term "writ of attachment" as a substitute for the method of attaching on the libel previously authorized under Sec. 12, Chap. 60, R. S., 1857.

It is unnecessary to decide whether want of proper service may be waived or cured in divorce proceedings by the general appearance of the libellee and submission to the jurisdiction of the court by pleading and participating in a hearing on the merits of the action.

Exceptions sustained.

HENRY L. DOHERTY et als. *vs.* JESSE C. MCDOWELL.

Kennebec. Opinion October 22, 1921.

Removal of cases from State Courts to Federal Courts. State Courts inquire and in the first instance determine whether upon the facts as shown by the petition and other pleadings a case has been made out requiring removal as prayed for. The term "proper district" as used in Section 28 of the United States Judicial Code means the district within the territorial limits of which the action is pending in the State Court. A case cannot by reason of diversity of citizenship of the parties be removed to a District Court in a district other than that in the territorial limits of which the suit is pending in the State Court.

Facts properly set forth in a petition for removal are assumed by State Courts to be true. Issues of fact arising out of such petitions are triable in the Federal Courts.

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The term "proper district" as used in Section 28 of the United States Judicial Code means the district within the territorial limits of which the action is pending in the State Court.

A case cannot by reason of diversity of citizenship of the parties be removed to a District Court in a district other than that in the territorial limits of which the suit is pending in the State Court.

The petition sets forth the citizenship and residence of the plaintiff to be in New York and of the defendant in Pennsylvania. On the ground of diversity of citizenship alone it prays for the removal of the cause from the Supreme Judicial Court for Kennebec County, Maine, to the United States District Court for the Western District of Pennsylvania.

Held:

Not maintainable.

On exceptions by defendant. This is an action of assumpsit brought by plaintiffs against defendant in the Supreme Judicial

Court within and for the County of Kennebec and State of Maine, to recover from defendant $250,000, the plaintiffs being residents of the State of New York and the defendant being a resident of Pennsylvania. On the return day defendant filed a petition and bond for the purpose of obtaining a removal of the suit to the United States District Court for the Western District of Pennsylvania, in which district defendant resided. The Justice presiding denied the application for removal, and to this ruling defendant excepted. Exceptions overruled.

Case is stated in the opinion.

Verrill, Hale, Booth & Ives, and Norman L. Bassett, for plaintiff.

Thomas L. Talbot, for defendant.

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

DEASY, J. The defendant has filed a petition for removal of this case to the Federal Court. No reason for removal is claimed other than diversity of citizenship.

The petition sets forth that "your petitioner at the time of the commencement of the above suit was and still is a citizen of the State of Pennsylvania and a resident of the Western District thereof," and that "the above named plaintiffs at the time of the commencement of the above suit were and still are citizens of the State of New York and residents of the Southern District thereof."

The petitioner thereupon prays for removal of the case to the District Court for the Western District of Pennsylvania being the district wherein the defendant is a citizen and resident. The presiding Justice refused to order the removal. The case comes to this court on exceptions.

Facts properly set forth in a petition for removal are assumed by State Courts to be true. Issues of fact arising out of such petitions are triable in the Federal Courts. *C. & O. R. Co.* v. *Cockrell U. S. S. C.*, 58 L. Ed., 544; *Craven* v. *Turner*, 82 Maine, 383. But State Courts inquire and in the first instance determine whether upon the facts as shown by the petition and other pleadings a case has been made out requiring removal as prayed for. *Craven* v. *Turner*, supra.

In the instant case there is no issue of fact. A question of law is presented which may be stated thus: Where the plaintiff and defendant are residents of different States, neither being a citizen or

resident of Maine, may the defendant have a case removed from the Supreme Judicial Court in this State to the United States District Court for the district in which he resides?

The right of removal is given by Section 28 of the United States Judicial Code (U. S. Comp. Stat. Sec. 1010) which so far as pertains to removal by reason of diversity of citizenship is as follows:—

"Any other suit of a civil nature at law, or in equity, of which the District Courts of the United States are given jurisdiction by this title and which are now pending, or which may hereafter be brought in any state court may be removed into the District Court of the United States, for the proper district, by the defendant or defendants therein, being non-residents of that State."

The question involved is the meaning of the term "proper district" as used in the above section of the statute.

The defendant contends that the district where the defendant resides is the proper district. The contention of the defendant is supported by dictum or opinion in the following cases:

Mattison v. *B. & M. Railway*, 205 Fed., 821; *Stewart* v. *Cybur Lumber Co.*, 211 Fed.; 343; *Park Square &c.* v. *Locomotive Co.*, 222 Fed., 979.

But a study of the history of the legislation on the subject, a comparison of Section 28 with other sections of the statute and an examination of authorities all point unmistakeably to the conclusion that the term "proper district" means the district within which the action is pending in the State Court.

The original enactment of 1789 provides for the removal of causes "into the next Circuit Court to be held in the district where the suit is pending." The language of the revision of 1875 is similar. The present judicial code was enacted in 1887. Section 28 above quoted provides for the removal of causes "into the District Court of the United States for the proper district."

It is fair to presume that Congress in using the term "proper district" intended the district which was at the time of the enactment, and which had been for about a hundred years the proper district. If so radical a change as is claimed had been intended it would have been made expressly and not left to inference. Section 28 does not define the term "proper district." Section 29, however, (U. S. Comp. Stat. Sec. 1011) which provides the machinery for removal authorizes a party to "make and file a petition . . . .

for the removal of such suit into the district court to be held in the district where such suit is pending;" and Section 53 (U. S. Comp. Stat. Sec. 1035) providing for cases where as in Maine a district has two or more divisions says "such removal shall be to the United States District Court in the division in which the County is situated from which the removal is made."

Moreover the great weight of judicial authority is to the effect that a case cannot by reason of diversity of citizenship of the parties be removed to a District Court in a district other than that in the territorial limits of which the suit is pending in the State Court.

From a decision by the U. S. Circuit Court for the Western District of Pennsylvania the same district to which the defendant seeks to have this case removed, we quote the following:

"There does not seem to be sufficient grounds for assuming that Congress impliedly extended the judicial power of the United States to permit of a removal of an action in a state court, by the defendant, into a federal court of a district in a different state. Until there is some express enactment by Congress, a case so removed should be remanded."

Lockport Glass Co. v. *H. L. Dixon Co.*, 262 Fed., 976.

See also to same effect: *Murdock* v. *Martin*, 178 Fed., 307; *St. John* v. *U. S. Fidelity and Guaranty Co.*, 213 Fed., 685; *St. John* v. *Taintor*, 220 Fed., 457; *Eddy* v. *C. & N. W. Railway Co.*, 226 Fed., 120; *Ostrom* v. *Edison*, 244 Fed., 228; *Thomas* v. *Delta L. & W. Co.*, 258 Fed., 758; *Fairview &c. Co.* v. *Steel Co.*, 258 Fed., 681; *Kansas Gas etc. Co.* v. *Wichita Co.*, 266 Fed., 614.

The plaintiff contends that where as in this case neither party is a citizen or resident of the district where the suit in the State Court is pending, no removal can be had to any District Court unless for some reason other than diversity of citizenship. Our determination that the suit is not removable to the District Court in Pennsylvania is decisive of the case. It is unnecessary to pass upon the further question.

Exceptions overruled.

SHELDON O. HARRINGTON *vs.* EMPIRE CREAM SEPARATOR COMPANY.

Androscoggin. Opinion October 22, 1921.

Wages or salary accruing after one's discharge, whether rightfully or wrongfully, before the end of the term if the contract for hiring was for a fixed period are not recoverable. An employee wrongfully discharged may recover as damages the difference between the amount which would after his discharge accrue to him under the contract if continued in force, and the amount which during the remainder of the term he earned, or by reasonable diligence might have earned.

Where there is a contract for hiring for a fixed period and the servant or agent is discharged either rightfully or wrongfully before the end of the term he cannot recover, as such, wages or salary accruing after his discharge. Wages and salary are commonly predicated upon the relation of master and servant, or principal and agent, and such relation cannot exist against the will of either party.

An employee wrongfully discharged may in an action for the purpose recover as damages the difference between the amount which would after his discharge accrue to him under the contract if continued in force, and the amount which during the remainder of the term he earned, or by reasonable diligence might have earned.

The instant case is an action on account annexed to recover salary and bonus under a contract covering a period both prior to and following the plaintiff's discharge from the defendant's employment.

Held:

That the plaintiff is entitled to recover in the action only sums accruing before his discharge.

On motion for new trial by defendant. This is an action of assumpsit on account annexed to recover for a bonus of $25 a month for seven months, and for salary amounting to $607.50, and cash paid out for expenses $69.28, making a total of $851.78. The plea was the general issue, and a verdict was returned for plaintiff for $821.56. Remittitur of all the verdict above one hundred forty-two dollars and sixty-seven cents to be filed by plaintiff within fifteen days, and motion overruled. If such remittitur is not filed entry to be, Motion sustained. Verdict set aside. New trial granted.

Case is stated in the opinion.

Frank L. Morey, for plaintiff.

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

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

DEASY, J. Action on account annexed to recover for salary, expenses and bonus. The plaintiff having recovered a verdict, the defendant brings the case forward on motion.

The plaintiff entered into a contract with the defendant to act as its agent in the sale of milking machines and cream separators. The contract is evidenced by letters.

The agreed compensation was $135 per month together with necessary traveling expenses, and also a bonus of $25 a month conditioned on the amount of sales. The verdict is based upon a finding that the parties intended and agreed that the contract should continue in operation for a year. This finding is justified though such period is not explicitly and in terms specified.

On July 23, 1920, the defendant discharged the plaintiff from its service by a letter an excerpt from which is as follows:—

"On July 31st, we are forced to ask you to lay off for an indefinite period. Now, do not misunderstand me, Mr. Harrington. We are not doing this from any dissatisfaction on your part, and we will be very glad to furnish you with a recommendation, or assist you in any reasonable way in securing another position. Kindly send in your photo book and supplies and a check will be mailed you, less your advance expense money."

The account annexed contains the item: "Salary from Aug. 1st to Dec. 1st 1920 4 mos. at $135. per mo. $540." It also contains a claim for expenses incurred between August 3 and August 10.

The verdict apparently includes these amounts in full. This is error. Whether or not the plaintiff is entitled to recover damages for wrongful discharge was not in issue and not considered. He was not entitled to recover salary accruing after July 31st when he was discharged.

Where there is a contract for hiring for a fixed period and the servant or agent is discharged either rightfully or wrongfully before the end of the term, he cannot recover, as such, wages or salary accruing after his discharge. Wages and salary are commonly pred-

icated upon the relation of master and servant, or principal and agent, and such relation cannot exist against the will of either party.

Courts in some jurisdictions have held the contrary, but the preponderance of authority as well we believe as the weight of reason are in harmony with the law as above stated.

Mining Co. v. *Andrews,* (Ariz.), 56 Pac., 970; *Arnold* v. *Adams,* 49 N. Y. S., 1041; *Howard* v. *Daly,* 61 N. Y., 369; *Derosia* v. *Ferland,* (Vt.), 76 At., 153; *Green* v. *Somers,* (Wis.), 157 N. W., 529; *Ogden-Howard Co.* v. *Brand,* (Del.), 108 At., 277; *Lichenstein* v. *Brooks,* (Tex.), 12 S. W., 975; *Olmstead* v. *Bach,* (Md.), 27 At., 501; *Hamilton* v. *Love,* (Ind.), 53 N. E., 181.

An employee wrongfully discharged may in an action for the purpose recover as damages the difference between the amount which would after his discharge accrue to him under the contract if continued in force and the amount which during the remainder of the term he earned, or by reasonable diligence might have earned.

Sutherland v. *Wyer,* 67 Maine, 69; *Alie* v. *Nadeau,* 93 Maine, 285.

The instant case, however, is an action for salary under a contract and not to recover damages for breach of a contract.

After an employee has been discharged the parties may of course enter into a new contract of hiring, expressly or by implication, or may renew or revive the old. If the employee continues to carry on the duties of his employment as before, with the knowledge and assent of his employer, such renewal or revival may be implied. In this case, however, no such renewal or revival is shown.

The items accruing before August 1st are recoverable. This includes salary for the last half of July, and expenses to the end of that month. The evidence also fairly shows that the plaintiff earned his bonus for April, May and June. The May deficiency was off-set by the surplus of sales in the following month. Under the terms of the contract no bonus is due for the other months.

The amount for which the verdict is justified is as follows:— Salary, $67.50. Expenses, $46.97. Bonus, $75. Total, $189.47. Less payment advanced $50. Balance $139.47 for which amount with interest from the date of writ the plaintiff is entitled to judgment.

If within fifteen days after the rescript in this case has been received by the Clerk of Courts for Androscoggin County, the plaintiff shall file his remittitur of all of the verdict above the sum of one

hundred forty-two dollars and sixty-seven cents (which sum includes interest to date of verdict) motion to be overruled. If such remittitur is not filed entry to be,

Motion sustained.
Verdict set aside.
New trial granted.

ALEXANDER JACKSON *vs.* MARGUERITE LUCILLE RUBY.

Cumberland. Opinion October 22, 1921.

A woman who marries, pregnant with a child by another man, but the facts being unknown by her husband, commits a fraud which vitiates the marriage and is ground for annulment, even if the parties to the marriage have before its consummation had sexual intercourse.

A woman who marries, when, unknown to her husband, she is pregnant with a child by another man commits a fraud which vitiates the marriage and is ground for its annulment on petition by the husband. It is none the less a reason for annulment if the parties to the marriage have before its consummation had sexual intercourse.

On exceptions by petitioner. This is a petition praying for annulment of marriage on the ground that defendant was at the time of the marriage pregnant with child by another man, and did not disclose the facts to her husband, but told him that she was pregnant by him as they had had sexual intercourse before their marriage. The cause was heard by the presiding Justice without the intervention of a jury who denied the petition, and plaintiff took exceptions. Exceptions sustained.

Case stated in the opinion.

William A. Connellan, for petitioner.

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

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

DEASY, J. The petitioner prays for the annulment of his marriage with the defendant on the ground as set forth in the petition and found to be true by the Superior Court Justice who heard the case "that on June 17, 1920 respondent was pregnant by another man than the petitioner, and that when she married him she knew her pregnancy was not of his begetting."

The court also found in effect that the parties had before the marriage had sexual relations and that the petitioner believed the assurances of the respondent that he was the father of her unborn child. In denying the petition the Justice ruled as follows:—

"I rule, however, as a matter of law, that inasmuch as the petitioner had had carnal knowledge of respondent's body, as hereinbefore found, the acts and representations of the respondent in inducing the marriage did not constitute such fraud as may be made the basis of a decree of annulment."

To such ruling and denial the petitioner excepted.

It is generally true that a woman who marries, when, unknown to her husband, she is pregnant with a child by another man commits a fraud which vitiates the marriage and is ground for its annulment on petition by the husband. *Reynolds* v. *Reynolds*, 3 Allen, 605; *Donovan* v. *Donovan*, 9 Allen, 140; *Fontana* v. *Fontana*, 135 N. Y. S., 220, 26 Cyc., 903.

It was, however, contended by the defendant and ruled by the Justice presiding that where the parties to the marriage have before its consummation had sexual intercourse the marriage will not be annulled, even though it was induced by the false representations of the woman, believed by the man, that he is responsible for her condition.

The ruling in this case is supported by eminent authorities.

Foss v. *Foss*, 12 Allen, 26; *Safford* v. *Safford*, 224 Mass., 392; *Franke* v. *Franke*, (Cal.), 31 Pac., 571; *States* v. *States*, 37 N. J., Eq., 195; *Bartholomew* v. *Bartholomew*, 14 Pa., Co. Ct., 230.

The contrary is strenuously maintained by other courts.

Lyman v. *Lyman*, 90 Conn., 399, 97 At., 312; *Wallace* v. *Wallace*, 137 Iowa, 37, 114 N. W., 527; *Ritayik* v. *Ritayik*, 202 Mo. App. 74,

213 S. W., 883; *Di Lorenzo* v. *Di Lorenzo*, 174 N. Y., 467, 67 N. E., 63; *Gard* v. *Gard*, 204 Mich., 255, 169 N. W., 908; *Winner* v. *Winner*, (Wis.), 177 N. W., 680.

The reason for the former rule is stated by the Massachusetts Court in *Foss* v. *Foss*, (supra), thus:

"We have therefore a case in which a man intermarried with a woman whom he knew to be unchaste, whom he had himself debauched, and of whose condition of pregnancy he was well aware. He took no steps to ascertain the truth of her statements concerning the paternity of the child, but, relying solely on her assurances on that subject, he entered into the contract of marriage. It seems to us that on these facts he was guilty of a blind credulity, from the consequences of which the law will not relieve him. His knowledge of the respondent's unchastity and of her actual pregnancy was sufficient to put a reasonable man on his inquiry. It does not appear that he could not have readily ascertained her previous intimacy with another man. Certainly by a resort to a medical examination, or by a delay of the execution of the marriage contract for a brief period, he could have easily put the truth of her statements to a decisive test. Whatever may have been the motives which led him to forbear all inquiry, it is a sufficient answer to his claim to be relieved from his contract that the deceit, if any, which was practised upon him was submitted to voluntarily and wilfully, and that he cannot be allowed to escape from his obligations by proof of facts the knowledge of which he might have obtained by the exercise of a proper and reasonable prudence and discretion."

For the contrary view the Supreme Court of Wisconsin in *Winner* v. *Winner*, (supra) states the ground as follows:

"To say that under such circumstances the man has no right to rely upon the woman's statements that he is the father of the child she is bearing, and that he must make inquiry elsewhere as to her chastity, is to negative all virtue, all truthfulness, and all decency in every woman that may have been imprudent enough to anticipate with her lover the rights of the marriage relation. Such a lapse from good morals should not be held destructive of every ethical instinct of the woman and render her unworthy of belief as to assertions fraught with such serious import, and whose truth she alone knows." . . . . "No right-minded man guilty of having wronged a woman or sharing a wrong with her would so act. He would do as plaintiff

did in this case, marry her. That is the only honorable reparation possible—the only method of legitimatizing the offspring which he believes to be his and of saving the honor of the woman he has promised to marry. The act of marriage in such a case is not the result of negligent credulity, but of honorable motives to repair as far as possible wrongs inflicted or shared by him. Such conduct should be encouraged to the end that lesser wrongs be remedied instead of being followed by greater ones."

In Maine the question is an open one. This court has never before been called upon to consider it. The opinion of the Wisconsin Court above quoted is supported by a preponderance of authority. We think that it has on its side too, the weight of reason.

We do not think that a man circumstanced as was the petitioner in this case should be denied the only remedy for the deception and fraud practised upon him, viz., the annulment of the marriage which but for the fraud would never have been consummated.

Nor can we subscribe to the doctrine that it is ever the duty of a man to subject the woman he intends to marry to the unspeakable humiliation of an inquisition like that prescribed by the court in *Foss* v. *Foss*.

The ruling of the Superior Court, while supported by eminent authority, is, we believe erroneous.

Exceptions sustained.

ALICE G. MICHELS, Lib't *vs.* CLARENCE E. MICHELS.

Cumberland. Opinion November 1, 1921.

An attempt of a husband to have his wife committed to an insane asylum if made in good faith and in a sincere belief that her mental condition is such as to be for her own good and that of her family that she thus be confined and treated, does not constitute cruel and abusive treatment as a cause of divorce. Otherwise, however, if such attempt is wilfully made, and such conduct on his part seriously affects her health, for that would constitute cruel and abusive treatment within the meaning of the statute, and she would be entitled to a decree of divorce as a matter of legal right, assuming the facts disclosed to be true.

1. If the attempt on the part of a husband to have his wife committed to an insane asylum although unsuccessful, is made in good faith and in the sincere belief that she is in such an unsettled mental condition that her own good and that of her family require confinement and treatment in such an institution, such an act lacks the essential element of cruel and abusive treatment as a cause of divorce.
2. If on the other hand the husband without just cause wilfully attempts to have his wife committed to such an institution, such conduct on his part seriously affecting her health, would constitute cruel and abusive treatment within the meaning of the statute. The motive which prompts the proceedings is the controlling factor.
3. Assuming the facts disclosed in the evidence for the libellant in this case to be true, she was entitled to a decree of divorce as a matter of legal right.

On exceptions by libellee. A libel for divorce alleging cruel and abusive treatment, tried before a jury who found in favor of the libellant. A decree of divorce was entered, the custody of two minor children given to the mother, and libellee ordered to pay money for their support. To the granting of the decree of divorce the libellee excepted on the ground that the evidence did not sustain the allegation of cruel and abusive treatment. Exceptions overruled.

The case is fully stated in the opinion.

William Lyons, for libellant.

W. R. & E. S. Anthoine, for libellee.

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

CORNISH, C. J. Libel for divorce heard by a jury who found in favor of the libellant on the allegation of cruel and abusive treatment. The presiding Justice thereupon entered a decree of divorce, granting the custody of the two minor children to the mother, and ordering the payment of money for their support. To the entering of the decree the libellee filed exceptions. The question presented is whether as a matter of law the evidence, which is made a part of the exceptions, warrants the decree, *Sweet* v. *Sweet*, 119 Maine, 81, or expressed in another form, whether as a matter of law taking the facts disclosed in the evidence for the libellant as true, they gave her an absolute right to a divorce. *Freeborn* v. *Freeborn*, 168 Mass., 50.

"Cruel and abusive treatment" are words of comprehensive meaning and the charge covers a wide range of conduct. *Holyoke* v. *Holyoke*, 78 Maine, 404. The outstanding fact upon which the libellant places great emphasis in this case is the attempt of the libellee to have her committed to the State Hospital for the Insane. On May 19, 1919, the husband made the necessary application to the municipal officers of Old Orchard, where the wife was then residing with her children, charging that she was insane, and praying for her commitment to the Augusta State Hospital. Notice was thereupon ordered upon the wife, a hearing was held on May 21, 1919, and the testimony of two physicians who made an examination of her was taken, both of whom testified that in their opinion she was not insane. Other evidence was also given on both sides.

At the conclusion of the public hearing the proceedings were dismissed by the municipal officers. This unsuccessful charge of insanity with its attendant publicity might or might not constitute cruel and abusive treatment. It depends upon the motive which prompted the institution of the proceedings. If the application although unsuccessful was made in good faith, in the honest and sincere belief that the wife was in such an unsettled mental condition that her own good and that of her family required confinement and treatment in such an institution, such an act would be regarded as lacking entirely the essential element of cruel and abusive treatment. *Reichert* v. *Reichert*, 124 Mich., 675. It would spring from kindness rather than cruelty.

If on the other hand the husband without just cause, wilfully attempted to have her committed to an insane asylum, such conduct seriously affecting her health, would obviously constitute cruel and abusive treatment within the meaning of the statute. In other words it was not merely the act itself, but the motive which inspired the act that was to be rigidly inquired into and determined by the jury. As bearing upon this issue the evidence was necessarily voluminous. It would be futile to rehearse it.

One significant fact, however, which must have carried great weight is that in July, 1919, only two months after his failure to secure her commitment, Mr. Michels instituted proceedings in the Probate Court for Berkshire County, Massachusetts, where he was residing, to have a conservator appointed to take charge of his wife's property, alleging in his petition that by reason of mental weakness she had become incapacitated to properly care for her property. This petition was signed by a sister of the libellant as well as by the libellee. It was duly served on Mrs. Michels but was subsequently dismissed by agreement. Here again, the question of good faith or wilful persecution on the part of the husband was the crucial point, and as bearing strongly on that, it satisfactorily appears that Mrs. Michels had never lost a dollar of her property by unwise investments and that she had wasted none. So that his attempts to deprive her of her liberty and of the management of her property both failed. We are constrained to say that the allegations of the libellant concerning these two proceedings are founded upon substantial evidence.

In addition to these specific and notorious acts, the libellant testified to her general treatment by her husband during a series of years. Even the printed page reveals something of the atmosphere that must have pervaded the home life, and the cold, neglectful, unsympathetic and surly attitude of the husband, resulting in her finally leaving him, taking her two children with her, and declaring that she could never return. She was undoubtedly of a highly nervous temperament, and was for a considerable period on the verge of a nervous breakdown. In that condition she needed the tender care and kindly treatment which his marriage vow demanded, instead of neglect at home or confinement in an insane hospital away from her home and children.

Without further discussing the evidence it is sufficient to say that in the opinion of the court, the libellant under the facts presented was entitled to her decree of divorce as a matter of law, and the entry must be,

Exceptions overruled.

MARY MARGRETTA MAGUIRE'S CASE.

Androscoggin. Opinion November 1, 1921.

Workmen's Compensation Act. Chap. 50, Sec. 34, of the R. S., provides that the county in which the injury occurs alone has jurisdiction of the cause, and all papers should be filed in such county. An appeal from a decree of a Justice of the Supreme Judicial Court confirming the finding of the Commission, if the papers in the case were filed in some county other than the one where the injury occurred, is not properly perfected and the Law Court is therefore without jurisdiction.

Claim under the Workmen's Compensation Act. The accident occurred in the County of Kennebec. The evidence was taken out before the Industrial Accident Commission in the County of Androscoggin as a matter of convenience. Copies of the decision with all other papers in connection therewith were filed by the defendant with the Clerk of Courts for Androscoggin County. From a decree of a Justice of the Supreme Judicial Court confirming the finding of the commission an appeal was taken by the defendant to the Law Court.

Held:

1. That under R. S., Chap. 50, Sec. 34, Kennebec County, "the County in which the injury occurred" alone had jurisdiction of the cause, and the papers should have been filed in that county instead of in Androscoggin County.
2. That the appeal was not properly perfected and the Law Court is therefore without jurisdiction.

On appeal by defendant. The question involved in this case is as to whether in cases coming under the Workmen's Compensation Act all papers in the cause should be filed in the county where the injury occurs and not filed with the clerk of courts of any other county. In this case the injury occurred in the County of Kennebec. Copies of

the decision of the commission, with all papers in connection therewith, were filed by the defendant with the Clerk of Courts of Androscoggin County. A Justice of the Supreme Judicial Court thereupon signed a decree confirming the finding of the commission and an appeal was taken therefrom by the defendant to the Law Court. Appeal dismissed with costs for claimant.

Case fully stated in the opinion.

George C. Webber, for Mary Margretta Maguire.

D. J. McGillicuddy, for Sarah R. Maguire.

Robert Payson, for defendants.

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

CORNISH, C. J. R. S., Chap. 50, Sec. 34, regulates appeals from the decisions of the Industrial Accident Commission under the Workmen's Compensation Act in these words: "Any party in interest may present copies certified by the Clerk of said Commission, of any order or decision of the Commission or of its Chairman or of any memorandum of agreements approved by the Commissioner, together with all papers in connection therewith, to the Clerk of Courts for the County in which the injury occurred; whereupon any Justice of the Supreme Judicial Court shall render a decree in accordance therewith and notify all parties. Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit in equity duly heard and determined by said Court, except there shall be no appeal therefrom upon questions of fact found by said Commission or its Chairman or when the decree is based upon a memorandum of agreement approved by the Commissioner. Upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure and the Law Court may, after consideration, reverse or modify any decree made by a Justice based upon an erroneous ruling or finding of law."

In the instant case the injury occurred in the town of Monmouth in the County of Kennebec. Copies of the decision of the Commission, with all other papers in connection therewith, were filed by the defendant with the Clerk of Courts, not of Kennebec but of Androscoggin County. A Justice of the Supreme Judicial Court thereupon signed a decree confirming the finding of the commission and an appeal was taken therefrom by the defendant to the Law

Court. Without considering the merits of the case the preliminary question is raised whether the appeal was so taken and perfected as to give this court jurisdiction, it being lodged in a county other than that in which the injury occurred.

The tribunal known as the Industrial Accident Commission, and all proceedings thereunder, are purely creatures of the statute. No jurisdiction is conferred except as the statute confers it. Therefore, the statutory requirements must be strictly complied with. Under the statute, Kennebec County alone had jurisdiction. The precise and unambiguous language of the Act permits no other conclusion.

The respondent, however, raises several contentions rather in the nature of a plea in confession and avoidance. In the first place it claims that the petitioner requested that the hearing before the Commissioner be had at Lewiston in the County of Androscoggin, and therefore all further proceedings should be had in that County. The record shows that the hearing was had and the evidence taken out in Androscoggin County, but was permitted under Chap. 50, Sec. 33, which provides "that all hearings shall be held in the town where the accident occurred unless the claimant shall in writing request that it be held in some other place." Written request by the claimant was made in this case and the request was granted. But that had no connection with and no effect upon the appeal. It had only to do with the place for taking out the testimony in the original hearing, which is a matter of mere convenience for the claimant. It might happen that testimony need be taken out in several different counties if the witnesses were scattered. Would jurisdiction be given to all such counties thereby? Clearly not.

Again the respondent contends that general jurisdiction was given to the court in equity and not to the court in any particular county, and that therefore only the question of proper venue is involved. This is not in accordance with the statutory provision. General jurisdiction is not given to the equity court. Our court sitting in equity does not have general jurisdiction over these appeals. It has only such jurisdiction, restricted as to place and procedure, as the statute specifies. The decree of the sitting Justice affirming the finding of the commission is a mere ministerial act. He hears and considers no testimony, and no arguments. He makes no decision but perfunctorily signs a decree in order to give progress to the appeal and place it in a channel for final determination by the Law Court.

Nor does the Law Court possess in such appeals such powers as it possesses in ordinary equity appeals. It must accept the findings of the Commission on disputed questions of fact as binding. In short the appeal merely takes on the same procedure as is followed in equity cases, but it does not become thereby a cause in equity. It retains its original essence.

Therein lies the distinction between this case and the authorities cited by the defendant. In those cases the court had full and complete jurisdiction of the cause and the only question was one of proper venue. Thus in *Backus* v. *Cheney*, 80 Maine, 17, it was held that the Supreme Judicial Court sitting as the Supreme Court of Probate had the same power to order a change of venue, in a probate appeal, as is possessed in ordinary common law actions.

In *Cassidy* v. *Holbrook*, 81 Maine, 589, it was held that if a plea in abatement to a common law action of replevin on the ground that it was brought in the wrong county is bad in form, the defendant cannot plead over. The case was in the right court but the wrong county.

The case of *U. S. Fidelity and Guaranty Co.*, Tex. Civ. App., , (1920), 219 S. W., 222, strongly relied on by the defendant is not applicable. The statutory proceedings on appeal in Workmen's Compensation cases in that State are entirely unlike the proceedings here. There the dissatisfied party, after notice, brings suit in some court of competent jurisdiction in the county where the injury occurred, and the majority of the court held that this gave full jurisdiction to that court, and if the suit were brought in the wrong county, then it was a mere question of venue and the court under another statute was authorized to transfer the action to the proper county. Even to that decision, which does not militate against our position here, there was strong and rather convincing dissent based upon the legal principle that when a court of general jurisdiction has power conferred upon it by statute which it did not otherwise possess, it is in that respect to be treated as a special tribunal. *Calverly* v. *Shank*, 28 Tex. Civ. App., 473; 67 S. W., 435; 7 R. C. L., 1032.

We must recur then to the clear provisions of the statute under consideration and conclude that the appeal was not properly perfected, and that this court is without jurisdiction.

Appeal dismissed with costs.

NELLIE KELLEY *vs.* ZEPHERIN THIBODEAU,

AND

MANNING R. KELLEY *vs.* SAME.

Oxford. Opinion November 1, 1921.

An owner of an automobile who allows an inexperienced and unlicensed person to drive his automobile, in the owner's presence and under his control, at an unreasonable and dangerous rate of speed with little regard for rights of pedestrians who conduct themselves as ordinarily prudent persons under like circumstances, is liable in damages if an accident occurs due to negligence of such driver as if it had been his own negligence that caused it. Damages not excessive. Motion for new trial on newly discovered evidence based on evidence of too trivial character.

Two actions to recover damages, for injuries received by Mrs. Kelley by being struck and run over by an automobile, one action brought by herself and the other by her husband. Both are before the Law Court on exceptions, general motion, and special motion on the ground of newly discovered evidence.

Held:

1. The instructions by the presiding Justice as to defendant's liability in case the jury found the car to be driven by another but under the full control and direction of the defendant correctly stated the law and afforded no ground for exception.
2. The requested instruction was properly refused because there was no evidence on which it could be based. The charge covered accurately every phase of the case open under the evidence, and the defendant's rights were carefully guarded.
3. The defendant's liability was abundantly proven. The evidence shows that the defendant's automobile was being driven by an inexperienced and unlicensed driver, in the owner's presence and under his control, at an unreasonable and dangerous rate of speed and with little regard for the rights of pedestrians, while Mrs. Kelley conducted herself as the ordinarily prudent woman would have done under like circumstances.
4. The damages awarded Mrs. Kelley, $4,527.90, considering the nature and extent of her injuries, cannot be regarded as grossly excessive. Nor can the verdict obtained by the husband, $2,251.17, considering the expenses paid and the loss sustained by him.

5. The special motion cannot be sustained. It relates simply to damages and does not affect liability. Conceding that the evidence of the three new witnesses is true it is not of such character, weight and value as to create a probability of a diminished result were the cases again submitted to a jury.

On exceptions and motions by defendant. Two actions brought by wife and husband against defendant to recover damages for alleged negligence of defendant in operating his automobile, or permitting it to be operated in his presence and under his control by an inexperienced and unlicensed driver, resulting in an accident seriously injuring the wife, one of the plaintiffs. The first action is to recover damages for injury to wife, and the second action by husband is to recover expenses incurred and loss of wife's services. A verdict of $4,527.90 was returned for plaintiff in the first action, and one of $2,251.17 returned for plaintiff in the second action. Defendant requested certain instructions bearing on the liability of defendant which the presiding Justice refused, and defendant took exceptions and also excepted to instructions given by the presiding Justice on the question of defendant's liability. Defendant also filed two motions for a new trial, one a general motion, and the other a special motion alleging newly discovered evidence. Exceptions and motions overruled. Judgment on the verdicts.

Case fully stated in the opinion.

Ralph T. Parker, and George A. Hutchins, for plaintiffs.

Albert Beliveau, and Matthew McCarthy, for defendant.

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

CORNISH, C. J. These two actions were brought against the defendant, one by Mrs. Kelley, the wife, for injuries sustained by her when struck and run over by the defendant's automobile near the junction of Franklin and Bridge Streets in the town of Rumford on the afternoon of September 15, 1919, and the other by the husband for expenses incurred and loss of his wife's services growing out of the same accident. In the former, the wife obtained a verdict for $4,527.90, and in the latter the husband obtained a verdict for $2,251.17.

The cases are before the Law Court on defendant's exceptions, general motion and special motion.

1. EXCEPTIONS.

The uncontradicted evidence shows that on the afternoon of the accident the defendant's automobile, which he runs for the public, was standing in front of his home on Waldo Street when he was approached by one Comeau, a barber, and asked that he and his three woodsmen friends who were with him be taken for a ride. The defendant consented and left with Comeau and his friends, making a party of five in all. The defendant was at the wheel, but shortly after they started Comeau asked permission to run the car and the defendant, according to his own testimony, said "Yes, you can run the car if you don't drive fast." Thereupon they changed places, Comeau taking the wheel and Thibodeau sitting by his side. The defendant's son had given Comeau a few lessons but Comeau was not an experienced driver and he was unlicensed. They first went out into the country about one and a half miles and on their return to the business section of the town and after crossing the bridge, this accident occurred.

Upon the question of defendant's legal responsibility for the management of the car under these circumstances, the presiding Justice charged the jury as follows:

"Now I instruct you that if Mr. Thibodeau allowed Mr. Comeau to drive that car, for the purpose of teaching him how to drive or if Comeau had previously been taught by Willie Thibodeau, and he had previously driven 150 miles,—if Mr. Thibodeau, the defendant, allowed him to drive the car, simply for practice, he, Thibodeau, having full control all the time of the car, having the right to direct how it should go, and who should drive it and how it should be driven, then Mr. Thibodeau is liable just the same, if the accident was due to negligence as if it had been his own negligence that caused it; he is responsible for the negligence of this Mr. Comeau, if those facts appear to you to be shown."

This rule of law was correctly given. The defendant takes nothing by this exception.

The second exception relates to the refusal of the court to give the following request: "If the defendant allowed Comeau to use the car for the benefit of himself and friends without compensation or pay, or on Thibodeau's business, and Comeau had absolute control while driving the car, then Thibodeau is not liable." This request was properly refused. It would have been misleading if given.

The evidence did not warrant such an instruction. It was uncontradicted, as counsel for the defendant states in his brief, that Comeau asked the defendant that he and his friends be taken by defendant on the ride, not that Comeau asked the privilege of taking his friends and Thibodeau on the trip. The case contains no facts upon which such an instruction could properly be based. Moreover, the charge of the presiding Justice on the question of Thibodeau's liability for the acts of Comeau, only a part of which is given above, was full and explicit and covered every phase of the case open under the evidence. The defendant's rights were carefully guarded. This exception must also be overruled.

2. GENERAL MOTION.

Two questions are raised under the general motion for a new trial, first, that the verdicts are manifestly wrong on the issue of liability, and second, that the awarded damages are excessive.

The question of liability need not be discussed at length. As usual in this class of litigation the negligence of the defendant and the contributory negligence on the part of the injured party were sharply contested. The jury found against the defendant on both issues and we think the evidence justifies their finding. The defendant's automobile was being driven by an inexperienced and unlicensed driver at an unreasonable and dangerous rate of speed and with little regard for the rights of travelers on foot, while the plaintiff conducted herself as the ordinarily prudent woman would have done under like circumstances. A very careful study of the evidence results in leaving the blame where the jury placed it.

On the question of damages, it appears that Mrs. Kelley, a woman fifty-five years of age, was seriously and permanently injured. She was knocked down upon the street and the car containing five men struck and ran over her with such force that her clothes were torn, the soles stripped from her shoes and the rings from her fingers. She was rendered unconscious and regained her faculties so slowly that five weeks elapsed before she was able to recognize her husband. There was a temporary paralysis of the left arm. The vision of the right eye was diminished eight-tenths. The attending physician states that for the first two weeks he did not expect her to survive. She remained in the hospital from September 15 to November 9, and then continued under the care of a physician and nurse practically up to the time of the trial. In short, Mrs. Kelley, according to the

testimony, has suffered excruciating pain and has been rendered an invalid for life. Under these circumstances her verdict of $4,527.90 cannot be regarded as grossly excessive.

Mr. Kelley, the husband, recovered $2,251.17. This included the expenses at the hospital, $345.29, the amounts paid physicians and nurses $1,047.76, a total of $1,393.05, for all of which receipts were produced. This leaves $858.12 as compensation for the loss of service of the wife, who has been rendered unable to perform household labor of any consequence. This amount cannot be deemed extravagant. No evidence whatever was offered by the defendant on the question of damages, and we are not disposed to reduce the amounts awarded by the jury.

3. SPECIAL MOTION.

Subsequent to the rendition of verdict the defendant filed a motion for new trial in each case on the ground of newly discovered evidence. This motion was accompanied by a statement under oath comprising the names of three witnesses whose testimony the defendant desired, the particular facts they were expected to prove and the grounds of such expectation. The record contains the testimony of two other witnesses, not mentioned in the statement, on the point of due diligence. This evidence cannot be considered. On a motion of this nature the testimony is confined to the witnesses named in the accompanying statement. *Thompson* v. *Morse,* 94 Maine, 359; *Fitch* v. *Sidelinger,* 96 Maine, 70. However, our decision is in no way affected by this exclusion. The three witnesses named, two of whom were physicians and one a dentist, testified to certain statements made to them by Mrs. Kelley prior to the accident bearing upon her nervous condition at that time and to the further fact that she then wore glasses. Conceding that all their testimony to was true, it is not of such character, weight and value as to create a probability of a changed result were the case again submitted to the jury. It does not touch the question of liability. It relates simply to damages, and when carefully scrutinized it is found to be of the most trivial character with slight probative force upon the real issues raised here. This motion cannot be sustained.

The entry must be,

Exceptions and motions overruled.

Judgment on the verdicts

MARY E. TARBOX, Pet'r *vs.* HARRY G. TARBOX.

Penobscot. Opinion November 3, 1921.

A petition for a new trial after judgment on a libel for divorce, filed within three years after judgment, when the parties have not cohabited and neither has contracted a new marriage subsequent to the former trial, is not barred by the three year limitation under Chap. 65, Sec. 11 of the R. S., even though final judgment thereon is not entered until after the expiration of that time.

R. S., Chap. 65, Sec. 11, 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" etc.

Held:

That, considering the history and purpose of this statute, a petition for new trial filed within the three year period, even though final judgment thereon is not entered until after the expiration of that time, is not barred by this limitation.

On exceptions by petitioner. This is a petition to review a judgment for divorce granted at an ex parte hearing on the ground of desertion, though service was made on libellee who did not appear at the hearing. At a hearing on the petition the Justice presiding dismissed the petition and ruled that the petitioner's right of action had been barred by the Statute of Limitation, R. S., Chap. 65, Sec. 11, to which ruling petitioner excepted. Exceptions sustained.

Case is stated in the opinion.

Bradley, Linnell & Jones, for plaintiff.

Morse & Cook, for defendant.

George H. Morse, for Isabel R. Judge.

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

CORNISH, C. J. This case involves the construction of R. S., Chap. 65, Sec. 11, limiting the period within which a new trial (somewhat in the nature of a review, *Simpson* v. *Simpson*, 119 Maine, at 17) may be granted in a libel for divorce. The words of the statute are

"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;" . . . . What marks the end of the three year period? Is it the bringing of the petition for new trial or the judgment thereon? Is a petition for new trial filed within the three year period seasonably filed, even though the final judgment thereon is not entered until after that time, or must the granting of the new trial itself be within the three year limit? These are the questions involved here.

The original divorce between these parties was granted at the October term, 1917, of the Supreme Judicial Court for Penobscot County. On February 16, 1918, this petition for a new trial was brought by the libellee, Mary E. Tarbox, was served on Harry E. Tarbox the original libellant on March 8, 1918, and duly entered at the April term, 1918, of said court, all within six months of the granting of the divorce. The cause was continued from term to term. On March 21, 1919, Harry E. Tarbox died. His death was suggested on the docket at the April term, 1919. A hearing was not had before the presiding Justice until January 31, 1921, the October term, 1920, being then open, and the Justice dismissed the petition, ruling as a matter of law that "affirmative action on the present petition is inhibited by the three year limitation of the statute, the death of the respondent notwithstanding." On exceptions to this ruling the case is before the Law Court.

The exceptions must be sustained. While the language of the statute gives some color to the defendant's construction, an examination of the original statute, Public Laws, 1839, Chapter 377, viewed in the light of the subject matter, clarifies the legislative intent. That act, after giving the Justices of the Supreme Judicial Court discretionary power to grant a new trial in cases of divorce, concludes: "Provided however that but one new trial shall be granted for the same cause and that no application for such new trial shall be sustained after a lapse of three years from the final determination of the first trial." Evidently the intention was that the application must be made within the three year period. A transposition of the words might more happily express the thought, viz.: "No application for such new trial, after a lapse of three years from the final determination of the first trial, shall be sustained." It is the application that is to be sustained or rejected, and to the making of that the three year

limit is to apply. Judgment in the divorce case marks the beginning of the period, making application for its reversal marks the end.

When the previous statutes and laws were revised and condensed in 1841, a change was made in the phraseology of this section, the word application was squeezed out and in the condensed form the clause appears, "provided such new trial shall not be granted after the lapse of three years after the former judgment." R. S. 1841, Chap. 89, Sec. 32. In 1857 the same idea was expressed, but in the affirmative rather than in the negative form: "Within three years after a judgment on a libel for divorce, the Court, on petition of the party aggrieved, may grant a new trial" &c., R. S. 1857, Chap. 60, Sec. 8, and this has been repeated in substantially the same language in subsequent revisions. R. S., 1871, Chap. 60, Sec. 9; R. S., 1883, Chap. 60, Sec. 14; R. S., 1903, Chap. 62, Sec. 11; R. S., 1916, Chap. 65, Sec. 11.

No specific legislation authorized the changed phraseology, and it is a cardinal principle in statutory construction that a mere change in phraseology in the reenactment of a statute in a general revision does not change its effect unless there is evident a legislative intention to work such change. *Hughes* v. *Farrar*, 45 Maine, 72; *Martin* v. *Bryant*, 108 Maine, 253; *Glovsky* v. *Maine Realty Bureau*, 116 Maine, 378. No such legislative intent of change can be perceived in this case. The meaning of the original statute still persists.

Moreover, any other construction is unreasonable and works injustice. A statute of limitation whose purpose is to end litigation is designed to cut off rights after the lapse of a certain period which by its very nature must be fixed and definite. It should not be in the nature of a movable feast. It must give all persons the same specified time beyond which their rights cannot be litigated. Then they can govern themselves accordingly.

And this right to reopen a case should depend wholly upon the action or inaction of the moving party, not on the conduct of his adversary or the happening of outside events for which the petitioner is in no way responsible. It should not depend upon the skill of a respondent to postpone the hearing, nor upon the delays of court procedure, through appeals or exceptions, to a time beyond the statutory period. Under such a construction as the defendant here contends for, even though an application were begun well within the three year period the petitioner might not be able to obtain judgment

until long after that period had elapsed and that, too, without his fault. The instant case is a good illustration. This petition was brought, served and entered within six months after the divorce was decreed, was continued in court for several terms, for reasons that the record does not disclose other than the death of the libellant in March, 1919, but was not actually heard until January 31, 1921, a few months after the expiration of three years from the divorce decree. Even now it is not finished because exceptions have brought the case to the Law Court and the cause will go back to another hearing below. Has the petitioner's right of review been thereby lost? We think that the statute should and can be so construed as to avoid this unjust result, and we think the construction here given is the one expressed in the original act of 1839, and never changed. Where any ambiguity exists, resort may be had to the nature of the subject matter, the object to be accomplished, and the consequences, because it is to be presumed that the Legislature had just, reasonable and definite ends in view.

The fact that the respondent has died since the commencement of these proceedings does not prevent their prosecution, where property rights are involved as here. *Leathers* v. *Stewart*, 108 Maine, 96; *Gato* v. *Christian*, 112 Maine, 427.

This petition survived.

Exceptions sustained.

ERNEST H. DYER

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

Cumberland. Opinion November 3, 1921.

The finding of the jury not so manifestly wrong as to warrant the verdict being disturbed by the court. The defendant's servant in operating the electric car was charged with the duty the defendant owed to travelers lawfully upon the highway to keep a lookout and exercise all reasonable care to avoid injuring them, and must have either seen the plaintiff in his position of peril and misjudged his distance from the track, or failed to exercise that due care which would have caused him to discover him in time to have avoided the accident. In the application of the rule of the "last clear chance" it is not necessary that defendant has actual knowledge of the plaintiff's peril. If he owed the plaintiff a duty to avoid injuring him, and in the performance of that duty should have discovered the plaintiff's peril in time to have avoided the accident by stopping the car, even though plaintiff was clearly guilty of contributory negligence but could not extricate himself from his perilous position, he is liable. Alleged newly discovered evidence purely cumulative. Damages clearly excessive and plaintiff to remit all over seventy-five hundred dollars, or motion sustained.

Upon a motion by the defendant for a new trial on the usual grounds and also upon newly discovered evidence,

Held:

That as to the manner in which the accident occurred, the jury must have found in favor of the plaintiff's contention and in this respect the jury's finding is not so manifestly wrong as to warrant the verdict being disturbed by this court;

That the defendant company owed a duty to travelers lawfully upon the highway to keep a lookout and exercise all reasonable care to avoid injuring them;

That in view of these conclusions, the defendant's servant operating the electric car must either have seen the plaintiff in his position of peril and misjudged

his distance from the track, or in the exercise of due care should have discovered him in time to have avoided the accident;

That in applying the rule of the "last clear chance," it is not necessary for the defendant to have actual knowledge of the plaintiff's peril, if he owed the plaintiff a duty of keeping a lookout to avoid injuring him, and in the performance of that duty should have discovered the plaintiff's peril in time to have avoided the accident;

That while the plaintiff was clearly guilty of contributory negligence in stopping his truck so near the tracks of the defendant and a duty also rested upon him to keep a lookout for the car he knew was behind him, the jury may have found, if the motorman could have stopped the electric car, as he testified he did within a distance of one foot, or even a greater distance, after discovering the plaintiff's danger, that after the plaintiff could no longer extricate himself from his perilous position, the motorman could still have stopped the car in time to avoid the accident;

That it must be presumed that proper instructions were given the jury as to the rights of the parties under these conditions, and while this court might have reached a different conclusion upon the evidence, it is unable to say, as upon the other branch of the case that a finding of the jury that the defendant had the "last clear chance" of avoiding the accident was clearly wrong;

That the alleged newly discovered evidence, upon which the second motion of the defendant is based, is purely cumulative and it cannot be said that if presented to another jury it would arrive at a different verdict;

That upon the question of damages, the court, after carefully considering the evidence, is of the opinion that they are clearly excessive and unless the plaintiff remit all over seventy-five hundred dollars, the motion of the defendant must be sustained.

On motions for new trial by defendant, one on the usual grounds and the other upon newly discovered evidence. An action to recover damages for personal injuries resulting from a collision between an automobile of the plaintiff and an electric car of the defendant, due to alleged negligence of the defendant in the operation of one of its street cars. A verdict for $11,500.00 was returned for plaintiff by the jury. Motion on ground of newly discovered evidence denied. Motion on ground damages are excessive sustained, unless plaintiff within thirty days after the receipt by the clerk of the rescript, remit all of the verdict over seventy-five hundred dollars as of the date of the verdict.

The case is fully stated in the opinion.

Hinckley & Hinckley, for plaintiff.

Bradley, Linnell & Jones, and William Lyons, for defendant.

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

WILSON, J. An action to recover damages for personal injuries due to alleged negligence of defendant company in the operation of its street cars. For the third time the case comes before this court. Once on a motion by defendant for a new trial; a second time on exceptions by the plaintiff to a directed verdict for the defendant; and now upon motions for a new trial by the defendant, one on the usual grounds and the other upon newly discovered evidence. Twice a jury at *nisi prius* has found for the plaintiff. It is, of course, regrettable that litigation should be prolonged, but the trials have been zealously contested and additional evidence and new questions have been presented.

Upon the first motion for a new trial, 117 Maine, 576, this court was of the opinion that the contention of the defendant as to the manner in which the accident occurred was so clearly established that the jury must have erred in the conclusion reached by them.

When the case again came before the court, 119 Maine, 224, on exceptions by the plaintiff to the ruling of the Justice presiding at *nisi prius*, a majority of the court were of the opinion that upon the evidence the issue as to how the accident occurred—whether the electric car ran into the truck of the plaintiff while at rest in the street, or whether the plaintiff momentarily lost control of his truck and it ran into the electric car—was so close that a verdict either way would not be so manifestly unsound as to warrant interference by this court. There being in the opinion of a majority of the court, sufficient evidence on which the jury might have found that the accident occurred in the manner claimed by the plaintiff, viz.: that he had passed the electric car and stopped by the side of the track to allow some boys to cross the street in front of him, and that when the electric car upon making the curve to enter the single track at this point, its fender and chain supporting it projected far enough beyond the track to extend under the step and mud guard of the truck and striking the front wheel, all combining to lift up that side of the truck, and finally tipping it over on its side, it raised the question whether, even though plaintiff was negligent in stopping so near the track, the defendant company should not in the exercise of due care have discovered the plaintiff in his place of peril in time to have

stopped the car and avoided the accident. The majority of the court was of the opinion that this question under proper instructions should have been submitted to the jury and sustained the plaintiff's exceptions.

Upon the third trial the jury found a verdict for the plaintiff in the sum of eleven thousand five hundred dollars and on the defendant's motion for a new trial on the usual grounds the question of whether the verdict is clearly wrong is again before this court.

Upon the evidence now presented we see no reason to change the opinion expressed in the 119 Maine, 224, that the jury in order to arrive at its verdict must have found that the accident occurred substantially in the manner described by the plaintiff and his witnesses, and that upon this point, there being no more inherent improbabilities in the contentions of the plaintiff than in those of the defendant, the finding of the jury is not so manifestly unfounded as to require the interference of this court, and that the other issues involved must be determined upon this assumption as to the manner in which the collision took place.

But as indicated then, even though the accident occurred in the manner described by the plaintiff, the court is still of the opinion that he was clearly negligent in stopping his truck so near the defendant's track knowing that a car was following behind him. Such a situation, we think, clearly raises the question of whether the negligence of the plaintiff in placing himself in the position of danger and failing to remove his truck in time was the proximate cause of his injuries, or whether the defendant, owing a duty to all travelers lawfully using the street, of keeping watch to prevent injuries being done to persons or teams, ought, in the exercise of due care in the performance of that duty, to have discovered the plaintiff in his position of danger in time to have avoided the collision, and its failure to do so should be regarded as the proximate cause.

The learned counsel for the defendant company strenuously urges, however, that the doctrine known as the "last clear chance" has no application to the facts in this case, because even if the accident occurred in the manner claimed by the plaintiff and his witnesses it does not appear that the defendant's servant had actual knowledge of the plaintiff's position of danger in time to avoid the accident, and also that the negligence of the plaintiff actually continued up to the moment of the collision.

The principles governing the application of the doctrine of the "last clear chance" have been so frequently stated by this court that to restate them can serve no purpose, as no new questions are presented by the facts in this case, unless the fact that it does not appear that the defendant's motorman had any knowledge of the plaintiff's peril prior to the accident modifies the application of this rule. The rule of the "last clear chance" is generally regarded as having first received judicial sanction in *Davies* v. *Mann*, 10 M. & W., 546, and the confusion that has arisen in the different jurisdictions since its application in that case shows the danger of attempting to lay down a rule broad enough to apply in all cases.

It may well be doubted whether the statement of the rule by Baron Parke in that early case has been or can be improved upon as a general statement: "Although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he is entitled to recover." Or in other words, if at any point of time in the succession of events or acts leading up to or resulting in the accident and the plaintiff's injuries, the plaintiff, though previously negligent, could not thereafter by the exercise of ordinary care have averted the accident, but the defendant by the exercise of ordinary care on his part could have done so, any prior negligence of the plaintiff in creating the dangerous situation is regarded only as a condition and not the proximate cause of the injury. *French* v. *Grand Trunk Railway Co.*, 76 Vt., 441; *Southern R. R. Co.* v. *Bailey*, 110 Va., 833, 840; *Atwood* v. *Railway Co.*, 91 Maine, 399.

Assuming the accident occurred in the manner claimed by the plaintiff, the defendant's counsel concede that if the motorman had seen the plaintiff's truck stopped beside the track in time to have avoided the collision it would not be excused by any prior negligence of the plaintiff. That under such conditions the case could not fairly be distinguished in principle from that of *Atwood* v. *Railroad Co.*, supra.

It is urged, however, that the case at bar is distinguished from the last cited case by the fact that the motorman in the instant case did not discover the plaintiff's peril until the accident occurred. The question of whether actual knowledge by the defendant of plaintiff's position of peril is necessary to the application of the "last clear chance" rule to a given case has never been directly before this court

prior to this case, though it has on several occasions indicated its position in this respect, as it did on plaintiff's exceptions, 119 Maine, 224, 227; *Fickett* v. *L. A. & W. St. Ry.*, 110 Maine, 267, 271; *Glidden* v. *Bangor Ry. & El. Co.*, 112 Maine, 354.

It is true that the courts in some jurisdictions have refused to apply this rule unless the position of the plaintiff was actually discovered by the defendant in time to have avoided the injuries. *Bourrett* v. *Chicago & N. W. Rwy. Co.*, 152 Iowa, 579; *Todd* v. *Railroad*, 135 Tenn., 92; *Starck* v. *Pacific & E. R. R. Co.*, (Cal.), L. R. A., 1916, E. 58, and see notes L. R. A., 1915, C. 48, 36 L. R. A., (N. S.), 957 where the cases on this question are collected and reviewed. But the trend of the cases and the weight of authority, we think, now hold that where as in the case at bar the defendant owed a duty to the plaintiff as a traveler on a public highway to keep watch and use all reasonable care to avoid injuring him, *Flewelling* v. *Railroad Co.*, 89 Maine, 585, 594; and the performance of that duty would have resulted in the discovery of the plaintiff's position in time to have avoided the accident by the exercise of ordinary care on the part of the defendant, unless the negligence of the plaintiff can be said to have actively continued up to the moment of the accident, as in *Butler* v. *Railway Co.*, 99 Maine, 149; *Denis* v. *St. Railway Co.*, 104 Maine, 39, 47; *Philbrick* v. *A. S. L. Rwy.*, 107 Maine, 429, 434; *Smith* v. *Somerset Traction Co.*, 117 Maine, 407, the doctrine of the "last clear chance" may be properly invoked by the plaintiff. *Indianapolis Traction Co.* v. *Kidd*, 167 Ind., 402, 411; *D. & R. G. R. R. Co.* v. *Buffehr*, 30 Colo., 27; *Nichols* v. *C. B. & Q. R. R. Co.*, 44 Colo., 501; *Kolb* v. *St. Louis Rwy. Co.*, 102 Mo. App., 143; *Teakle* v. *R. R. Co.*, 32 Utah, 279, 291; *Payne* v. *Healey*, (Md.), 114 Atl., 693; *Acton* v. *Moorhead R. R. Co.*, 20 N. D., 435; *Birmingham Rwy. Light and P. Co.* v. *Brantley*, 141 Ala., 614; *Dickson* v. *Chattanooga Rwy. & Light Co.*, 237 Fed. Rep., 352; Thompson on Neg., Vol. I, Sec. 231; Vol. II, Secs. 1476, 1477. "Where the defendant owes no duty to the plaintiff as in the case of trespassers there may be sound reasons for adhering to the rule of actual knowledge." Shearman and Redfield on Neg., 5th Ed., Sec. 484. In the case of railroads, however, using the public streets, public policy, we think, requires them to be held responsible in case injuries to those lawfully using the highways result from the failure on the part of their servants to use reasonable care in keeping a lookout for travelers, provided, of course, the traveler was not also

actively negligent at the time and thereby contributed to his own injury, and the defendant's servants if they had exercised reasonable care could have discovered the plaintiff's peril in time to have avoided injuring him. Otherwise, motormen of street cars might be guilty of the grossest negligence through inattentiveness to their duties,—talk with passengers in their cars, or gaze at people on the sidewalks,—and unless it was shown that they actually saw the plaintiff in his exposed position the railroad would escape all liability. Such a doctrine has been characterized, and not too strongly, by Thompson in his work on Negligence, Vol. II, Sec. 1476, as "a miserable doctrine in favor of which not one word can be said."

Assuming the accident in the case at bar happened as contended by the plaintiff and his witnesses, it is perfectly clear that the motorman operating the defendant's car must either have seen the plaintiff's truck and misjudged its distance from the track and the clearage required for him to pass or in the exercise of ordinary care he should have discovered it in time to have avoided the collision. The only question remaining, then, is: Was the plaintiff also actively negligent at the moment of the collision and so contributed to the accident. If so, of course, he cannot recover.

Since there is no evidence in the case that the defendant's servant did actually discover the plaintiff's position of danger prior to the accident, but on the contrary the motorman positively denies it, even though in the exercise of due care he should have done so, the plaintiff being in a position where ordinary care on his part required him to keep a watch for a car which he knew was approaching behind him, there is much force in the defendant's contention that that duty actively continued to the moment of the collision, and that he cannot be said to have been merely passively negligent, as the negligence of the plaintiff in *Atwood* v. *Railroad Co.*, supra was characterized in *Denis* v. *St. Railroad Co.*, 104 Maine, 39, 47, and hence the negligence of the parties was in fact concurrent.

The jury, however, may have found from the evidence that there came a time in the succession of events leading up to the collision when no act of the plaintiff could have avoided the collision, but the motorman could still have stopped the car if he had discovered the plaintiff's danger. If so, from that time the negligence of the plaintiff may be said to have ceased, or at least no longer in any way contributed to his injuries.

The plaintiff's truck according to his testimony and the direct evidence of four or five other witnesses was at rest. Assuming the engine to have been running he could not move a ten or twelve foot truck out of the danger zone in an instant. The jury, therefore, may have found that if the motorman could by applying his emergency brakes have stopped the electric car within "a foot or a little more," as he testified he did at the time of the collision, or even within five feet, that when the plaintiff, notwithstanding his prior negligence, could no longer have avoided the collision, even if he had seen the approaching car and then did everything possible to move his truck from the place of danger, the defendant's servant could still, if he had exercised ordinary care, have discovered the plaintiff's exposed condition and stopped the car in time to have avoided the collision.

We must assume since no exceptions were taken that the jury was properly instructed as to the rights and duties of the parties under these conditions. This court might have arrived at a different conclusion if it had heard and seen the witnesses. The case presented is a very close one upon the evidence; but the facts upon which the case turns are distinctly within the province of the jury to determine. On the whole, after carefully reviewing the testimony, we are unable to say that the verdict of the jury is so manifestly wrong either upon the question of the manner in which the accident occurred, or as to which party had the last clear chance to avoid the collision as to warrant this court in again interfering with the jury's finding. *Atwood* v. *Railroad Co.*, 91 Maine, 399, 405.

The motion based upon newly discovered evidence must also be denied. The new evidence is only cumulative, and we cannot say that if presented to another jury it would arrive at a different result. *Parsons* v. *Railway*, 96 Maine, 503.

While the defendant did not argue the question of excessive damages, the court is of the opinion that they are so clearly excessive that they must be substantially reduced or a new trial should be ordered. It is true the plaintiff suffered a serious and painful injury and that his expenses for medical care and treatment were large; but his physician, a surgeon of wide repute and standing, says that in his opinion he will recover and that the broken bone will become strong, though he may not have the full use of his foot and ankle. Considering all these elements together with his loss of earnings since

the accident and his probable loss of earning until full recovery, or in the future, we are of the opinion that unless the plaintiff shall remit all of the verdict over seventy-five hundred dollars a new trial should be ordered.

Motion on ground of newly discovered evidence denied.

Motion on ground damages are excessive sustained unless the plaintiff, within thirty days after the receipt of the rescript by the clerk, remit all of the verdict over seventy-five hundred dollars, as of the date of the verdict.

JOHN T. CULLICUT *vs.* THOMAS F. BURRILL et al.

Penobscot. Opinion November 5, 1921.

The negligence complained of was established by the jury and the court is not convinced that their conclusion was manifestly wrong. The storm, though a severe one, was not so overpowering and unusual that the cause of the accident should be regarded as an act of God or vis major. Damages grossly excessive and to be reduced to $4,500 by a remittitur.

In an action of tort for injuries sustained by the plaintiff by being struck by a galvanized iron blower pipe which, in turn, was hit in the fall of a wooden ventilator shaft during a severe storm, it is

Held:

1. The negligence complained of in the alleged faulty construction, insecure fastening, inadequate support and improper maintenance and repair of the ventilator shaft, was established by the jury and this court is not convinced that their conclusion was manifestly wrong.
2. The storm, though a severe one, was not so extreme that it might not have been anticipated as likely to occur. Nor was it so overpowering and unusual that the cause of the accident should be regarded as an act of God or vis major.
3. The damages awarded, $7,000, were grossly excessive for the injuries sustained.

On motion for a new trial by defendants. This is an action of tort for personal injuries suffered by plaintiff while an employee of Cyr Brothers who were building a dam for the defendants near their woolen mill in Corinna, on October 30, 1917. A heavy wind caused a wooden ventilator shaft extending up through the roof of the dye house to a height of twenty-two feet to blow over, and in falling, it struck a blower pipe of galvanized iron which, in turn, gave way and fell upon the plaintiff, who was at work on the ground, causing the injuries complained of. Cyr Brothers were assenting employers under Workmen's Compensation Act, and a settlement had been made between the employer, employee and the Insurance Company. This action, one of subrogation, was brought in the name of the employee for the benefit of the Insurance Company, under the provisions of R. S., Chap. 50, Sec. 26. A verdict for the plaintiff in the sum of $7,000, was rendered by the jury, and the case went to the Law Court on defendants' general motion for a new trial. Motion for new trial granted and verdict set aside unless the plaintiff within 30 days after the filing of the mandate remits all the verdict in excess of $4,500.

The case is fully stated in the opinion.

George H. Morse, and W. B. Peirce, for plaintiff.

Gillin & Gillin, for defendants.

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

CORNISH, C. J. This is an action of tort for personal injuries. The plaintiff at the time of the accident, October 30, 1917, was an employee of Cyr Brothers who were building a dam in Corinna for the defendants, near the defendants' woolen mill. Above the plaintiff as he worked and about fifteen feet from the ground was a twelve-inch galvanized iron blower pipe eighty feet long, which connected the defendants' woolen factory on one side with a picker house on the opposite side of the stream. Near this blow pipe were two wooden ventilator shafts extending up through the roof of the dye house to a height of twenty-two feet, the opening of the shaft being about two feet six inches square. In a heavy wind on the day alleged, one of these shafts fell upon the blower pipe which, in turn, gave way and fell upon the plaintiff causing the injuries complained of.

Cyr Brothers were assenting employers under the provisions of the Workmen's Compensation Act, and a settlement has been effected between the employer, employee and the Insurance Company which was carrying the risk. This action is brought under the provisions of R. S., Chap. 50, Sec. 26, for the benefit of the insurer and was properly instituted in the name of the employee. *Donahue* v. *Thorndike and Hix,* 119 Maine, 20.

The jury rendered a verdict for the plaintiff in the sum of $7,000 and the case is before the Law Court on defendants' general motion for a new trial. Regardless of the subrogation element of the action the same issues are involved as in an ordinary action of tort for negligence between parties who do not sustain the relation of employer and employee to each other. There was no claim by the defendants of any contributory negligence on the part of the plaintiff. That leaves simply the question of negligence on the part of the defendants and the amount of the verdict to be considered.

The negligence complained of is in the faulty construction, insecure fastening, inadequate support and improper maintenance and repair of the ventilator shaft. The defendants' answer is that the shaft was properly constructed and maintained, and that the accident was caused solely by a hurricane for which they were not responsible. These two issues were sharply contested. Upon both, the jury found in favor of the plaintiff. The method of construction of the shaft, the strength and character of the materials used, the manner in which it was supported or stayed in order to withstand the elements, were questions peculiarly within the experience and province of practical jurymen. A careful study of the evidence does not convince the court that their conclusion was manifestly wrong on this branch of the case.

As to the defense of vis major, undoubtedly the legal principles governing in this jurisdiction were correctly stated by the presiding Justice in his charge. No exceptions were taken and we must therefore assume that the rules were clearly and adequately stated. This left a question of fact to be determined by the jury upon contradictory evidence. After a thorough analysis and comparison of the testimony taken in connection with the fact that no other structure of any kind in Corinna on the day in question appears to have been affected by the gale, our conclusion may be expressed in the language of the court in a former case: "The storm though a severe one was

not so extreme that it might not have been reasonably anticipated as likely to occur; nor was it so overpowering and unusual that the cause of the accident should be regarded, according to the definition adopted by writers, as an act of God, or vis major." *Toole* v. *Beckett*, 67 Maine, 544.

The damages awarded, however, ($7,000) we think, were grossly excessive and indicate lack of appreciation of the evidence on this point on the part of the jury.

It was incumbent upon the plaintiff to prove the extent and seriousness of his injuries. No bones were broken. The only objective symptom of injury according to the testimony of the attending physician was the difficulty the plaintiff had in rotating his head to the right. The same physician says that at the time of the trial there was an improvement in this respect. He diagnosed the injury to be one to the ligaments and nerves of the back, developing after a week or ten days some apparent withering of the muscles of the right arm, affecting especially the forefinger. The doctor made twenty-two calls in all between October 30 and December 6, 1917. His medical services then ceased and there is no evidence that the plaintiff received any further medical aid, or that he called for any. The expenses amounted to seventy-five or eighty dollars. Permanent injury is not proved. The plaintiff has done little work since the accident but he is up and about and drives for pleasure his own automobile, which he cranks with his left hand. Without rehearsing all the evidence on the question of injury it is sufficient to say that in the opinion of the court the awarded damages are grossly extravagant. A verdict for $4,500 should be ample for the injuries proved to have been sustained.

Motion for new trial granted and verdict set aside unless the plaintiff within 30 days after the filing of this mandate remits all of the verdict in excess of $4,500.

INTERNATIONAL AGRICULTURAL CORPORATION

vs.

WALTER WILLETTE et al.

Aroostook. Opinion November 5, 1921.

The court will grant relief against a false denial of proven interest or bias by a juror being examined by counsel on the voir dire, and accepting such juror relying on his statements as true, when as a matter of fact they were untrue, and the plaintiff being misled thereby, does not constitute a waiver of any rights.

In an action of assumpsit to recover for potato fertilizer sold and delivered, the jury returned a verdict for the defendants.

One of the jurors when examined by counsel for the plaintiff on the voir dire stated that he had no claim and no interest in any claim against any fertilizer company, when, in fact, he and his partner had at that time a claim against such a company which claim was allowed within one month after this trial to the amount of $1,344.75.

Held:

1. That the plaintiff was entitled to full, fair and frank answers, so that he might challenge the juror if it appeared that he was not indifferent.
2. That the plaintiff had the right to rely upon the juror's statements and waived nothing by accepting him after his denial of interest.
3. That the statement being untrue and the plaintiff being misled thereby, the court will grant relief against a false denial of proven interest or bias.

On motion for a new trial by plaintiff. An action of assumpsit to recover a balance of $9,905.74 for potato fertilizer sold and delivered to defendants. Defendants filed a plea of general issue and a brief statement alleging that the fertilizer was adulterated and misbranded and was sold in violation of Chap. 36 of the R. S. The jury returned a verdict for the defendants, and the plaintiff filed a general motion to set aside the verdict, and also a special motion to grant a new trial

because of the disqualification of a member of the jury. The special motion only was considered and sustained, and a new trial granted.

The case is stated fully in the opinion.

Doherty & Tompkins, Powers & Guild, and Pierce & Madigan, for plaintiff.

Charles P. Barnes, for defendant.

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

CORNISH, C. J. In an action of assumpsit to recover a balance of $9,905.74 for potato fertilizer sold and delivered to the defendants in the winter and spring of 1917 for use upon their farms in Aroostook County the jury returned a verdict for the defendants, the suit being resisted on the ground that the fertilizer was adulterated and misbranded and was sold in violation of R. S., Chap. 36. The case is now before the Law Court on a general motion to set aside the verdict as manifestly against the evidence, and also upon a special motion to grant a new trial because of the disqualification of a member of the jury. It is necessary to consider only the special motion.

From the evidence taken out under the special motion, it appears that unusual care was taken and each juror was examined on the voir dire by counsel for the plaintiff. One of the jurors so examined was Amos G. Libby, who was engaged in farming in company with his brother under the name of Libby Brothers. The evidence was not taken by the stenographer, but plaintiff's attorney who conducted this examination describes it as follows: "As nearly as I can recollect, I asked Mr. Libby whether he had any claim or interest in any claim against any fertilizer company for adulterated fertilizer, and he replied 'not yet.' I then asked him what his answer meant and whether he did in fact have any claim or interest in any claim against any fertilizer company, practically repeated the first question, to which he said 'No, he had none.'" This juror was then allowed to serve. This testimony as to what took place at the trial is not controverted. The plaintiff had at that time exercised none of its peremptory challenges.

The trial was had at the November term, 1919, and the record shows that on December 15, 1919, the Hubbard Fertilizer Company made a settlement with the Libby Brothers, whereby the company's

bill for fertilizer sold the Libby Brothers in the season of 1919, and amounting to $1,720, was reduced $1,344.75 because of the counter claim of Libby Brothers for injury to their potato crop because of the quality of the fertilizer, leaving a balance of $375.25 due the Fertilizer Company. This settlement is in writing.

Mr. Libby seeks to explain his former testimony on the voir dire, when he denied the existence of any such claim, by stating that although he had told the fertilizer agents that their crops were not satisfactory and although the agents had visited their farms several times during the summer to examine the crops and to ascertain their condition, still he did not regard that as a claim. "I don't call it a claim. They was around looking the crops over, as I said before," was his language. Perhaps he was attempting to differentiate between a claim reduced to figures, put in written form, and presented to the other side, and a claim existing in fact, although its amount and extent might remain indefinite. He seems to have had something of the sort in mind when in response to the question on the voir dire as to having any claim, he at first answered "Not yet," and as this was somewhat vague, the attorney put the question again in the broadest possible form so as to give him an opportunity to explain and to state all the facts, if there was any qualification. He then answered without reservation or qualification, "No, he had none." This disarmed any suspicion that his first answer may have aroused. The attorney was justified in taking him at his word and accepting him as a disinterested juryman. He had the right to rely upon his statements and he waived nothing by accepting the juryman after his denial of interest. *Flagg* v. *Worcester,* 8 Cush., 69.

The answer, however, was in fact untrue, as the evidence proves. Mr. Libby, with his partner, did have at the very time when he was interrogated a large claim against the Hubbard Fertilizer Company based upon the inferior quality of the fertilizer, a similar question to that involved in the pending suit, and that claim was acknowledged and allowed by that company within one month after the verdict adverse to the International Agricultural Corporation was rendered in this suit. He must have been deeply interested in the outcome of this litigation. It was most likely to have an important bearing upon the settlement of his own claim.

At the very basis of our trial system stands a disinterested, unprejudiced jury as triers of the fact, a body every member of which should

be free from bias and prejudice. To this both parties are entitled as a matter of law as well as of justice. In order to secure this result this statute, which is but declaratory of the common law, has been enacted: "The Court on motion of either party in a suit, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or formed an opinion, or is sensible of any bias, prejudice or particular interest in the cause; and if it appears from his answers or from any competent evidence that he does not stand indifferent in the cause, another juror shall be called and placed in his stead." R. S., Chap. 87, Sec. 99.

The plaintiff exercised this right of examination in the instant case in order to ascertain whether Mr. Libby stood indifferent. He was entitled to full, fair and frank answers, so that he might challenge the juror if it appeared that he was not indifferent. *Gibney* v. *St. Louis Transit Co.*, 204 Mo., 704. "What is meant by a person standing indifferent? Manifestly that the mind is in a state of neutrality as respects the person and the matter to be tried; that there exists no bias either for or against, in the mind of the juror, calculated to operate upon him; that he comes to the trial with a mind uncommitted and prepared to weigh the evidence in impartial scales." *Sellers* v. *The People*, 4 Ill., 412; *The People* v. *Vermilyea*, 4 Cow., 108, 122. The existence of similar circumstances has been recognized as a ground of disqualification. *May* v. *Elam*, 27 Iowa, 365; *Pearcy* v. *Ins. Co.*, 111 Ind., 59; *Davis* v. *Allen*, 11 Pick., 466, and see dictum in *McLellan* v. *Crofton*, 6 Maine at 329.

Had Mr. Libby answered truthfully and given all the facts, the plaintiff's attorney would undoubtedly have challenged him. No attorney, mindful of his duty to his client, could have done otherwise. He was deceived and misled by the juryman's unqualified statement and the court must grant relief against a false denial of proven interest or bias. Otherwise the examination on the voir dire would be a mockery. This court has always been scrupulously vigilant to preserve the absolute impartiality of the panel, *Jewell* v. *Jewell*, 84 Maine, 304, and in case of alleged misconduct has held that it need not be shown that the mind of the juror was actually influenced by the attempt, but whether the attempt might have any tendency to create such influence. *York* v. *Wyman*, 115 Maine, 353, and cases cited.

In the case at bar the plaintiff was deprived of his legal right to have twelve impartial jurymen, all of whom should stand indifferent to the cause, by the misleading and untrue statement of Mr. Libby. That right can be restored only by granting the special motion in this case.

Special motion sustained.
New trial granted.

GEORGE F. CARY, Ex'r and Trustee, In Equity

vs.

FRANCIS L. TALBOT et als.

Washington. Opinion November 5, 1921.

Bill in equity seeking the construction of a will, and for instructions to the executor and trustee. Under clause two, legal title vested in the trustee, and equitable title in the beneficiaries named, as all were living at death of testator, and their interest was not in common but joint, hence upon death of any one of them, the interest of deceased would pass to survivors, not to heirs, executors, administrators or assigns. All interests under the will vest within the prescribed time, hence rule against perpetuities not offended, and trust is valid. Beneficiaries have an assignable interest in income accruing and distributed in their lifetime only. Trust may be terminated by the sale of all the property during the lifetime of one or more of the beneficiaries, otherwise to continue until death of the last survivor. Residuary interests vested at death of testator, and in case of death pass to devisees, legal representatives or assigns. All persons now entitled to participate as representing a deceased beneficiary have a present assignable interest in the residuum.

Bill in equity asking for the construction of the will of Peter S. J. Talbot, and for instructions to the executor and trustee.

Held:

1. That under clause two, the legal title vested in the trustee, and the equitable title in the twelve beneficiaries named, as they were all living at the death of the testator.
2. Their interest was not in common but joint, and upon the death of one or more his or their interest would pass not to his or their heirs, executors, administrators or assigns, but to the survivors.
3. The trust created is valid. Its provisions do not offend the rule against perpetuities, because all interests under the will vest within the prescribed time.
4. In case of serious disagreement between the trustee and his cotenants who own an undivided half of the wild land, the remedy of the trustee would be to apply to the court in equity, setting forth all necessary facts and bringing in all necessary parties.
5. Proceeds from the sale of the real estate and income from the sale of stumpage should be distributed annually among those entitled thereto. If a beneficiary is not living at the time of annual distribution his or her share passes to the then survivors.
6. The beneficiaries have an assignable interest in income accruing and distributed in their lifetime, but not in income accruing and distributed after their decease.
7. The trust may be terminated by the sale of all the property during the lifetime of one or more of the beneficiaries. If no sale is effected during that time the trust will continue until the death of the last survivor.
8. The death of the testator fixed the time of vesting of the residuary interests, and as all the devisees and legatees were living at that time, if any have since died their interest passed to their devisees, legal representatives or assigns.
9. The surviving residuary beneficiaries or other persons now entitled to participate as representing a deceased beneficiary have a present assignable interest in the residuum.
10. Reasonable counsel fees may be fixed by the sitting Justice and may be allowed in the executor's account.

On report. A bill in equity praying for the construction of the will of Peter S. J. Talbot, who died January 5, 1908, leaving neither widow nor children, but twenty-eight relatives. A hearing was had upon the bill and answers, and by agreement of the parties, the Justice sitting ordered the cause reported to the Law Court, upon bill and answers, for final determination. Bill sustained with costs. Decree in accordance with the opinion.

The case is fully stated in the opinion.

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

Ryder & Simpson, for certain defendants.

George C. Wheeler, for other defendants.

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

CORNISH, C. J. Peter S. J. Talbot executed the will before us for construction on July 3, 1907. He died six months later, on January 5, 1908, leaving neither widow nor children, but twenty-eight relatives, including a brother, nephews and nieces, grandnephews and grandnieces. Of all these he selected eight to be recipients of his bounty, to whom he joined four others, two sisters-in-law and two whose relationship is not disclosed. He further named alternates in place of two, but the remaining twenty of his relatives were not to share in his estate. Among the twelve thus selected he distributed his property through two distinct channels, a part through trusteeship and a part directly under the residuary clause. The reason for the separation is apparent. The testator had owned in common with his brother, James R. Talbot deceased, two tracts of wild land. It was for the best interest of all concerned that these lands should continue to be operated as an entirety, and he therefore placed them in trust under the second clause of his will, which is as follows, omitting the description:

"To have and to hold said real estate by said George F. Cary in trust for the following named purposes, to wit: Said trustee is to employ my nephew James R. Talbot of said East Machias as agent to have charge of said real estate, grant permits for cutting the growth thereon, collect the stumpage, and after deducting the state and county taxes, and such other expenses as may accrue thereon, to pay over annually the net income to said trustee.

Said trustee is to annually distribute said net income, less the expenses of administration of his said trust, among such of the following named persons, in equal shares, as may be living at the time of said distribution, and not to their heirs, executors, administrators, or assigns, to wit: (1) Rev. M. Jones Talbot, D. D. if living, but if not living at time of the distribution, then the share he would have taken if living is to be paid to Emery H. Talbot of Dorchester, Mass. (2) Mrs. Mary C. Talbot, for the personal use of herself and her son, Henry L. Talbot, if she be living at the time of the distribution, otherwise said share is to be paid to said Henry L. Talbot. (3) Emily P. Talbot of said East Machias. (4) Mrs. Elizabeth B. Talbot of said East Machias. (5) Mrs. Emily P. Harris of said

East Machias. (6) Mrs. Betsey T. Hawley of Malden, Mass. (7) Francis Loring Talbot of said East Machias. (8) Mrs. Mary P. Salmon of Newton Highlands, Mass. (9) Miss Alice W. Pope of Boston, Mass. (10) Mrs. Anna Spaulding of Seattle, Wash. (11) Mrs. Clara F. Hooper of said East Machias. (12) Frank E. Talbot of Chicago, Ill. Said trustee is to hold each of said undivided halfs as long as the other undivided half is wholly owned by the devisees of said James R. Talbot, or their heirs or devisees, but he is hereby authorized and empowered to sell and convey the same, or any part thereof, wholly discharged of said trust, concurrently with a conveyance made by such other owners, whenever all the owners, himself included, decide that it is for the best interests of all to so sell and convey. Should the other undivided half of either of said tracts cease to be owned by the devisees of said James R. Talbot, or by their heirs or devisees, then said trustee is to have the power and authority to sell and convey the undivided half held by him, or any part thereof, wholly discharged of said trust whenever he may deem it advantageous so to do. Whenever sale and conveyance is made of the trust estate, or any part thereof, the net proceeds of such sale shall be distributed in the manner hereinbefore provided for distribution of funds received from stumpage."

What is the true legal interpretation of this clause? We deem it to be this. The legal title vested in George F. Cary, the trustee, the equitable title in the twelve beneficiaries named, as they were all living at the death of the testator. Their interest was not in common but joint, and upon the death of one or more his or their interest would pass, not to his or their heirs, executors, administrators or assigns, but to the survivors. We are aware of the statute providing that "devises of land to two or more persons create interests in common unless otherwise expressed." R. S., Chap. 78, Sec. 13. But in this will it is otherwise expressed and in distinct terms. This section also contemplates the employment of an agent by the trustee who shall have charge of the lumber operations and shall pay over annually the net income to the trustee. At each annual period of distribution only such of the beneficiaries named can take as may then be living. The original fractional interest was twelfths, but the shares at subsequent divisions will grow larger as the number of distributees grows smaller. The principal or any portion thereof in case of sale of the whole or a part of the corpus is to be distributed

in the same manner and in the same proportions as the net income.

Let us now answer such of the propounded questions as need be answered at the present time.

A. "Whether the testator created a valid trust by the second item of this will or whether the provisions thereof are nugatory as violating the rule against perpetuities; and if null what disposition is to be made of the property which is the subject of said second item."

We answer that the trust is valid. Its provisions do not offend the rule against perpetuities. All interests under the will, both legal and equitable, vest within the prescribed time and it is with the vesting rather than the termination, the Alpha rather than the Omega, that the rule concerns itself. *Pulitzer* v. *Livingston*, 89 Maine, 359; *Andrews* v. *Lincoln*, 95 Maine, 541; *Strout* v. *Strout*, 117 Maine, 357.

B. "If a valid trust exists, what the trustee's remedy is in case of serious disagreement between him and his cotenants regarding the expediency or necessity of operating on said tracts, or concerning the quantity or character of the growth to be cut thereon, in any particular year."

The remedy of the trustee would be to apply to this court in equity which has plenary powers in the execution of trusts under R. S., Chap. 82, Sec. 6, Par. X, and Chap. 73, Secs. 10 and 11, setting forth all necessary facts and bringing in all necessary parties.

C. "Whether the trustee would be justified, in case of such disagreement, in applying for partition of the real estate with the view of causing his one-half part thereof to be set out to be held by him in severalty, the part assigned as his share to be managed independently of the remainder of said tracts."

D. "Should said lands promise to be unproductive of substantial income for a series of years because of paucity of growth thereon, whether the trustee would be justified in selling and conveying his part thereof; and whether, if so justified, a license of probate court or a decree of this court would be a preliminary requirement."

These interrogatories are based upon a possible disagreement in the future between the manager of the half interest owned by the devisees of James R. Talbot and the manager or trustee of the half interest owned by the devisees of Peter S. J. Talbot. They should not be answered at the present time. It is unwise to anticipate trouble and the court must confine itself to the solution of problems

that have already arisen or must necessarily arise, and not attempt to solve those that by the exercise of patience and tactful wisdom on the part of the interested parties may never exist.

E. "Several of the persons named as cestuis que trust having died subsequently to the death of said Peter S. J. Talbot as set out in the seventh paragraph of this bill, what disposition is to be made of the shares of income of the proceeds of sale of said real estate, that the deceased cestui would have taken had he or she been living at the time of distribution."

We are somewhat in doubt as to the meaning of this question, because it speaks of "the income of the proceeds of the sale of real estate." There should be no income as such from the proceeds of sale of the real estate. Such sales would be of the corpus itself and when made the proceeds should be distributed among those entitled thereto. The income from the sale of stumpage should be divided in the same manner. In both cases if a beneficiary is not living at the time of annual distribution his or her share passes to the then surviving beneficiaries as already stated.

F. "Whether the surviving cestuis, or other persons now entitled to participate in the distribution as representing a deceased cestui, have an assignable interest in the prospective income, whether accruing during their lifetime or after their decease."

The beneficiaries have no assignable interest in income accruing and distributed after their decease. They have an assignable interest in income accruing and distributed during their lifetime.

G. "How long the trust is to continue."

By its terms it may be terminated by the sale of the property during the lifetime of some of the beneficiaries. If no sale is effected during that time, the trust will continue until the death of the last survivor. The trust would then terminate for want of a cestui que trust. *Stone* v. *McLain,* 102 Maine, 168; *Laughlin* v. *Page,* 108 Maine, 307, 318.

H. "Who is to succeed to the title of the trust real estate at the termination of the trust."

This question should not be answered at the present time. If the trust be terminated by the sale of the entire property during the lifetime of one or more of the beneficiaries, there will be no occasion to answer it. If it be terminated by the death of the last survivor, that will doubtless be far in the future and if necessary it can then be answered when all the parties then claiming an interest may be

brought before the court and their rights determined. It is likely, however, that such a controversy will never arise.

I. "Several of the persons named as residuary beneficiaries under the will having died since the testator, as set out in the seventh paragraph of this bill, and there being funds in the hands of the executor that do not belong to the trust estate, but which are distributable as residuum of the principal estate, what persons are to receive said funds as distributees."

This involves the construction of the residuary clause, which is as follows:

"Third. All the rest, residue and remainder of my estate, whether real, personal or mixed, and wherever and however situated, I give, bequeath and devise in equal shares, unto such of the following named persons as may be living at the time of my decease, but not to their heirs, executors, administrators, or assigns, to wit: The aforesaid M. Jones Talbot, Mary C. Talbot, Emily P. Talbot, Elizabeth B. Talbot, Emily P. Harris, Betsey T. Hawley, Francis Loring Talbot, Mary P. Salmon, Alice W. Pope, Anna Spaulding, Clara F. Hooper, and Frank E. Talbot. Should said M. Jones Talbot not survive me, then the share which he would have taken if living, is to go to the aforesaid Emery H. Talbot should he be living at the time of my decease; and should the said Mary C. Talbot not survive me, then the share which she would have taken if living is to go to said Henry L. Talbot provided he be living at the time of my decease."

The death of the testator fixed the time of the vesting of these residuary interests. It appears from the record that all these devisees and legatees were living at that time. Therefore all the interests then vested in the persons named. The devisees or legal representatives or assignees of any who have died since the testator's decease would succeed to such beneficiary's share. They take not from the testator but from the devisee. There is a clear distinction in this respect between clause two and clause three, the trust estate and the residuary estate. In the former, the interest is joint and survival at time of distribution is the crucial test; in the latter, the interest is in common and the vested share of a devisee passes to his or her representative.

J. "Whether the surviving residuary beneficiaries, or other persons now entitled to participate as representing a deceased beneficiary, have a present assignable interest in the residuum."

We answer in the affirmative. The interests held by these parties are vested and as such are assignable.

It is proper under the circumstances of this case that the estate of Peter S. J. Talbot should bear the reasonable costs and expenses of this litigation. Reasonable counsel fees may be fixed by the sitting Justice who signs the final decree and may be allowed in the executor's account.

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

DENNIS J. O'BRION,

Appellant from Decree of Judge of Probate.

Cumberland. Opinion November 5, 1921.

A will may be void in part and valid in part. A valid will stands unless superseded by a later will, or changed by codicil or writing, or revoked by burning, cancellation, tearing or destruction. An alleged will, the existence of which is due to undue and improper influence, hence not a valid will, carries such incurable infirmity during its existence, and cannot be offered in evidence as a revocatory document.

A will may be contested in whole or in part, and it may be void in part and otherwise valid.

In proceedings for the probate of a will, a writing purporting to be a later will, but then already totally disallowed, cannot properly be offered in evidence as a revocatory document. It matters not that a beneficiary under the earlier instrument, in seeking for himself a greater bequest than it contains, procured the making of the later one by the exerting of an undue and improper influence.

On exceptions. A document purporting to be the will of Hannah O'Brion, dated in 1916, was disallowed by the presiding Justice in the Supreme Court of Probate, on the ground of undue influence. Testatrix had made an earlier will in 1912, and a codicil thereto in 1914, both of which were in existence at the time of her decease, which were brought forward after the disallowance of the will made in

1916, as her will, and both were allowed by the Justice presiding in the Supreme Court of Probate, to which ruling contestant excepted. Exceptions overruled.

Case is fully stated in the opinion.

William A. Connellan, for contestant.

Henry Cleaves Sullivan, and Francis W. Sullivan, for proponent.

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

DUNN, J. An instrument legally executed as and for a will shall stand until the maker make another valid will, or he make a lawful codicil or writing, or he otherwise effectually revoke it by an intentional burning, cancellation, tearing or destruction, performed either personally or by a proxy acting under his direction in his presence. So is the statute with regard to the express revocation of a will. R. S., Chap. 79, Sec. 3.

When Mrs. O'Brion of Portland died a document purporting to be her will was filed for proof and establishment. Notwithstanding it apparently conformed with scrupulous care to all essential statutory requisites, yet the courts, both of first instance and appellate, denied the instrument probate; the latter court finding that, although Mrs. O'Brion was of testamentary capacity, still she never designed to make the will; that the document was in truth and fact the will of another person executed by her hand; that it was not her own voluntary act, but that it was her act procured by the undue and improper influence of a son of hers called Dennis.

Then another instrument, bearing date some four years earlier than the impeached one, together with a codicil about two years older than the paper which it modified or qualified, were brought forward as her will. Disallowance followed by the Probate Court. On appeal, the Supreme Court of Probate, holding the testatrix mentally competent and the instruments expressive of her will to accord with the requirements of the statute of wills, allowed them accordingly. A contesting child of the testatrix has exceptions. The exceptions have no merit. And this, regardless of the fact that he who procured the making of what was disallowed as a will, is a beneficiary under the proved and allowed one.

It seems to be generally held by the courts in other states that a will may be contested in whole or in part, and that it may be void

in part and otherwise valid. *Rudy* v. *Ulrich*, 69 Pa. St., 177; *Sumner* v. *Staton*, (No. Car.), 65 S. E., 902; *Harrison's Appeal*, 48 Conn., 202; *Rockwell's Appeal*, 54 Conn., 119; *Riggs* v. *Palmer*, 115 N. Y., 506; *Eastis* v. *Montgomery*, 93 Ala., 293, 9 So. 311; *Henry* v. *Hall*, 106 Ala., 84, 17 So., 187. Decisions in Massachusetts, writes Chief Justice Knowlton, "assume or imply that this is the law." *Old Colony Trust Company* v. *Bailey*, 202 Mass., 283. Our own court has said that a will is revocable in whole or in part by cancellation or obliteration. *Townshend* v. *Howard*, 86 Maine, 285. The contest of the purporting subsequent will of Mrs. O'Brion went to the whole instrument, dispositive portion and all, and was entirely successful. The defeat of that will, if for verbal convenience it may be styled a will, did not operate to revive the earlier will and codicil. They did not need to be revived. They were and are still living. For, once a will be legally made, it survives until legally revoked. The second will, the discredited document, never had had a legitimate making. And never having had the distinction of bespeaking the mind and heart of her whose will it spuriously pretended to be, it is an outcast in the judicial courts with no recognizable rights, least of all the right of having its revocatory clauses controlling; because primarily lacking the intention of the testatrix of revoking what she had done before; at the most, it is but an unauthorized ineffectual attempt at a revocation. *Laughton* v. *Atkins*, 1 Pick., 535-546; *Lyon* v. *Dada*, (Mich.), 86 N. W., 946; *Rudy* v. *Ulrich*, supra; *O'Neall* v. *Farr*, 1 Rich., (So. Car.), 80. A peculiarly illustrative analogous case in our own reports, having to do with the inefficacy of a testator's destruction of his will as the result of the exercise of undue influence upon his mind, is that of *Rich* v. *Gilkey*, 73 Maine, 595. There, in salient passages of special strength and beauty, the effect of the exercise of an undue influence on a testator's mind is instructively discussed. Says the opinion, by way of instance, "A man makes a legal will. But . . . . if he is induced by undue influences to attempt a revocation, the codicil is of no avail, and the will stands unrevoked." The opinion in *Rich* v. *Gilkey* is one that can be read again, and again, and at every reading its charm and its cogency grow upon the reader.

Concerning the present case, nothing need be added to what already has been said, except to direct the making of the entry of

Exceptions overruled.

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

Lincoln. Opinion November 7, 1921.

Trespass under R. S., Chap. 100, Sec. 9, done wilfully and knowingly without license of plaintiff. Allegation that defendant wilfully and knowingly broke out "the glass in the windows in the barn on said premises" is sufficient to sustain an award of either single or double damages, as the evidence may warrant. The evidence upon which a verdict was based must be before the Law Court before it can consider a motion for new trial on ground that damages were excessive.

Action of trespass under R. S., Chap. 100, Sec. 9, with allegation that the acts of defendant were done wilfully and knowingly, without license of the plaintiff; the declaration has been before the court upon general demurrer, and the opinion then delivered (119 Maine 79, 109 Atl., 376) holds (1) that ownership is an essential allegation; (2) that ownership of the land described in the declaration is sufficiently alleged; (3) that ownership in the plaintiff, of the horse-stalls, cribs, cow-chain holders, and partition walls is not sufficiently alleged; (4) that a cause of action under said statute, for wilfully and knowingly breaking out "the glass in the windows in the barn on said premises," is sufficiently set forth.

The defendant now contends that the declaration is insufficient to sustain a verdict for double damages; the presiding Justice ruled otherwise, and allowed exceptions. The exceptions must be overruled. The declaration is sufficient to sustain an award of either single or double damages, as the evidence may warrant. *Burrill Nat. Bank* v. *Edminister*, 119 Maine, 367.

The defendant argues that ownership is not alleged, but that question is not reserved by the exceptions. Moreover, we have already held that a cause of action is set forth for wilfully and knowingly breaking out the glass in the windows in the barn on the premises; we must assume that the jury was properly instructed as to the horse-stalls, cribs, cow-chain holders and partitions.

The defendant also argues that the damages are excessive; but the evidence upon which the verdict was based, is not before us.

On exceptions by defendant. An action of trespass under R. S., Chap. 100, Sec. 9, alleging that the acts of trespass were done wilfully and knowingly, without license of plaintiff. Defendant questioned

the sufficiency of the declaration, but the Justice presiding ruled that the declaration was sufficient to sustain even double damages, to which ruling defendant excepted. A verdict for double damages was returned for plaintiff in the sum of $333.33. Exceptions overruled.

Case is stated in the opinion.

George A. Cowan, for plaintiff.

Rodney I. Thompson, for defendant.

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

MORRILL, J. Action of trespass under R. S., Chap. 100, Sec. 9, with allegation that the acts of defendant were done wilfully and knowingly, without license of the plaintiff; the declaration has been before the court upon general demurrer, and the opinion then delivered (119 Maine, 79, 109 Atl., 376) holds (1) that ownership is an essential allegation; (2) that ownership of the land described in the declaration is sufficiently alleged; (3) that ownership in the plaintiff, of the horse-stalls, cribs, cow-chain holders, and partition walls is not sufficiently alleged; (4) that a cause of action under said statute, for wilfully and knowingly breaking out "the glass in the windows in the barn on said premises," is sufficiently set forth.

At a subsequent trial the defendant contended that the declaration was insufficient to sustain a verdict for double damages; the presiding Justice ruled otherwise, and allowed exceptions. The defendant's brief states that this is the only question presented to the Law Court.

The exceptions must be overruled. The declaration is sufficient to sustain an award of either single or double damages, as the evidence may warrant. *Burrill Nat. Bank* v. *Edminister*, 119 Maine, 367.

The defendant argues that ownership is not alleged, but that question is not reserved by the exceptions. Moreover, we have already held that a cause of action is set forth for wilfully and knowingly breaking out the glass in the windows in the barn on the premises; we must assume that the jury was properly instructed as to the horse-stalls, cribs, cow-chain holders and partitions.

The defendant also argues that the damages are excessive; but the evidence upon which the verdict was based, is not before us.

Exceptions overruled.

THE RUNDLETT COMPANY *vs.* MARRINER S. MORRISON.

Cumberland. Opinion November 7, 1921.

Verdict for defendant unmistakably wrong and should not stand, upon defendant's own testimony, corroborating testimony of plaintiff's witnesses. The appointment of a receiver for plaintiff after action brought, and general issue filed by defendant, does not abate the action.

If this case presented solely a question of credibility, of the weight to be given to the testimony, we might hesitate to interfere with the verdict, notwithstanding the number of witnesses stands three to one against it. But the version given by the defendant of his statements to Mr. Black, the cashier, and to Mr. Christian, the treasurer of the plaintiff, unmistakably carried the implication that the price of coal screenings had advanced. Any person would understand therefrom that the increase was in the price of the screenings, not in the price of hauling. The testimony of defendant thus corroborates the testimony of plaintiff's witnesses. It is clear that the verdict is wrong and should not stand.

The defendant's contention that he was dealing in screenings, selling them to The Rundlett Company, cannot be sustained. The coal was sold to The Rundlett Company upon its credit, charged to it, billed out to it, and the weigh slips read, "Sold to Rundlett Co."

The defendant's contract was to haul coal screenings for one dollar per ton; if he would maintain his right to the money under another and different contract, the assent of the plaintiff to such other contract must clearly appear.

Mere negligence in making a mistake is not sufficient to preclude the plaintiff who made it from demanding its correction; for such negligence should not warrant the defendant in retaining the benefits of the mistake, unless his circumstances have been thereby so changed as to render it unjust and prejudicial to his legal interests.

The action by the corporation did not abate upon the appointment of a receiver, but may be continued for the benefit of the latter, and his name should be substituted by an order obtained on summary application.

On motion for new trial by plaintiff. An action of assumpsit to recover the sum of three hundred fifty dollars and seventy cents,

which plaintiff claims the defendant has in his possession, having obtained it by false and fraudulent representations, which in equity and good conscience belongs to him. Verdict was for defendant which the plaintiff moves to set aside for usual reasons. Motion sustained.

Case stated in the opinion.

Bradley, Linnell & Jones, for plaintiff.

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

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

MORRILL, J. This is an action to recover $350.70, which the plaintiff claims was an overpayment for hauling coal screenings, obtained through the misrepresentation of defendant. The jury returned a verdict for defendant, which the plaintiff moves to set aside for the usual reasons. The motion must be sustained.

The plaintiff operated a cold storage plant on Union Wharf, Portland, where it used coal screenings purchased of Lehigh Coal and Navigation Company, which had a place of business on the same wharf. The plaintiff had another place of business on Commercial Wharf where its treasurer's office was located.

The following facts are not disputed: in the fall of 1919 the defendant made a contract with the plaintiff to haul screenings from the Lehigh sheds for one dollar per ton. The screenings were sold to the plaintiff for two dollars per ton. Every Saturday morning the defendant presented to one Black, plaintiff's cashier, the weigh slips of screenings hauled during the week and collected three dollars per ton; two dollars per ton he paid to the Lehigh Company and received a receipted bill, which so far as the case shows, he kept. This arrangement was made between the plaintiff and the superintendent of the Lehigh Company. The screenings were sold to the plaintiff, as shown by the weigh slips; the price did not appear thereon.

This course of dealing continued until some time in June, 1920; the defendant then began to collect four dollars and a half per ton, paying the Lehigh Company two dollars as before, and retaining two dollars and a half for hauling. As to what took place at this time in June the witnesses differ. One Rackleff, the superintendent of

the cold storage plant, testifies, "Mr. Morrison told me that the Lehigh was going to charge $3.50 for the coal and he would have to get $4.50—the price would be $3.50 for the coal and $1.00 a ton for hauling which would make it $4.50." He testifies further that he knew nothing to the contrary until in the latter part of October he received a bill from the Lehigh Company for a small amount of screenings billed at $2.00 per ton.

Mr. Black, the cashier of the plaintiff, testifies, "Sometime in June he (Morrison) came over with his slips same as he usually does to be paid, and I started to figure them up, and he says, 'You will have to add on $1.50 more because I have got to pay the Lehigh people $1.50 more.' I says, 'Does Mr. Rackleff know that?' He says, 'Yes.' I called Mr. Rackleff up to verify it, and he says, 'It is all right.'

Q. You paid from then on that basis? A. Yes."

Mr. Peightel, to whom the defendant applied for the job of hauling the screenings, testifies that some time in the beginning of the summer the defendant said that the Lehigh Company was going up on the screenings.

The defendant denies these statements in this way; he was asked by his counsel:

"Q. Did you at any time tell anyone the reason you went up to $4.50 a ton was because the Lehigh Valley had gone up on you? A. No, sir; they never went up on me."

He does not attempt to otherwise deny or to give his version of the conversations with Rackleff and Peightel.

His version of the conversation with Mr. Black is as follows:

"Q—Mr. Black has testified that when you called to get your money, you told him $4.50 a ton? A.—Yes; sir.

Q.—He paid you, and will you tell the court and jury what happened the first time you asked him for $4.50 a ton? A.—Why, I went in and passed him my bill, or my slips which they always paid me by, and I told him the screenings had gone up to $4.50 a ton. Any further conversation I don't remember. And he paid me my money there and then.

Q. Did he call up to inquire of anybody? A.—I don't know whether he did or not; I can't say."

He also testifies that he notified Mr. Christian, the treasurer of the company:

"Q.—What was the first thing you said to him? A.—The first thing I said to him—that I meant to have notified him before over the phone when I talked with him regarding the horse. I told him then screenings were going to be $4.50 commencing Monday morning. 'All right' he said. That is all there was to the conversation."

Mr. Christian positively denies that he had any such talk with the defendant; he says, "I had no dealings with Morrison."

If this case presented solely a question of credibility, of the weight to be given to the testimony, we might hesitate to interfere with the verdict, notwithstanding the number of witnesses stands three to one against it. As Mr. Justice Dunn aptly remarked in *Ladd* v. *Bean*, 117 Maine, 445, "Witnesses are to be judged not so much by numbers as by the weight of the evidence given by them. And the weight of the evidence depends upon its effect in inducing belief."

But the version given by the defendant of his statements to Mr. Black and Mr. Christian unmistakably carried the implication that the price of coal had advanced. "I told him (Black) the screenings had gone up to $4.50 a ton;" "I told him (Christian) screenings were going to be $4.50 commencing Monday morning," were his words according to his own version. Any person would understand that the increase was in the price of the screenings, not in the price of hauling. The defendant seems to have acted upon the idea, and his counsel has argued, that he was dealing in screenings, selling them to The Rundlett Company. Mr. Rackleff testified, "He said it was none of our business, if he bought coal for $3.00 a ton, whatever he got for it, no more than it was for us to buy fish at one price and sell it at another." The defendant himself testified:

"Q.—You weren't buying the coal in the beginning of the Lehigh Company? A.—From the Lehigh.

Q.—Not in the beginning? A.—I don't know what you really call it if I wasn't buying it from them; I got it from them.

Q.—You didn't buy the coal of Mr. Flaherty in the beginning? A.—That is the way I figured it—I was buying it. It was billed to the Rundlett Company on their slips."

This contention cannot be sustained upon the uncontroverted testimony. The coal was sold to The Rundlett Company upon its credit, charged to it, billed out to it, and the weigh slips read, "Sold to Rundlett Co."

In judging of the meaning which would be attributed to the defendant's version, it must be remembered that he had been employed by plaintiff for more than two years as one of its night force; that he had sought the opportunity to haul the screenings in his leisure hours at one dollar a ton, and was employed on that basis; he apparently had the confidence of his superiors who trusted him with the money to settle the weekly bills and did not ask him for the receipted bills. He thus obtained money to which he was not entitled. His contract was to haul coal screenings for one dollar per ton; if he would maintain his right to the money under another and different contract, the assent of the plaintiff to such other contract must clearly appear. After the first employment no other contract for hauling is shown.

Upon the defendant's own testimony, corroborating the testimony of plaintiff's witnesses, the verdict is unmistakably wrong and should not stand.

It is contended, however, that the plaintiff has no standing to recover the money thus paid, because bills showing the price of the coal were sent daily from the Philadelphia office of the Lehigh Company to the plaintiff. However that may be, knowledge of those bills is not brought home to the officials who dealt with Morrison, and is denied by them; none of them had charge of or received the mail. "It is evident that mere negligence in making the mistake is not sufficient to preclude the plaintiff who made it from demanding its correction; for such negligence should not warrant the defendant in retaining the benefits of the mistake, unless his circumstances have been thereby so changed as to render it unjust and prejudicial to his legal interests." *Sandy River Nat. Bank* v. *Miller*, 82 Maine, 137, 143.

It is also urged that after the commencement of the action and before filing of defendant's plea a receiver of the property of the plaintiff was appointed and the corporation enjoined from exercising any of its privileges or franchises. Hence it is said that the present action cannot be maintained. But the defendant pleaded the general issue, thus admitting the capacity of the plaintiff to sue. The action by the corporation did not abate upon the appointment of the receiver but may be continued for the benefit of the latter, and his name should be substituted by an order obtained on summary

application. R. S., Chap. 51, Sec. 84. Beach on Receivers. Alderson's Ed. Sec. 666. Alderson on Receivers, Sec. 534. *Talmage* v. *Pell,* 9 Paige, 410.

Motion sustained.
Verdict set aside.
New trial granted.

JESSIE W. BRIDGHAM *vs.* LUCIAN P. HINDS.

Penobscot. Opinion November 7, 1921.

In sales of personal property, excepting where vendee already has possession, or the property is in the tortious possession of a third person, a delivery, either actual, constructive, or symbolical, is very essential, as against third parties. Actual delivery should be made without laches when it can be reasonably and consistently. Property, title to which has actually passed from vendor to vendee, may, however, be left by vendee in possession of vendor for a specific purpose. Delivery is a question of fact and no hard and fast rule determining it can be laid down. Acts and conduct of the parties subsequent to the alleged sale constitute pertinent evidence on the question of good faith, the probative force of which is measured by their consistency with such alleged sale.

When the same goods are sold to two persons by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other. An attaching creditor of the seller is to be considered as having purchased for a valuable consideration. Therefore, in the absence of a delivery, actual, constructive, or symbolical, an attaching creditor would not be precluded by an antecedent chattel sale of which he had not knowledge in advance of his own act.

In this case the defendant, a deputy of the sheriff of Franklin County, attached certain personal property, on a writ which he had for service. For alleged conversion of the property, growing out of its attachment and its taking, this action of trover was begun by one who claims an earlier sufficient purchase. Following an adverse verdict, defendant brings the action forward on exceptions as well as on motions for a new trial, one of the motions being in usual form and the other on the ground of newly discovered evidence. The testimony

submitted with the latter motion is so decisively interwoven with the fiber of the case as to make it appear probable that the verdict would be different were the cause submitted anew with the additional evidence.

On motion and exceptions by defendant. An action of trover to recover damages for alleged conversion of personal property by defendant who had attached it on a writ and taken possession of it, plaintiff claiming that prior to such attachment, he had purchased in good faith for value and taken delivery of said personal property, and defendant claiming that the seller of the property and the plaintiff acting in collusion to hinder, delay and defraud the creditors of the seller, fraudulently transferred said property liable to attachment, to plaintiff with no intention on the part of either that the title to the property should pass to plaintiff on account of such alleged sale. A verdict was returned in favor of the plaintiff of $1,984.78, and defendant filed a general motion for a new trial, and excepted to the charge of the Justice presiding, and subsequently amended the motion for a new trial on the ground of newly discovered evidence. Motion for a new trial on the ground of newly discovered evidence sustained. New trial granted. Consideration of the general motion for a new trial, and the exceptions, thus became unnecessary.

Case stated in the opinion.

J. B. Merrill, and Gillin & Gillin, for plaintiff.

Wing & Wing, and John P. Deering, for defendant.

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

DUNN, J. It is a rule of law tracing of ancient lineage to an analytical past, that when the same goods are sold to two persons by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other. *Jewett* v. *Lincoln,* 14 Maine, 116. An attaching creditor of the seller is to be considered as having purchased for a valuable consideration. *Lanfear* v. *Sumner,* 17 Mass., 109. Therefore, in the absence of a delivery, actual, constructive, or symbolical, an attaching creditor would not be precluded by an antecedent chattel sale of which he had not knowledge in advance of his own act, (*Cobb* v. *Haskell,* 14 Maine, 303; *Mason* v. *Sprague,* 47 Maine, 18; *Ludwig* v. *Fuller,* 17 Maine, 162), although the transaction of sale were evidenced by writing. *McKee* v. *Garcelon,* 60 Maine, 165; *Reed* v. *Reed,* 70 Maine, 504. How it comes

that a sale, even where the purchase price be paid, is, delivery lacking, ineffectual as against second purchasers, is attributable to fault and to fraudulent unfairness on the buyer's part in clothing the seller with the apparent indicia of ownership so as to permit him, as the ostensible owner, to induce others to purchase the identical things, or to extend to him a credit on the strength of belief in his ownership thereof, to their injury. *Ludwig* v. *Fuller*, supra; *Cobb* v. *Haskell*, supra; *McKee* v. *Garcelon*, supra; *Goodwin* v. *Goodwin*, 90 Maine, 23. Besides, especially where the contract is not evidenced by writing, a delivery would insure a better identity of the property sold. *Goodwin* v. *Goodwin*, supra.

"What amounts to proof of delivery," says Dickerson, J., in delivering the decision in *McKee* v. *Garcelon*, supra, "has been much discussed by courts and jurists, and where so much depends upon the subject matter of the sale, its situation and condition, the usual course of trade, and all the other attendant circumstances, together with the subsequent acts of the parties as showing their intention at the time of the sale, it will be found exceedingly difficult, if not absolutely impracticable, to lay down a general rule applicable to all cases." In substance, runs the opinion, it is highly essential to validity as against third persons, that there be a relinquishment both of ownership and possession by the vendor and of their assumption by the vendee.

Actual delivery means, as the noun and its modifier themselves clearly indicate to the understanding, a formal immediate tradition of the property to the vendee. The meaning of these words as used when applied to an affair at a haberdasher's is perfectly plain to gather, but the mind at once rejects the suggestion of attempting to apply like meaning to the sale of a ship sailing on the ocean, or of logs on the bank of a stream, or of bricks fresh and hot from a kiln. The law, however, never exacts the doing of that which is impossible or unreasonable. *Haskell* v. *Greely*, 3 Maine, 425. It permits, when the property is not present or accessible, as in the case of the ship, or is difficult of access as the logs, or incapable of practicable manual tradition, as bricks still red hot after making, what is called a constructive delivery. That is to say, to illustrate, having reference again to the ship, the giving of a bill of sale under which the vendee would be entitled to take possession of the vessel on her arrival in port; or, recurring to the instances of the logs and the bricks, where

the vendor approaching in view of the sold property with the vendee, proclaims its delivery to him; or, still further citing illustratively, when a part of the goods are delivered for the whole; or, if the goods be in the custody of a third person, the parties to the sale and purchase give such party notice of the transfer. Yet another method of making a delivery, the property itself not being at once available, is known as symbolic. A good exemplification of a symbolical delivery is that of a bill of lading duly indorsed. *McKee* v. *Garcelon*, supra.

So the rule patently is that, excepting where the vendee already has possession (*Nichols* v. *Patten*, 18 Maine, 231), or the property is in the tortious possession of a third person (*Cartland* v. *Morrison*, 32 Maine, 190), it is of the utmost importance, as against third parties, that there be a delivery actual, constructive, or symbolical. *Quincy* v. *Tilton*, 5 Maine, 277; *Ludwig* v. *Fuller*, supra; *Leisherness* v. *Berry*, 38 Maine, 80; *Vining* v. *Gilbreth*, 39 Maine, 496; *Mason* v. *Sprague*, supra; *Bethel Steam Mill Company* v. *Brown*, 57 Maine, 9; *Fairfield Bridge Company* v. *Nye*, 60 Maine, 372; *McKee* v. *Garcelon*, supra; *Farrar* v. *Smith*, 64 Maine, 74; *Reed* v. *Reed*, supra; *Goodwin* v. *Goodwin*, supra. Actual delivery is evident. With the doctrine of symbolical delivery we are not here and now concerned. Because of consequential danger to the rights of others, the principle of a constructive delivery is not one to be extended. *Cobb* v. *Haskell*, supra. When actual delivery be reasonably and consistently possible it should be had. *Brown* v. *Pierce*, 97 Mass., 46. A constructive delivery involves something more than mere oral utterance. *Edwards* v. *Grand Trunk Railway Co.*, 54 Maine, 105. A vendee must be put in situation to take possession of the property regardless of the consent of the vendor, and without doing violence to the rights of third persons. *Sawyer* v. *Nichols*, 40 Maine, 212. And the vendee must move with becoming dispatch; he should not be guilty of laches in taking possession of his purchase. *Winslow* v. *Norton*, 29 Maine, 419. In the very nature of things, in the case of a sale of bulky or heavy articles, it ordinarily is out of the question to produce evidence of a delivery and change of possession as determinative as in the case of articles more readily movable. But, formal delivery wanting, in order to validate the business as to later innocent purchasers for valuable consideration, there must be proof that ever after the sale the property continued to be in the exclusive possession or control of him who first bought it from the same seller. *Nichols* v.

Patten, supra. The dividing line between what constitutes a delivery valid or invalid touching subsequent buyers is not so easy to define with precision as at first glance might seem. A mere colorable change of possession, one made with the intention that the title should be transferred only in appearance and not in reality, is plainly insufficient. On the other hand, a broad statement that the buyer, following his investiture with title, might not compatibly allow the seller again to have possession of the property, would be too absurd for denial. The seller may become the bailee of the buyer. Where the title has already actually passed from the one and vested in the other, the property may be left with the seller for a specific purpose, as for transportation and delivery at another place, or, if purchased in an unfinished condition, to fit it for delivery, if the intention of the parties to that effect is fully proved. *Boynton* v. *Veazie*, 24 Maine, 286; *Bethel Steam Mill Co.* v. *Brown*, supra; *Hatch* v. *Standard Oil Company*, 100 U. S., 124; 25 Law Ed., 554. See too, *Veazie* v. *Holmes*, 40 Maine, 69; *Hotchkiss* v. *Hunt*, 49 Maine, 221; *Chase* v. *Willard*, 57 Maine, 157. A delivery is cardinal. Still no hard and fast rule as to what comprises an adequate delivery may be prescribed. Delivery is a question of fact provable by evidence direct or inferential. It has been held in the case of lumber piled in the seller's yard, that pointing out the several piles to the buyer and telling him to take them away, did not protect the negotiation from later attaching creditors, the buyer not exercising dominion over his purchase through several intervening months. *Cobb* v. *Haskell*, supra. Again, the transaction was upheld in a case where a farmer, in good faith, by a witnessed deed, for a paid price, sold five cows to a buyer to whom, approaching and pointing out the particular cattle he said, in the presence and hearing of a witness, "I deliver you this stock free from all incumbrance;" whereon, synchronously, the farmer at the buyer's request became a bailee for hire of the cows, without the cattle leaving the one barn down to the time of their attachment ten days afterward by the seller's creditor. *Goodwin* v. *Goodwin*, supra. He who knew the jurist who wrote the court's opinion in the Goodwin case, will readily visualize him entering with anxious and cautious steps upon rather narrow grounds, yearning to do right or just to all concerned, as he was so quick to sense when his practised eye had discerned integrity and fairness.

In the sale of chattels, as in other concerns of matter or substance, the good faith attendant, when the claim of a stranger standing on the footing of an innocent purchaser for valuable consideration presents, looms largely as a dominant factor. What conclusion upright and reasonable men would likely draw as, seeking to maintain the law of right in manifest supremacy, they might look into that of the past for the indispensable constituent of a valid delivery, is always appropriate in critical survey.

Reduced to its elements that which is to be dealt with here is this:

The defendant, in his office as a deputy of the sheriff of Franklin County, had for service a writ sued out in an action against one Alcanzo D. Newcomb, then residing at Farmington. For the purpose of making an attachment of property on the writ, he went to the homestead premises of Mr. Newcomb, on June 21, 1920, and then and there made attachment, as he testifies, of a pair of gray horses, one set of double harness, a Fordson tractor, a Republic truck, and other personal estate. At the time, Mr. Newcomb, who, for the purposes of this case, had had unencumbered title to the property, and his wife were in Boston; their sons, the eldest some twenty years of age, being in charge of affairs at home. By arrangement with the boys, who had communicated by telephone with their parents, the officer did not immediately remove any of the property, but either he himself or a fellow deputy remained upon the premises, keeping the attachment continuously in custody and charge, until Mr. Newcomb's home-coming a few days afterward, when the deputy took it all away. Mr. Newcomb testifies that on returning home he told the officer that the property had earlier been sold and delivered to this plaintiff. The deputy says that Newcomb said nothing beyond telling him to take the stuff and be gone with it. Be this as it may, while the officer was yet at the Newcomb place, and before he had taken the property from there, a Bangor lawyer telephoned that a client of his was the owner thereof by purchase. The notification was in turn communicated to the attorney for the attaching creditor. For alleged conversion of the property, growing out of the attachment and the taking, this action of trover was begun. Following adverse verdict, defendant brings the case forward on exceptions, as well as on motions for a new trial, one of the motions being in usual form and the other on the ground of newly discovered evidence. In our view, the newly discovered evidence motion is decisively interwoven with the fiber of the case.

This plaintiff and Mr. Newcomb are cousins. Plaintiff says that while at Newcomb's house, one day a week before that of the deputy sheriff's arrival, his cousin suddenly and unexpectedly proposed to sell him the property in question, and also another pair of horses, a disc harrow, a plow and an automobile, for a cash consideration at the moment not otherwise defined than that it would be attractively advantageous to the buyer. Says the plaintiff, when he had shown me the horses, the tractor, harrow and harnesses, Newcomb backed out a seven passenger Buick automobile and getting in we started for Carrabasset, a place, as the court takes notice, more than thirty miles away. As we rode along, Newcomb asked what I would be willing to pay for the automobile, together with the other property that he had exhibited to me, and inclusive also of a truck at Carrabasset. I said, so in epitome continues plaintiff's version, two thousand dollars if all is as you say, but first show me the truck. Newcomb assented. After examining it, plaintiff states that he made known his approval to Newcomb, and that he told men who were standing near of his purchase of the truck. On the way back, it was agreed between Newcomb and himself, or so he says, that the former should retain the horses in his keeping and work them for their owner's profit on a public road under construction in the vicinity, pending plaintiff's use for them on a farm that he contemplated buying near his own home; but, endeavor elsewhere to buy a cart being vain, the horses never were so worked. Seemingly, after the unsuccessful search for a cart, plaintiff proffered his check in payment of the price of his purchase, which Mr. Newcomb declined to receive, insisting upon cash; proclaiming meanwhile delivery of the property. Plaintiff left for Old Town where he was living. Three days later he and Newcomb met in a Bangor law office; a bill of sale was drafted, executed and delivered; the grantor received plaintiff's check for the full consideration, which check was promptly paid by the local bank on which it was drawn. Besides enumerating the items of property already mentioned, the bill of sale describes a double wagon, of purchasing which plaintiff disclaims recollection. From the time that he was at Farmington and Carrabasset, plaintiff never again saw the property, or any of it, nor made effort so to do, until after the attachment. Corroborating testimony is given by Mr. Newcomb, who explains that he sold at a sacrifice, being pressed for money. There is discrepancy in their testimonies respecting

the wagon; plaintiff's statement, as we have seen, is that he sought to buy a cart from some other person, whereas Mr. Newcomb says plaintiff was seeking to buy a tip body for the wagon he had already bought of him. But in the main the two men say much alike. And their sayings are strengthened here and there by the testimony of Mrs. Newcomb; her evidence, however, going only to things said and done after the men had returned from Carrabasset.

At the trial, it was contended by defendant that plaintiff had said, in the course of conversation early after the attachment, that the deal was not closed at Farmington; that the offer there made was rejected, to be later renewed and accepted at Bangor where, on delivery of the deed, the purchase price was paid, albeit the plaintiff did not, in the four days that lay between the purchase and the attachment, busy himself to possess what he had bought, and at the time of his so speaking did not know the whereabouts of the automobile, even. So much for the trial term record.

The testimony appropriately submitted with the motion on the ground of newly discovered evidence makes it appear probable that the verdict would be different were the cause submitted anew with the additional evidence. *Parsons* v. *Railway*, 96 Maine, 503. The defendant and the sheriff of Franklin County testify that, one day a month after the trial, they saw the very automobile in Newcomb's garage, Mrs. Newcomb then claiming ownership, and snow tracks indicating its recent use. So the testimony of two witnesses, neither of apparent interest, to the effect that the tractor was at Dead River, forty miles distant from Farmington, as the court observes distance, on the certain day that plaintiff says it was delivered to him in the last named town, and that it continued to be in use at Dead River for a week still longer, presents an aspect not seen in the original portrayal of the case. Standing out in prominence, for it would be passing strange if both vendor and vendee were unmindful of statutory requirement, is the showing by the Secretary of State that official registration of the automobile remained in Newcomb's name throughout the year of the alleged sale. This is supplemented by testimony that, barring a short time in the summer of that year, Mr. Newcomb continued to use the vehicle until deep snow prevented. Likewise, testimony that the asserted vendor continued on his own account to work the pair of horses that though sold were not attached, and that the harrow and the plow remained indefi-

nitely in his possession for no especial reason, tends indicatively to reveal, till dissolving light shall fade it from mental screen, that there never was delivery of the chattels a conversion of which is claimed, good as against him attaching.

Plaintiff's learned counsel rightly urge that in order to sustain a motion on the ground of newly discovered evidence, it must be made to appear not only that the evidence is admissible and material, but that it is in legal contemplation newly discovered; that it is other than that which might have been known had diligence been used, and that it must reach beyond the mere impeachment or contradiction of a former witness to the merits of the controversy, and so extend pointing out that on a retrial of the case a different result would be reasonably probable. *Linscott* v. *Orient Insurance Company,* 88 Maine, 497. The contention is salutary. Public policy looks to the finality of trials; it looks benignly to a finality, not unduly deferred, with justice reigning. The practice of the noble profession of the law is not a game. What the rule of reason might regard as diligent conduct under one set of circumstances, it might brand under another as lethargic. There are limitations even to what a defendant in an action of tort must be held reasonably to anticipate. Quite true is it, as counsel so properly press upon attention, that much of the supporting testimony is of acts and occurrences succeeding the trial. But evidence of things happening after a trial—the subsequent particular acts of the parties to the alleged sale in relation to it—may be considered as newly discovered. *Mitchell* v. *Emmons,* 104 Maine, 76. Where, as here, conceding arguendo its truth and force, there is evidence of after trial occurring acts directly tending to make certain the material point that at best was not far outside the cloud-land of doubt before, then, in slight paraphrase of the words of former Chief Justice Savage, such is evidence of a condition existing at the trial, and shedding newly discovered light on that condition. *Southard* v. *Railroad Company,* 112 Maine, 227.

The motion for a new trial on the ground of newly discovered evidence is sustained. Let the case be tried again, plaintiff and defendant, each in his turn, throwing upon its issues, in the effulgent brightness of competency and relevancy, the light of the evidence that he may have.

As already indicated, this conclusion obviates necessity for consideration either of the usual form motion or of the exceptions.

Motion for a new trial on the ground of newly discovered evidence sustained.
New trial granted.

ADELBERT L. MILES, Judge of Probate,

vs.

TYLER M. COOMBS, Administrator et als.

Knox. Opinion November 7, 1921.

It is the general rule that, when suit is brought for the special use of any one, the interest of that person must be established to maintain the action, because it is involved in the breach assigned.

A man made a will creating a trust. The will was admitted to probate. The trustee whom the testator nominated qualified. When that trustee had died another was appointed in succession; the latter too now is dead. Conceiving it to be his duty to straighten up and carry out the trust, the sole surviving executor of the will initiated steps leading to the present action on the bond of the trustee latest to die.

An insuperable difficulty with this action is that the real and actual plaintiff has no greater interest in it than a stranger. Executors execute wills; trustees control and manage trusts. It is the general rule that, when suit is brought for the especial use of any one, the interest of that person must be established to maintain the action, because it is involved in the breach assigned. An interest on the part of this executor plaintiff is not shown. That the executor is personally a beneficiary of the trust is at this time inconsequental, for he is not now so suing.

Looking toward finality of litigation, and that with becoming promptitude, the court suggests to the defendant administrator, that he prepare as best he can from available data, an account of his intestate's doings as trustee, and that he file and settle such account in the Probate Court. To the plaintiff is suggested

the seeming practical advisability, in probable economy of both time and expense, of the appointment of still another trustee, to exercise a trustee's rights, and to discharge the trust conformably to its terms.

On report. An action of debt brought in the name of the Judge of Probate of the County of Knox against Tyler M. Coombs, administrator of the estate of Edward B. Carleton, as principal, and Cora C. Cushing and Nettie P. Levensaler, as sureties in the trustee bond, given by said Edward D. Carleton, June 18, 1912, as trustee under the provisions of the will of J. O. Cushing, late of Thomaston in County of Knox, deceased. The case was reported to the Law Court, by agreement of the parties, upon an agreed statement of facts, for such decision as the law and the facts require. Plaintiff non-suit.

Case stated in the opinion.

Edward K. Gould, for plaintiff.

Rodney I. Thompson, for Nettie P. Levensaler and Cora C. Cushing.

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

DUNN, J. J. O. Cushing made a will. It was admitted to probate. By that will he created a trust, the income payable to his son Edwin for life, and afterward to Edwin's widow during her survivorship; "then to said Edwin O. Cushing's children, if he has any, and if no children, then to my legal heirs." Of the trust, Charles H. Cushing, another son of the testator, originally was trustee. When Charles died, one Edward D. Carleton succeeded, by the intervention of a court acting independently of testamentary nomination, to uphold the trust. The beneficiary, Edwin, died childless. Edwin's widow is dead. Mr. Carleton has died.

From the statement on which this case is submitted, it appears that the executors of the Cushing will never proceeded of judicial record in the settlement of their decedent's estate, beyond returning an inventory to the Knox Probate Court. That court has no record concerning Charles Cushing as trustee, excepting, as the arguments of counsel indicate, with regard to his confirmation in the trust. Trustee Carleton's Probate Court record, so far as he himself procured its making, stops with the filing and approval of a bond for his fidelity.

In this situation the sole surviving executor of the will, conceiving it to be his duty to straighten up and carry out the trust, has taken steps which have led to where he now is, developing on the way the fact that Carleton, upon assuming the fiduciary relationship, received from a Thomaston bank the transfer of a credit balance of $3,305.59, all which he withdrew, save six or seven dollars. Whether the withdrawals were rightful or wrongful, or what disposition was made thereof, is not authoritatively shown.

An insuperable difficulty with the present action, brought in the name of the Judge of Probate against the administrator of the Carleton estate and the sureties on Mr. Carleton's bond as trustee, is that the real and actual plaintiff has no greater interest in it than a stranger. This action is for the benefit of the executor of Mr. Cushing's will. The authorizing decree and the writ both so recite. It certainly is the general rule, that, when suit is brought for the especial use of any one, the interest of that person must be established to maintain the action, because it is involved in the breach assigned. *Bennett* v. *Woodman*, 116 Mass., 518. An interest on the part of this executor plaintiff is not shown. The trust, an enforcement of which is sought, attached when the executors paid over the money to the first trustee. They ought to have made a report to the court. But, though the executors were delinquent, the right of a beneficiary of the trust was not in consequence extinguished, nor was the care, diligence and responsibility required of the trustee, whether the first or a succeeding one, to preserve and protect the property and to carry out the trust, thereby lessened. It is for an executor to execute a will, and for a trustee to control and manage a trust. If a valid trust be created, it may fail for want of a beneficiary (*Brooks* v. *Belfast*, 90 Maine, 318), but it shall not fail for want of a trustee. *Childs* v. *Waite*, 102 Maine, 451. A beneficiary may pursue and recover trust property improperly diverted, regardless of change in its form, providing its identity be established outside the hands of a bona fide purchaser for valuable consideration without notice. *Oliver* v. *Piatt*, 3 How., 333; 11 Law Ed., 622. Or, in election of remedy, the beneficiary may hold the trustee liable for the breach of the trust. *Oliver* v. *Piatt*, supra. In very deed, to render the beneficiary's rights even more broad or comprehensive, a statute provides that a bond given by a trustee may be put in suit, by order

of the supervisory court holding it, for the benefit of any person interested in the trust estate. R. S., Chap. 73, Sec. 12. The suing executor is said to be personally a beneficiary of the trust, but even so he is not acting the part of cestui and, whatever its power to regulate proceedings inherently of common law or equity inception, this court may not extend defined authority in actions purely statutory.

Looking toward finality of litigation, and that with becoming promptitude, the court suggests to the defendant administrator of Mr. Carleton's estate, that he prepare as best he can from available data, an account of his intestate's doings as trustee, and that he file and settle such account in the Probate Court. To the plaintiff is suggested the seeming practical advisability, in probable economy of both time and expense, of the appointment of a trustee, in succession to the trustee latest to die, to exercise a trustee's rights, and to discharge the trust conformably to its terms. So suggesting, the court decides that in the case in hand the entry must be,

Plaintiff non-suit.

ISAIAH W. BERRY

vs.

M. F. DONOVAN & SONS, Employer, and Travelers Insurance Company, Insurer.

Cumberland. Opinion November 10, 1921.

While maritime law and admiralty jurisdiction are of the law of the United States, yet a State may enact a statute which is optional or elective, and not mandatory, which does not invade the limits of such Federal Law, but extends to parties an option which if accepted may change their rights and liabilities under the Federal Law.

A state may neither broaden nor narrow the limits of maritime law and admiralty jurisdiction, that being of the law of the United States.

But the State of Maine in enacting the Workmen's Compensation Act has not presumed to encroach or trench upon a power which the people of the United States conferred upon the nation. The statute is optional or elective and not mandatory as to those within its purview.

Acceptance of the provisions of the law creates a contractual relationship between employer and employee in which they mutually substitute for rights and liabilities that the law would imply from the contract of hiring, other rights and liabilities, made effective by the superadded state sanctioned contract, in respect to the form of compensating industrial injuries.

A contract so founded is entitled to be respected as a contract universally.

On appeal by defendants. An appeal from a decree by a Justice of the Supreme Judicial Court in conformity with the finding of the Industrial Accident Commission that M. F. Donovan & Sons, or their insurance carrier, pay to plaintiff compensation in the sum of $15 per week from February 4, 1921, to February 24, 1921. The plaintiff was injured while in the employment of the defendant in unloading railroad ties from a vessel tied to one of the wharves in Portland harbor. The ties were being lifted from the vessel by means of a derrick installed on the vessel and swung out over the wharf and loaded onto trucks. Plaintiff was stationed on a platform

built on the wharf and while in the course of his employment was knocked from the platform to the wharf and in falling injured his right arm. There was no dispute about the facts. The contention of the defendant being that at the time the claimant was injured he was engaged in the performance of a maritime contract and was within the admiralty jurisdiction and that the Workmen's Compensation Act of the State of Maine is unconstitutional in so far as it purports to include matters within the admiralty jurisdiction. Appeal dismissed. Decree below affirmed.

Case is fully stated in the opinion.

Harry E. Nixon, for plaintiff.

Leon V. Walker, and Verrill, Hale, Booth & Ives, for defendants.

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

DUNN, J. Mr. Justice Holmes, speaking for the court of which he is, in the case of *The Blackheath,* 195 U. S., 361, 49 Law Ed., 236, uses language worthy a sort of copyright. He says that "the precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history."

The power of the Congress to legislate respecting maritime contracts, is paramount. This prerogative finds origin in that provision of the Federal Constitution enabling the making of all laws necessary and proper for carrying into execution the powers vested by the supreme organic law in the government of the United States or its departments or officers. U. S. Con., Art. I, Sec. VIII. Among these powers are those of all cases of admiralty and maritime jurisdiction, (Idem. Art. III, Sec. II), and the regulation of commerce with foreign nations and among the several states, with uniformity. Idem. Art. I, Secs. VIII, IX. Exercising such control the first Congress conferred upon the District Courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, ... saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." The Judiciary Act, Sept. 24, 1789, Chap. 20, Sec. 9; 1 U. S. Stat., 73-77. The saving clause has been retained through all revisions of the statute down to the present time. 36 U. S. Stat., 1091; Comp. Stat., 1916, Sec. 991 (3). Before passing on, it may be well to remark, by way of reminder, that the Congress in

its exception did not save to suitors a remedy in the common law courts, but saved to them a common law remedy. The Moses Taylor, 4 Wall., 411, 431, 18 Law Ed., 397. The distinction is the difference between an action and a remedy; a remedy does not necessarily imply an action. *Knapp* v. *McCaffrey*, 177 U. S., 638, 44 Law Ed., 921. A remedy, upon the authority of Bouvier, is the means employed to enforce a right, or to redress an injury. Remedies are usually by action, but by no means necessarily so. *Knapp* v. *McCaffrey*, supra.

The State of Maine, repeating and amending an earlier law, (Laws of 1915, Chapter 295), has enacted a Workmen's Compensation Act. Laws of 1919, Chapter 238. The statute defines the word "employee" as inclusive of every person in the service of another, other than casually, under any contract of employment whatsoever, excepting persons engaging in farm labor, as domestic servants, as masters of or seamen on vessels in interstate or foreign commerce, and officials of the State and its subdivisions, with exceptions, not material to be particularly stated here, regarding certain public officers and employees. The definition of "employer" is correspondingly comprehensive concerning those customarily employing five or more persons in the same business. The act is optional or elective. Acceptance of its provisions creates a contractual relationship between employer and employee. *Mathias Gauthier's Case*, 120 Maine, 73; *Mailman's Case*, 118 Maine, 172. Mutual acceptance by employer and employee of the provisions of the act adds a contract to the underlying contract of employment; the superadded contract having to do with the subject of the employer's responsibility for disabling or fatal personal injuries to the employee, should such befall the latter in the course of his employment. Express assent, and a compliance on his part with stated preliminary requirements, to the approval of the commission erected to administer the act, will bring an employer within the circle of the law. Non-action, that is to say, a failure to give notice of a desire to be left outside, impliedly places the employee of an assenting employer there. If an employer, other than one employing domestic servants, or engaging in agriculture or logging, elect to remain without the act, and he be named defendant in tort for personal injuries sustained by his employee, or from death resulting therefrom, the doctrines of assumption of risk and fellow service and the defense of contributory negligence will be

denied him. A liability is imposed on every assenting employer, to the exclusion of common law liability, and as well of liability under any statute other than the present one, to make or provide a compensation for injuries to his employee, regardless of fault as a factor or cause; excepting where injury or death is brought about by the wilful intention of the employee or his fellow, or results from the employee's intoxication while on duty; the employer's knowledge of the intoxication or of its likelihood affording defensive proposition. Self-insuring by the employer, on satisfactory proof of his pecuniary ability to pay the compensation and benefits provided for, and a deposit by him of security therefor, is permitted. Or, instead, he may furnish the insurance of an approved underwriter. The extent of liability is determined by the commission, or the chairman of the commission, as the particular case may come within the law. Findings of fact are final. A decision has the status of a judgment, and is enforceable by process of the Supreme Judicial Court. Laws of 1919, Chap. 238, Sec. 35. In addition to immediate medical or like treatment, compensation is to be granted, dating ten days from the accident, upon a graduated scale based upon loss of earning power, having regard to the previous wage and the nature and duration of the disability. Death benefits are measurable according to the dependency of designated surviving dependents.

In this situation of legal affairs, a vessel lay tied to a Portland wharf, in waters available to interstate commerce. Her freight was railroad ties. M. F. Donovan and Sons, Inc., a local stevedoring corporation, having contracted with the ship to discharge the cargo, hired the plaintiff, a longshoreman, to assist in the unloading. In performing his duties the plaintiff stood on a platform on the wharf. To this platform a sling, operated by a traveling derrick on the vessel, brought successive loads of the ties, from whence the ties were placed on a truck to be wheeled to another part of the wharf. On one of its journeys the sling struck the plaintiff; it knocked him from the platform to the wharf, and thereby incapacitated him temporarily for work. Donovan and Sons, Inc., was an assenting employer under the Workmen's Act. Its employee, deeming himself to be within that act, made application for the allowance of compensation. His application was granted. A Justice of this court entered statutory directed decree upon the award of the commission. Laws of 1919, Chap. 238, Sec. 34. *Hight* v. *Manufacturing Co.,* 116 Maine,

81. Appeal brings the case here. Laws of 1919, Chap. 238, Sec. 34. Both the stevedoring corporation and its insurance carrier strenuously contend that, in so far as it was sought to be applied to the facts of this case, the Workmen's Compensation Act contravenes the Constitution and the laws of the United States. No other question is raised.

Admiralty and maritime jurisdiction, as these terms are used in this country, extend not only to all things done upon and relating to the sea, to transactions relating to commerce and navigation, to damages and injuries upon the sea, and all maritime contracts, torts and injuries, (*DeLovio* v. *Boit*, 2 Gall., 398), but still beyond the high seas to waters navigable therefrom. *The Genesee Chief*, 12 How., 443, 13 Law Ed., 1058; *The Hine* v. *Trevor*, 4 Wall., 555, 563, 18 Law Ed., 451; *The Eagle*, 8 Wall., 15, 19 Law Ed., 365.

It seems almost superfluous to say that a state may neither broaden nor narrow the limits of maritime law and admiralty jurisdiction. *The J. E. Rumbell*, 148 U. S., 1, 37 Law Ed., 345; *Steamboat Orleans* v. *Phoebus*, 11 Pet., 175, 9 Law Ed., 677; *Butler* v. *Boston & Savannah Steamboat Company*, 130 U. S., 527, 32 Law Ed., 1017. State laws cannot exclude a maritime contract from the domain of admiralty jurisdiction; they cannot alter the limits of that jurisdiction. A state can only authorize the enforcement of rights by common law remedies, "or such remedies as are equivalent thereto." *The Lottawanna*, 21 Wall., 558, 580, 22 Law Ed., 654. Under the Judiciary Act it is open to a suitor to proceed in rem in the admiralty or in personam in the same jurisdiction, or, at his election, in the stead of going into admiralty, he may resort to his common law remedy either in the federal or in the state courts. *Hine* v. *Trevor*, supra; *The Belfast*, 7 Wall., 624, 19 Law Ed., 266; *Taylor* v. *Carryl*, 20 How., 583, 15 Law Ed., 1028; *Schoonmaker* v. *Gilmore*, 102 U. S., 118, 26 Law Ed., 95; *Manchester* v. *Massachusetts*, 139 U. S., 240, 35 Law Ed., 159. Of course he may not for the one thing properly prevail in both jurisdictions. But personal suits on maritime contracts or for maritime torts are maintainable in state courts. If, as a general proposition, no remedy is sought against the vessel itself, the case is not within the exclusive jurisdiction of the federal courts, but the state courts, administering common law remedies, have concurrent jurisdiction. 1 Cyc., 811; 1 C. J., 1253, Sec. 24. A suit in personam by a sailor for his wages is maintainable at common law, and there-

fore may be brought in a state court. *Leon* v. *Galceran,* 11 Wall., 185, 20 Law Ed., 74. Proceedings in personam growing out of a collision may be so enforced. *Schoonmaker* v. *Gilmore,* supra. A seaman's wages are subject to attachment by trustee process. *White* v. *Dunn,* 134 Mass., 271. A suitor may have a remedy in a state court even if the admiralty courts have jurisdiction, when the right of action was created by a state statute enacted subsequently to the passage of the Judiciary Act. *American Steamboat Company* v. *Chace,* 16 Wall., 522, 21 Law Ed., 369; *Knapp* v. *McCaffrey,* supra. A state may pass laws enforcing the rights of its citizens which affect interstate commerce, but the laws of the state must stop short of regulating such commerce in the sense in which the Federal Constitution gives the exclusive jurisdiction of that subject to the Congress. *Sherlock* v. *Alling,* 93 U. S., 99, 23 Law Ed., 819; *Kidd* v. *Pearson,* 128 U. S., 1, 32 Law Ed., 346; *Pennsylvania Company* v. *Hughes,* 191 U. S., 477, 48 Law Ed., 268. A lien given by a state statute upon a vessel for materials furnished on the vessel's credit for, and by their use fairly forming part of her original construction, may be enforced against the vessel in a state court, even though she be engaging in interstate commerce. It is altogether probable that the vessel might otherwise become subject to a maritime lien, superior to the existing lien, enforceable in the admiralty. *The Winnebago,* 141 Fed., 945; *The Winnebago,* 205 U. S., 354, 51 Law Ed., 836. The distinction between such proceedings as are and such as are not invasions by a state of the exclusive admiralty jurisdiction is stated with refreshing clarity in the case of *Knapp* v. *McCaffrey,* supra. The court there says:

"If the cause of action be one cognizable in admiralty, and the suit be in rem against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be in personam against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute of a common law remedy."

The exclusive jurisdiction granted by the Constitution to the United States courts has reference, as relating to the case at bar,

either to a libel directly against the vessel herself, or, since the comparatively recent decision of *Southern Pacific Co.* v. *Jensen*, 244 U. S., 205, 61 Law Ed., 1086, to a proceeding under the compulsory compensation act of a state against the owner of a ship plying in interstate commerce. It seems settled that, where the suitor is not proceeding in either of these ways, but prosecutes his action in personam, he may proceed in the courts of a state. *Knapp* v. *McCaffrey*, supra; *Rounds* v. *Cloverport*, 237 U. S., 303, 59 Law Ed., 966. In matters of contract the jurisdiction of admiralty depends upon the subject matter, viz., whether maritime or not. *Philadelphia Railroad Co.* v. *Towboat Company*, 23 How., 209, 16 Law Ed., 433; *Insurance Co.* v. *Dunham*, 11 Wall., 1, 20 Law Ed., 90. In tort the jurisdiction of the admiralty is not dependent upon the fact that the wrong or injury is inflicted by the vessel or on board the vessel; it depends upon whether the tort occurred upon the high seas or upon navigable waters; in shorter phrase, it is controlled by locality. *The Plymouth*, 3 Wall., 20, 18 Law Ed., 125; *Cleveland Terminal Company* v. *Steamship Company*, 208 U. S., 316, 52 Law Ed., 508; *Atlantic Transportation Co.* v. *Imbrovek*, 234 U. S., 52, 58 Law Ed., 1208.

In the case in hand the plaintiff is not assuming to enforce a suit in rem against the vessel, nor is he attempting to prosecute a suit in personam against her master or her owner, nor to extend a contractual relationship born of state legislation beyond an immediate party, or the insurance carrier of the immediate party, to the contract. His attitude is that he and his employer, enjoying constitutional freedom to contract, voluntarily put aside rights and obligations otherwise vouchsafed them, and therefor substituted the new form of compensating industrial injuries which the Legislature of their State has provided. Having done this, and injury having befallen the plaintiff out of and in the course of his employment, he insists that this court make their contract to square with the demands of real justice and plain common sense, that his rights in the dual citizenship of State and Union may not be unjustly infringed, and that the remedial legislation out of which the contract sprang may be judged by what it achieves in satisfying the righteous demand of society for a justice that is exact, equal and full.

The presented situation, as we see it and understand it, is this. First, a contract between a stevedoring corporation and a vessel to

discharge her cargo, the contract being of maritime nature; next, a contract between that stevedoring corporation and the plaintiff, having to do with his employment in the unloading; this, too, may be regarded as a maritime contract; finally, between the same stevedore and the same longshoreman, a contract about the contract that they already had made; the latest contract touching the employer's responsibility for possible injuries to the employee. This contract arose out of and by force of the State's statute, immediately upon the consummation of that contract made next before, but not without the express assent of the one and the implied assent of the other of the contracting parties. The contract relates to a maritime contract. It springs from an existing maritime contract. So does a sale by a merchant to fishermen about to go on a fishing voyage, of articles for their personal use; but such is not a maritime contract. *The Mary F. Chisholm,* 129 Fed., 814. A contract to build a ship would be potential of contemplated maritime contracts; yet a shipbuilding contract is not for the admiralty. *The Winnebago,* 205 U. S., 354, 51 Law Ed., 836. A shipping broker has no lien on a vessel, in admiralty, for services in procuring a charter party. *The Thames,* 10 Fed., 848. Workmen employed solely by the head stevedore must look to him for their wages, and have no lien upon the ship. *The Hattie M. Bain,* 20 Fed., 389. The contract entered into between this plaintiff and his employer is designed to be enforced only in the jurisdiction of that State whose law authorized its making. *Arizona Company* v. *Iron Company,* 119 Maine, 213. Plainly, if the longshoreman were entitled to enforce against his employer, an action of tort for personal injuries, it would seem that a common law remedy in personam would be available, whether the accident happened on the high seas or near shore in the navigable waters of this State. *The Hamilton,* 207 U. S., 398, 52, Law Ed., 264. As also admiralty would have jurisdiction. *Atlantic Transportation Company* v. *Imbrovek,* supra. The stevedore and its longshoreman, when the making of their original contract of hire was complete, must be held to have voluntarily agreed that if, in the course of the latter's employment, disabling or fatal injury should come to him, a compensation would be made in manner and amount as defined by a statute of their State, to the exclusion of liability therefor otherwise. Without such voluntary adoption the statute would be of no effect between the parties. Such voluntary adoption afforded a peculiar

remedy, entitled to recognition only in the State granting it, though it might apply to injury occurring elsewhere. No reason is perceived why it would not be quite as competent for them to fix upon a mode for determining when, where, and the extent to which money relief or compensation should be forthcoming in the event of accident, as it would be for them, after the happening of an accident, amicably to make adjustment of damages or to submit the question to the determination of a common law arbitration, or for the injured one to waive his right to damages, or for the other to make him an award therefor—no legal liability existing. In all this there is no attempt to hinder, restrain or regulate commerce; no effort to establish as against the vessel or her owner, a form of personal injury compensation or of death benefit given by a state statute, but unknown both to the admiralty and to the common law; no purpose to make asymmetry in the customs and ordinances of the sea. True, the compensation promised to be afforded finds reflection in the wage scale, but not more clearly than common law responsibility would be mirrored there were it not for the intervening contract. There is neither change nor attempt to change the contract to which the vessel is party; that remains the same in every court, maritime or common law. Employer and employee mutually substitute for rights and liabilities which the law would imply from the contract of hiring, other rights and liabilities made effective by a state sanctioned contract of their own making, entered into to remove the uncertainties of possible lawsuits. One may pause to inquire if this may not be what, in the opinion in *The Lottawanna*, supra, is referred to as an "equivalent of a common law remedy;" he may halt seriously to ask himself if, after all, this be other than a manifestation of the quality of marching forward, in all its sanctity and inviolability, inherent in the Constitution of his country, which makes that fundamental institution to keep step, as the common law too keeps step, with the van of the procession of society in safe and sane progress. Yet the question is not so much whether there be here the equivalent of a common law remedy, nor yet whether the Constitution of the United States, instinct with life and with the attributes of nationality, of its own impulsion moves forward, as the years roll around, to meet and regulate the changing circumstances of human affairs in America, but, rather, whether concerning a contract maritime in relationship, to which neither a vessel nor a vessel's owner be party,

there may be made another contract deserving of respect in the jurisdiction where made. In this rigorous climate, where the winds of common sense blow free and strong, that contract seems anchored secure within a safe legal haven.

The prevailing opinion in the case of *Knickerbocker Ice Company* v. *Stewart*, 253 U. S., 149, 64 Law Ed., 834, is advanced by the defendants as of relation to the issue presented here. The light to be got from that decision of the highest court in the land, speaking the last word on the question involved, is that the Congress exceeded its power to legislate in attempting, as against the owner of a barge, and in defiance of that owner's will, to permit the application of a compulsory compensation law of New York to injuries sustained within the admiralty and maritime jurisdiction, by the owner's employee; on the theory that such legislation is destructive of the essential harmony and uniformity that it was meant in the adoption of the Constitution that the federal government should provide and preserve in the rules concerning matters maritime. The decision must be accepted as conclusive. But that decision does not indicate the course of the present case. Under a compulsory statute the rights and liabilities of parties arbitrarily arise from the law. Under an elective statute they come into existence from contract. The distinction and the difference are too clear for exposition. And, what is the more, undoubtedly an independent contractor might be liable to his own employee, regardless of whether the vessel or her owner would be or not. A state legislature has no power to modify or abrogate the maritime law—that being of the law of the United States. *Workmen* v. *New York*, 179 U. S., 552, 45 Law Ed., 314. The Legislature of the State of Maine has not presumed to encroach or trench upon a power which the people of the United States conferred upon the nation. The Legislature has confined itself to the enactment of a law intended to operate only in those instances where its provisions are voluntarily contractually adopted, and operative solely by the procedure of the statute on which the adoption is bottomed. A contract founded on that law is of right entitled to the rights of a contract universally.

Doey v. *Howland Company*, 224 New York, 30, also relied upon in the brief of the defendants, involves the liability of an intermediate independent contractor to his employee, killed while at work on an ocean-going boat. The Industrial Commission of the State of New

York made an award of death benefit. It held that, upon the contract of hire, the state statute, without regard to action in such behalf by the parties themselves, superimposed a contract providing absolute yet limited liability for personal injuries. Bowing gracefully to recognition of ultimate authority, as that authority finds expression in *Southern Pacific Company* v. *Jensen*, supra, and in *Clyde Steamship Company* v. *Walker*, 244 U. S., 255, 61 Law Ed., 1116, the Court of Appeals of the State of New York eventually annunciated the ruling that the industrial commission had no authority in the case. Respecting that case and its decision, and regarding the other New York cases cited by the defendants, it is to be remembered that the relationship in each and all of them, as distinguishable from that in the instant case, was compulsory and not contractual. This means much. The Doey case, and the concomitant ones from New York, involve the question of a state legislature assuming to read a compensatory contract into another contract, whether the contracting parties of their volition would or no. Upon the contractual phase of the situation, the final arbiter of federal questions has not yet said. Until it shall say otherwise, if, indeed, it ever shall, our ideas of the nature of contracts readily lead us to the conclusion that the decision of the Chairman of the Accident Commission in this plaintiff's case is invulnerable to attack.

Appeal dismissed.
Decree below affirmed.

ANSON W. BENNER *vs.* MARTHA B. BENNER.

Lincoln. Opinion November 10, 1921.

Expressions by a presiding Judge on issues of fact involved in a trial do not constitute exceptionable error unless the language and manner are such as to impress the jury that obedience on their part is to follow. It is within the descretion of the presiding Judge to permit introduction of further evidence at any time before the charge, and to read a letter introduced in evidence in the course of his charge, to show its relevancy or want thereof, to the issues involved in the controversy.

The legislative inhibition that a judge must not express opinion on arising issues of fact in the trial of a case goes no further in its meaning than that he should refrain from speaking of the facts in manner implying his utterance entitled to obedience. The presiding Judge had descretion, notwithstanding a party had rested his case, and the closing argument of opposite counsel had been begun, to grant leave for the introduction of further evidence.

Exercise of such power is not subject to revision or exceptions. The collateral statement of the judge, in association with granting leave to introduce the further testimony, that injustice would not be done in his court if he could help it, does not attain to the rank of exceptionable error.

It was not error for the judge, in the course of his charge to the jury, to interrogatively read a letter that had been introduced in evidence, to show either its relation to the subject of the controversy or the want thereof.

On exceptions by plaintiff. An action of assumpsit on account annexed to recover $523.95 less a cash credit item of $100. After the testimony was in, and counsel for defendant had argued, and counsel for plaintiff was addressing the jury, the presiding Justice permitted defendant, under objection by plaintiff, to testify that she never paid the item credited in the account annexed, some comments being made by the presiding Justice as to his duty to litigants in his court, and during the charge to the jury the presiding Justice read a letter written by defendant to plaintiff which had been introduced in evidence. To which several doings on the part of the presiding

Justice and parts of the charge to the jury, as indicated, after verdict for defendant, plaintiff excepted. Exceptions overruled.

Case stated in the opinion.

Rodney I. Thompson, for plaintiff.

George A. Cowan, for defendant.

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

DUNN, J. When the Legislature, in defining the respective functions of the court and of the jury in the trial of a case, laid down the inhibition that the Judge must not express opinion on arising issues of fact, it went no further in its meaning than that he should refrain from speaking of the facts in manner implying his utterance entitled to obedience. R. S., Chap. 87, Sec. 102; *State* v. *Mathews,* 115 Maine, 84. He must separate the questions of law from the questions of fact, and thus disunited sent the questions of fact to the province of the jury, free from authoritative verbal invasion by himself. But it never was intended that a Judge should sit listlessly by, fulfilling duty as though he were administering the rules in a contest for superiority by chance and skill, utterly powerless to aid in the ascertainment of truth as the underlying essential to a proper verdict. Far from it. The Legislature meant that, in the employment of the exerpience of his career, he should make the positions and contentions of the litigants clear, by stating, analyzing, comparing and explaining the evidence, by stripping it of extraneous considerations, pointing out any seeming contradictions, resolving it into its simplest elements, supplementing all by definition of the law's governing power, that the jury with discerning appreciation might come to a correct result, and the gladsome light of jurisprudence shine on undimmed. *State* v. *Mathews,* supra; *York* v. *Railroad Co.,* 84 Maine, 117; *State* v. *Day,* 79 Maine, 120; *Jameson* v. *Weld,* 93 Maine, 345.

Plaintiff sued to recover a balance claimed as due for items of personal property sold through the intervention of the agency of his son, who at the time was the defendant's husband. An account annexed to the writ is inclusive of a cash credit. For the purpose of establishing his case, the plaintiff, invoking the provisions of R. S., Chap. 87, Sec. 127, introduced a supporting affidavit comprehensive

both of debits and of the credit, and going to the reasonableness and justness of his charges. He also introduced, at some stage in the proceedings, a letter that the defendant had written to him. Testifying as a witness in her own behalf, defendant denied liability for each and every one of the debit items. She left the stand without having been inquired of about the attributed credit. Payment ordinarily is a defensive proposition, but the evidentiary statute mentioned exacts that the plaintiff's affidavit state the credits. In the course of his final argument to the jury, plaintiff's attorney advanced the idea as strange that defendant should have made a partial payment on a bill she did not owe. At the instance of opposite counsel, the arguing lawyer was interrupted, and, remarking that injustice would not be done in his court if he could help it, the trial Judge allowed defendant again to witness; she testified that there was no payment. Plaintiff's counsel, first reserving exception both as to what the Judge had said and as to allowance of the testimony against objection, resumed and concluded his argument. He now relies upon the exception. He relies as well upon another exception, resting on the Judge's comments, while he was charging, on the letter; the plaintiff insisting that the letter "was in the nature of some acknowledgment of that indebtedness."

The exceptions may be considered in inverse order. The Judge interrogatively read the letter, or a substantial part of it, sentence by sentence, to show either its relation to the subject of the controversy or the want thereof, saying in concluding animadversion: "To what was she alluding? What is the subject matter? That is all I wish to say, to call your attention to that letter. But you read it, and see how far that corroborates this plaintiff in his claim for these charges." If by any mischance there was error in the exposition of the letter, it has altogether lost its way out of the record.

It was clearly within the absolute discretion of the presiding Judge, notwithstanding defendant's case had been rested, and though the closing speech of the plaintiff was already under way, to grant leave for the introduction of further evidence, whether omitted by inadvertence or because of a previous lack of knowledge by counsel. Rule XXXIX; *McDonald* v. *Smith*, 14 Maine, 99; *State* v. *Martin*, 89 Maine, 117. The exercise of such power is not subject to revision on exceptions. *Ruggles* v. *Coffin*, 70 Maine, 468. Nor does the collateral statement of the Judge, in association with granting leave

to introduce the further testimony, that injustice would not be done in his court if he could help it, attain to the rank of exceptionable error. Assuredly the Judge would not wittingly or willingly promote injustice. He desired that the contending parties be freely, fairly, and fully heard. The office of a Judge is to administer right and justice; the record sent up is pervasive that he who presided was of this fact fully aware. Upon the submission of the case, the issues of fact joined by the pleadings respecting which testimony had been offered, were left by the Judge for the sole determination of the jury under appropriate instructions, as a reading of his whole charge shows.

Exceptions overruled.

ROSWELL L. MURRAY *vs.* MURRAY RYDER.

Lincoln. Opinion November 15, 1921.

Where a lessee is obliged to pay taxes assessed on the property embraced in the lease, such payment being a condition of the lease, and also pay taxes assessed on property not embraced in the lease as the assessment was made on both the leased and unleased property as an entirety, the assessment being made against the lessor, the lessee is entitled on final settlement to recover of the lessor his proportional part of the taxes.

The plaintiff, lessor, brought suit against the defendant, lessee, to recover the value of stock sold and not replaced and of supplies used and not replaced, as provided in the agreement of letting, and also for rent. The defendant filed an account in set-off to recover the amount of taxes paid by the defendant on the portion of the real estate reserved by the lessor. The jury found a verdict of $1.00 in favor of the defendant. On plaintiff's general motion for a new trial it is

Held:

1. That as the entire property, both the leased and the unleased portions, was taxed to the plaintiff as an entirety and as under the lease the defendant was obliged to pay the taxes assessed upon the leased portion, and as the tax created a lien upon the whole, the defendant paying the entire tax was entitled on final settlement to recover of the plaintiff his proportional part thereof.
2. That in this view of the law and upon the whole evidence, the verdict should not be disturbed as being manifestly wrong.

On general motion by plaintiff for a new trial. A suit brought by lessor against lessee, to recover the value of stock sold and not replaced, and of supplies used and not replaced, as provided in the lease, and also for rent. Defendant claimed on account in set-off to recover for taxes paid by him on real estate of lessor not embraced in the lease, the tax having been assessed on both portions as an entirety, he being obliged under the conditions of the lease to pay the taxes assessed on the real estate embraced in the lease. A verdict of $1.00 was returned by the jury in favor of the defendant. Motion overruled.

Case is stated in the opinion.

Howard E. Hall, and A. S. Littlefield, for plaintiff.

W. M. Hilton, for defendant.

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

CORNISH, C. J. On October 19, 1897, the plaintiff let to the defendant for the term of one year certain land situated in Newcastle, together with all the buildings thereon except the dwelling house and flower garden adjoining, and the hen house situated north of the dwelling house. A lease was drafted at the time setting forth all the terms of the letting and the agreements on either side, but it was not signed. However it was introduced at the trial without objection as evidence of the agreement between the parties and both concede that it truthfully sets forth the terms under which the defendant used and occupied the premises. It was a family affair, the plaintiff being the uncle of the defendant and one object of the lease being to furnish a home for a relative of both. The rent was nominal, one dollar per year. It was agreed that the lessee should provide the inmates of the dwelling with certain supplies and maintain the household specified. It was further agreed that the lessee should have the right to sell any stock which was upon the place at the time of entry, surrendering to the lessor at the termination, stock of equal value or a cash equivalent. The lessee was also to have the use of all the farming tools and implements together with the hay, feed and farm produce at the time of entry, the lessee to surrender to the lessor at the termination, "all claim to any hay, feed and produce stored on said farm at that time and necessary to maintain the stock and household until another season's crops are gathered." The lessee was to pay all taxes assessed upon the leased premises.

This arrangement was carried out and the defendant used and occupied the leased premises until June 1, 1919, a period of nearly twenty-three years, when trouble arose and the plaintiff resumed possession. On January 28, 1920, he began this action to recover the value of the stock sold by the defendant and not replaced at the termination of the lease, the value of the crops, produce and supplies similarly used but not replaced, and for the rental for one and a half years preceding November 1, 1919, a total claim of $1,650.

The defendant pleaded the general issue and filed an account in set-off embracing the plaintiff's proportional part, estimated at one-third, of the taxes paid by the defendant upon the entire property, both upon that portion leased to the defendant and that reserved to the plaintiff, for the whole period from 1898 to 1918, this estimated one-third amounting to $164.34.

The jury found a verdict for the defendant in the sum of one dollar. The case is now before the Law Court on a general motion to set aside the verdict. No exceptions being filed it can be assumed that proper instructions were given by the presiding Justice on all the propositions of law involved.

It is unnecessary to consider in detail the evidence of the plaintiff tending to substantiate his various claims. These were matters particularly within the experience of a jury and their findings are not shown to be manifestly wrong. Their conclusion would seem to have been that the total of the plaintiff's claims amounted to $163.34, because they rendered a verdict for the defendant in the sum of one dollar, and in order to reach that result, as the defendant's claim was made up of a single class, namely taxes, and amounted to $164.34, this must have been one dollar in excess of the plaintiff's adjudged claim.

The real contention here is that under the law and the evidence the defendant was not entitled to charge the plaintiff with the amounts paid for taxes on the plaintiff's property, and therefore the account in set-off should have been disallowed.

As we have already seen, the entire property consisted of two parts, one leased to the defendant, the other reserved by the plaintiff. Under the agreement, the lessee was to pay "the rent as above stated and all taxes and duties levied or to be levied thereon during the term, and also the rent and taxes as above stated, for such further time as the lessee may hold the same." "Thereon" means of course

the premises leased. That left the taxes on the balance of the property, the dwelling house, garden and hen house, to be paid by the owner, the plaintiff. Each year the tax was assessed by the town against the plaintiff upon the real estate as a whole, making no distinction between the leased and the unleased portions, all the land being assessed at one figure, all the buildings at another, and a single tax levied upon the whole. The tax bills, which constitute a demand for payment, were sent each year to the defendant, the plaintiff being a resident of New York, and were paid by him. Up to the time of the difficulty between the plaintiff and defendant in 1919, the matter of these payments was never mentioned between them.

Under this state of facts the plaintiff contends that the defendant's payment of the portion of the tax assessed upon the plaintiff's reserved portion was entirely voluntary, and therefore cannot be recovered. In one sense it was voluntary because it was not made at the specific request of the plaintiff. But in another and a vital sense it was not voluntary because its non-payment would have led to serious consequences and would have endangered the portion held under the lease, and under such circumstances a request is implied by law.

The tax might have been assessed by the town directly against the defendant in the first instance, as being the person in possession, the statute permitting the assessment against either the owner or the person in possession. R. S., Chap. 10, Sec. 9. Had it been assessed against the defendant as the person in apparent possession clearly he would have been obliged to pay the whole for his own protection and look to the owner for his share.

The real situation here does not essentially differ from that. The assessment was a unit. A lien was thereby created, R. S., Chap. 10, Sec. 3, upon the entire property for the whole tax, upon the leased as well as the unleased portion, and this lien could have been enforced against either portion or both. In order, therefore, to protect his own interest and to remove the menace of a lien it was necessary for the defendant to pay the entire tax, not only what would be a fair proportion to cover his leased property but the balance to cover the unleased portion. The collector would have accepted nothing less. This the defendant did, and in our opinion he was well within his legal right to recover from the plaintiff for the amount so paid on a final settlement. It was similar to the payment, by one tenant in

common, of a joint incumbrance upon the estate, and in such a case the tenant so paying can recover of his cotenant his proportional part. *Dickinson* v. *Williams*, 11 Cush., 258; *Kites* v. *Church*, 142 Mass., 586. The same is true of taxes paid under like circumstances by a cotenant, *Dewing* v. *Dewing*, 165 Mass., 230.

Our statute recognizes the existence of such a reciprocal duty on the part of landlord and tenant in Chap. 6, Sec. 12, where it is provided as follows: "When a tenant paying rent for real estate is taxed therefor, he may retain out of his rent half of the taxes paid by him; and when a landlord is assessed for such real estate, he may recover half of the taxes paid by him and his rent in the same action against the tenant, unless there is an agreement to the contrary."

In the case at bar, there was an agreement that the lessee should pay all the taxes on the leased land. The lessor was necessarily obliged to pay on what was reserved. The proportion fixed by the defendant, one-third for the plaintiff and two-thirds by the defendant is an estimated figure, and under the testimony as to values would seem to be fair and just.

Our conclusion therefore is that the defendant's set-off had a substantial basis in law and in fact, and is in accord with the spirit of the decisions both in this State and Massachusetts, some of which were cited by the plaintiff. *Williams* v. *Hilton*, 35 Maine, 547; *Davis* v. *Smith*, 79 Maine, 351; *Marsh* v. *Hayford*, 80 Maine, 97; *Amory* v. *Melvin*, 112 Mass., 83; *Nichols* v. *Bucknam*, 117 Mass., 488.

Motion overruled.

A. GAUTHIER AND SON

vs.

WALKER D. HINES, Director General of Railroads.

Oxford. Opinion November 15, 1921.

A Railroad Company is not bound by an agreement made by a local freight agent, to purchase at face value, goods in the hands of consignees, damaged in transit.

A local freight agent of a Railroad Company has no implied authority to bind the company in agreeing to purchase at face value goods in the hands of consignees that had reached their destination in a damaged condition.

The Railroad Company having disposed of the damaged goods and received therefor the sum of $356.59, the presiding Justice properly ordered a verdict for that amount.

On exceptions by plaintiffs. An action of assumpsit containing two counts, the first on an account annexed to recover the face value of 612 dozen of canned tomatoes at $1.50 per dozen, which were shipped from California to Rumford by freight, arriving at point of destination in a damaged condition, and freight and trucking, making a total of $1,106. The second count is for money had and received. Plaintiffs claimed that a freight agent of defendant agreed to take the damaged goods and pay the face value. Defendant contends that even if the freight agent agreed as claimed by plaintiffs, and it is doubtful if his language could be construed to constitute such an agreement, he had no authority, express or implied, to make such an agreement to bind the defendant. The defendant disposed of the cans left in its possession, receiving therefor $356.59, and tendered that sum to the plaintiffs. The presiding Justice ordered a non-suit on the first count, and ordered a verdict for plaintiffs on the second count for said sum of $356.59, and plaintiffs excepted. Exceptions overruled.

Case is stated in the opinion.

Albert Beliveau, for plaintiffs.

Charles B. Carter, for defendant.

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

CORNISH, C. J. The plaintiffs, retail merchants, were the consignees of a shipment of canned tomatoes from California, consisting of twelve hundred and fifty dozen cans, which arrived at Rumford by freight over the Maine Central Railroad on November 2, 1918. On opening the car it was found that a portion of the shipment was in an unsalable condition. The cartons were broken, and damp, and many of the cans were rusty and without labels. The plaintiffs hauled one load to their store but left the balance.

The writ contains two counts, the first on an account annexed for 612 dozen at $1.50 per dozen, $918, together with amount paid for freight $173.40, and trucking $14.60, making a total of $1,106.

The second count is for money had and received.

The plaintiffs base their first count on a conversation their senior member claims to have had with Mr. White the local freight agent after the condition of the goods was discovered, in which Mr. White told Mr. Gauthier to use what he could of the cans and to haul the rest to the station and "we will take care of them." In this he is corroborated by the representative of the brokers who originally sold the goods to the plaintiffs, and who overheard the conversation. The defendant offered no evidence so that the fact of the conversation is established.

The plaintiffs construe this to mean that the Railroad Company would take the goods off their hands, or in other words would purchase from them at the cost price, the damaged cans which they had already paid for to the vendors, together with all freight and trucking charges. A more reasonable construction of the words "we will take care of them" might be that the company would dispose of the damaged goods as best it could and account to the plaintiffs for the proceeds, but assuming the proper construction to be as the plaintiffs claim, an absolute contract of purchase, the legal question immediately arises whether the plaintiffs must not go further and establish by competent proof, legal and sufficient authority in Mr. White to bind the Railroad Company in this manner and to this extent.

No evidence was introduced on this point, further than to show that Mr. White was the local freight agent of the company at Rumford. This, therefore, reduces the problem to a single question, whether the making of such an agreement was within the scope of

his authority as local freight agent per se. We have no hesitation in holding that it was not. The ordinary duties of a local freight agent in the reception and forwarding of freight and the receiving of transportation charges are quite distinct from the power to admit liability on the part of the company for negligence in transportation, or from making contracts in whatever amount to purchase at face value damaged goods in the hands of dissatisfied consignees. The latter cannot be inferred or implied from the former. They are far outside the scope of the freight agent's employment.

In a recent case where the cause of action was the alleged negligence of the defendant in setting a fire by sparks from its locomotive, the court held that a letter written by a station agent to the general manager the next day after the fire, stating among other things that it was set by one of the company's engines, was inadmissible as being outside his line of duty. The opinion continues: "Further it needs no argument to sustain the proposition that Mr. Hayes had no authority by virtue of his office as station agent to bind the railroad company by an admission of its liability as alleged in this case. If authority in him to make such an admission is claimed it should be shown by competent proof for it cannot be inferred as within the scope of his authority as station agent." *Warner* v. *Maine Central Railroad Co.*, 111 Maine, 149. In the case at bar, Mr. White was not even the station agent. His official position as freight agent was one degree lower. A non-suit was properly ordered by the presiding Justice on the first count.

As to the second count, for money had and received, it appears that the Railroad Company disposed of the cans left in its possession, receiving therefor the sum of $356.59, and tendered that sum to the plaintiffs.

The presiding Justice properly ordered a verdict for the plaintiffs in that sum, on the second count.

Exceptions overruled.

ADA E. HOWARD *vs.* JOHN L. HOWARD.

Oxford. Opinion November 15, 1921.

A married woman cannot maintain an action for alienation of affections against a male defendant.

Under the Statutes of Maine an action for alienation of affections cannot be maintained by a married woman against a male defendant. *Farrell* v. *Farrell*, 118 Maine, 441, affirmed.

On exceptions by plaintiff. An action for alienation of the affections of her husband brought by plaintiff against her father-in-law. Motion by defendant to dismiss was sustained by the presiding Justice and plaintiff took exceptions. Exceptions overruled.

Case stated in the opinion.

Matthew McCarthy, for plaintiff.

George A. Hutchins, and Nathan G. Foster, for defendant.

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

CORNISH, C. J. This is an action for alienation of the affections of her husband brought by the plaintiff against her father-in-law. The presiding Justice sustained the defendant's motion to dismiss and the plaintiff alleged exceptions.

The only question involved is whether such an action can be maintained by a married woman against a man. In the very recent case of *Farrell* v. *Farrell*, 118 Maine, 441, this court held that such a suit cannot be maintained against a male defendant, but the plaintiff in the pending suit frankly asks the court to overrule that decision, as well as the preceding decisions upon which that is based, as being opposed to both reason and authority. This we are not inclined to do.

The course and scope of legislation and judicial decision on the point at issue may be briefly reviewed. An exhaustive discussion

of the progress of legislation on the general subject of the legal rights of married women may be found in *Haggett* v. *Hurley*, 91 Maine, 542, 551.

It is conceded that at common law a wife would have no standing in court in such a case. The earlier statutes in this State empowered a married woman to maintain an action in her own name for the preservation and protection of her property and the recovery of wages for personal labor not performed for her own family. These various acts are condensed in R. S., 1857, Chap. 6, Sec. 3. But it was held that these statutes did not give the wife the right to sue in tort in her own name, as for instance in an action for malpractice, *Ballard* v. *Russell*, 33 Maine, 196, (1851) nor of malicious prosecution, *Laughton* v. *Eaton*, 54 Maine, 156, (1866). Ten years later the right was extended so that the former statute as amended by Public Laws 1876, Chapter 112, reads as follows:

"She may prosecute and defend suits at law or in equity either of tort or contract in her own name, without the joinder of her husband, for the preservation and protection of her property and personal rights or for the redress of her injuries, as if unmarried, or may prosecute suits jointly with her husband." This language has continued unchanged to the present time and is now R. S., 1916, Chap. 66, Sec. 5. Upon this section the plaintiff rests her claim in the case at bar, contending that it is sufficiently broad to authorize the pending suit.

It is a familiar principle that statutes in derogation of the common law should be strictly construed. The court is to go no faster and no farther than the Legislature has gone. Mindful of this principle our court has had occasion to construe the meaning and scope of this section under consideration.

In *Hobbs* v. *Hobbs*, 70 Maine, 381, it was held that a wife could not maintain an action of assumpsit against her husband while the marriage relation was still subsisting. In construing the force and effect of the enlarging statute of 1876, the court says: "It relates to cases when, by the very assumption, the husband may be a party with the wife or not at her election. The design is to protect her from all marital interference in suits commenced by the wife alone or jointly with her husband and to prevent his maintaining alone any action respecting his wife's property."

The same statute came under consideration again in *Libby* v. *Berry*, 74 Maine, 286, where it was held that a woman after divorce could not maintain an action of tort against her former husband for an assault committed during coverture. The language of the court is this: "According to the construction already given to the act of 1876, it does not so far modify the common law as to authorize a civil action by the wife against the husband to recover damages for an assault, nor against those who act with the husband and under his direction in doing such a wrong. It only authorizes her to maintain alone such actions as previously could be sustained when brought by the husband alone or by the husband and wife jointly. It enlarges not her right of action but her sole right of action. It does not enable her to maintain suits which could not have been maintained before, but to bring in her own name those which must have been brought in the husband's name either alone or as a party plaintiff with her."

If this marks the limit of the enlarged powers of the wife under this statute, then clearly the present action cannot be maintained, because an action for the alienation of the husband's affections by his father could be brought neither by the husband alone, nor by the husband jointly with the wife. Such an action, based upon the wrong doing of the father but aided by the connivance of the husband, could not be maintained by the husband. It would be incongruous. His interests would lie with the defense rather than the prosecution.

This doctrine has been consistently followed and applied in cases strictly in point.

In *Doe* v. *Roe*, 82 Maine, 503, it was held that a wife cannot maintain an action against another woman for debauching and carnally knowing her husband. The statute in question was not specifically discussed in the opinion, but it could not have escaped the attention of both counsel and court. In *Morgan* v. *Martin*, 92 Maine, 190, the same question arose in an action by a married woman against another woman for alienating the affections of the husband of the former, and *Doe* v. *Roe* was affirmed. So stood the law as the settled doctrine in this State until 1913, when the Legislature granted additional rights to married women in these words:

"Whoever, being a female person more than eighteen years of age, debauches and carnally knows, carries on criminal conversation with, alienates the affections of, the husband of any married woman, or

by any acts, enticements and inducements deprives any married woman of the aid, comfort and society of her husband, shall be liable in damages to said married woman in an action on the case brought by her within three years after the discovery of such offense." Public Laws, 1913, Chap. 33. R. S., 1916, Chap. 66, Sec. 7.

This act opens the door to an action by a married woman against a female defendant more than eighteen years of age, but no farther. It gives no right against a male defendant. If the plaintiff's theory is correct that the Act of 1876 gave ample authority for the maintenance of such an action by the wife against any person so offending, the passage of the Act of 1913 was wholly unnecessary. It added nothing to the existing rights. The Legislature apparently thought otherwise and enlarged the rights so far as women defendants were concerned, but no farther. It could have gone farther and have granted the right against all defendants, but it did not see fit to do so. The inclusion of women was the exclusion of men defendants. The court must stop where the Legislature stopped. To go beyond would be judicial legislation. The Act of 1913 has been very recently construed by this court and the precise question raised in the pending case was there raised and decided adversely to the plaintiff. *Farrell* v. *Farrell*, 118 Maine, 441, (1920). The law, therefore, is firmly established in this State and we see no reason to overrule this long line of decisions.

The learned counsel for the plaintiff calls attention to the radical changes in the position of woman before the law since the olden days, all of which is true; but the question presented to us is, not what should be, but what is; and to quote the conclusion of the opinion in *Laughton* v. *Eaton*, 54 Maine, supra: "The argument would be appropriately addressed to the Legislature. The present state of the law requires that the entry in this case should be

Exceptions overruled."

ELIZA J. STANLEY, by AUDREY P. HICHBORN,
Her Conservator, and AUDREY P. HICHBORN, Administrator of
ALLURA M. STANLEY

vs.

HOLLIS M. SHAW et als.

ELIZA J. STANLEY, by AUDREY P. HICHBORN,
Her Conservator, and AUDREY P. HICHBORN, Administrator of
ALLURA M. STANLEY.

vs.

HOLLIS M. SHAW.

AUDREY P. HICHBORN, Conservator of ELIZA J. STANLEY

vs.

HOLLIS M. SHAW and INHERITANCE REALIZATION COMPANY.

(Three suits in Equity)

Kennebec. Opinion November 15, 1921.

When a fiduciary relation exists between two parties, it is not necessary to prove specific fraudulent representations to obtain relief in a court of equity, where there has been an unfair and unjust transfer of property or property rights from the confiding dependent to the superior confidant.

From time to time between 1908 and 1916 Hollis M. Shaw received from Eliza J. and Allura M. Stanley conveyances and assignments of property until he had absorbed the greater part of all of their estate, real and personal, in possession amounting to more than twenty thousand dollars, and besides had acquired an assignment of their expectant interest in a much larger estate as presumptive heirs of an aged and demented relative. For these conveyances and assignments the consideration was grossly inadequate, indeed there was hardly any consideration except indefinite and unsecured promises.

The above entitled suits are brought for an accounting and to set aside these transfers to Shaw as fraudulent and void.

No specific fraudulent representations were proved. This is not decisive. As was said by the learned Justice who heard the case originally "Fraud treads no beaten path—and the same inequitable and disastrous results may be reached by gentler and more seductive methods."

The decree made by a single justice found that a fiduciary relation existed between the parties and that in view of such relation the transfers were fraudulent and void, although there was no proof of any specific fraudulent representation. The defendant strenuously contended that a fiduciary relation cannot be presumed but must be proved, and that in this case no such relation had been proved. But the evidence to prove a fiduciary relation was abundant.

The Stanley sisters were undoubtedly intelligent but were aged, inexperienced, confiding and credulous. Shaw was in the prime of life, a shrewd, experienced business man. The inequality between the parties could hardly have been greater. The confidence and trust reposed in him by the sisters was well nigh absolute. In dealing with them, acting for himself or his corporations, it was, of course, plainly his duty to have them seek disinterested and competent advice. He made no such suggestion. They sought no other adviser. They relied implicitly on him. A plainer case of a fiduciary relation can hardly be imagined. He took an unfair and inequitable advantage of the confidence and trust reposed in him.

On appeal by defendants. Three bills in equity brought to obtain relief from conveyances and assignments of property and property rights made by two elderly, maiden ladies, being sisters, to the defendant, Hollis M. Shaw, as being unfair, unjust, and inequitable, alleging that an imposition and unfair advantage was practiced by defendant upon said two sisters, and that a fiduciary relation existed between defendant and said two sisters. The three cases were heard by the Chief Justice who sustained the bills and decreed the relief prayed for, and defendants took an appeal. Appeal dismissed. Decree affirmed.

Case is fully stated in the opinion.

George W. Heselton, for complainants.

Leroy L. Hight, and Andrews & Nelson, for respondents.

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

DEASY, J. In the year 1908 the defendant, Hollis M. Shaw, first became acquainted with two aged sisters Allura M. Stanley, since deceased, and Eliza J. Stanley represented in this litigation by a

Conservator of her estate. The sisters owned the farm in Winthrop estimated to be worth four thousand dollars upon which they lived. Partly in deposits then in banks, and partly in inheritances which soon after accrued to them they had some seventeen thousand dollars in personal property.

Shaw, who was a bond salesman, sold to the sisters $8,500 in bonds of a Farmington Corporation, the value of which is not questioned. As time went on the acquaintance thus formed became closer and Shaw came to be implicitly trusted by the aged ladies and to be their sole adviser and business agent.

In the year 1911 he organized a corporation called The Dirigo Power Co. and attempted to develop a hydro-electric power at Union in Knox County. The Dirigo Power Co. issued bonds which at best were highly speculative, and in the end proved to be nearly worthless. Acting under Shaw's advice the sisters exchanged $6,500 of their Farmington bonds for a like amount of the Dirigo Power Co. bonds. He then borrowed of them two thousand dollars for the Dirigo Company giving its bonds as security. They still had two thousand dollars of Farmington bonds and these were made over to Shaw without apparent consideration.

Excepting six thousand dollars which the Misses Stanley had invested in an annuity, Shaw thus acquired substantially all of their personal estate.

In 1916 they conveyed the farm to him reserving only "the right to live and have a home upon said premises in the house thereon." A part of the farm he conveyed to Ellen Shaw, his mother, and the rest he mortgaged to secure a loan of two thousand dollars of money borrowed for his own use. He thus absorbed about all of the property which the sisters had in possession. Moreover, he discovered that they had an expectant interest in another and larger estate and prepared to acquire that.

The sisters were the sole presumptive heirs of a cousin, Benjamin, who was under guardianship, aged, demented, without issue and without testamentary capacity. Benjamin's estate was worth something more than one hundred thousand dollars.

Shaw organized a corporation called The Inheritance Realization Co. His plan was to have this company succeed to Benjamin's estate upon his death.

To assignments or contracts for this purpose he secured the assent and signatures of the Stanley sisters, and of three of the five more remote kindred who would inherit Benjamin's property in the event of his surviving Allura and Eliza Stanley. Shaw gave half of the stock in the Inheritance Company to the Stanley sisters, and afterwards obtained a transfer of it to himself. He kept sixteen per cent. of the stock to use in settling with two more relatives, and not succeeding in this, secured an assignment of it to himself. Ten per cent. he reserved for his own services. Twenty-four per cent. was assigned to the three expectant heirs other than the Stanley sisters, whose assent was obtained. This stock he has also bought so that he together with two men who have advanced him money for a share in the enterprise own the entire stock in the Inheritance Corporation.

These suits are brought by the Administrator of Allura Stanley and the Conservator of Eliza's estate for an accounting, and to set aside as fraudulent these various transfers.

The defendant, Hollis Shaw, denies that any fraud has been practiced. He claims to have acted in good faith. He says that the transfers to him were in consideration of support and maintenance provided and to be provided by him, and that he has agreed to pay Eliza ten thousand dollars out of her brother's one hundred and seventeen thousand dollar estate.

The three cases were heard by the Chief Justice who sustained the bills and decreed the relief prayed for. In his memorandum of decision the law applicable to the case is stated so accurately and felicitously that we cannot do better than to adopt and quote it.

"It is not claimed by the plaintiff that Mr. Shaw obtained possession of the Stanley property and rights by specific and direct false and fraudulent representations. Were such a claim made, the evidence is not sufficient to support it. But fraud treads no beaten path, and the same inequitable and disastrous results may be reached by gentler and more seductive methods.

When a fiduciary relation is found to exist between two parties whether that relation has been created by law or by the designing acts of one of the parties, especially when they are not on an equality, the opportunity for imposition and unfair advantage afforded by such relationship is so great as to render all transactions between them subject to suspicion, and when a transfer of property or property rights is made from the confiding dependent to the superior confidant

either directly or indirectly a court in equity will scrupulously inquire into the fairness and justness of the transaction. If the facts show that an unfair advantage has been taken it will intervene to protect the confiding and injured party even from the results of what might under ordinary circumstances as between parties dealing on an equality and sustaining no such confidential relations to each other, be deemed their own improvidence.

Equity throughout its broad domain performs no higher and finer service than this."

This statement of the law is supported by many authorities among which may be cited, *Thomas* v. *Whitney,* (Ill.), 57 N. E., 808; *Bingham* v. *Sheldon,* 91 N. Y. S., 917; *McCowan* v. *Short,* (Ind.), 118 N. E., 538; *Hawkes* v. *Lackey,* 207 Mass., 424; *Tate* v. *Williamson L. R.,* 2 Ch., 55; *Bacon* v. *Soule,* (Cal.), 126 Pac., 384; Story's Equity Jurisprudence, Secs. 258-307. Bispham Principles of Equity, Sec. 238.

Not disputing the correctness of the above statement of the law, the defendant Shaw says that the existence of a fiduciary relation is not to be presumed, but must be proved, and that in this case such relation has not been established by evidence. But the fiduciary relation is overwhelmingly proved. It is established by the defendants' own testimony.

The Chief Justice who heard the case found "that Mr. Shaw by a long continued and persistent course of conduct artfully and fraudulently gained the complete confidence of these two sisters and created such an overmastering influence that they were willing to take and did take any steps with reference to their property that he suggested." Every reasonable presumption is in favor of the correctness of this finding of fact. Moreover, it is clear that no other conclusion could have been reached. The Stanley sisters were undoubtedly intelligent, but were aged, inexperienced, confiding and credulous. Shaw was in the prime of life, a shrewd experienced business man. The inequality between the parties could hardly have been greater. The confidence and trust reposed in him by the sisters was well nigh absolute. In dealing with them, acting for himself or his corporations, it was, of course, plainly his duty to have them seek disinterested and competent advice. He made no such suggestion. They sought no other adviser. They relied implicitly on him. A plainer case of a fiduciary relation could hardly be imagined.

For his own benefit and for that of his corporations he took an unfair and inequitable advantage of the confidence and trust reposed in him. The alleged obligations set up as the consideration for the transfers, even if legally available and enforcible are grossly inadequate and are unsecured and supported only by the broken reed of Shaw's credit. The other defendants have no superior equities. In each case the entry must be

Appeal dismissed.
Decree affirmed.

CANAL NATIONAL BANK *vs.* E. W. COX et al, Adm'rs.

Cumberland. Opinion November 15, 1921.

The appointment of Commissioners under R. S., Chap. 68, Sec. 55, upon application of administrator to whom a claim in writing against the estate has been presented, and a hearing had before such Commissioners, operate as a waiver of any defect or insufficiency in the claim as presented.

The plaintiff having a claim against the estate of F. E. Richards deceased, presented such claim in writing to the Administrators of said estate. The defendants contend that such claim is insufficient and ineffectual. But the defendants did not rely upon the information furnished them by the claim as presented, but made application under R. S., Chap. 68, Sec. 55 for the appointment of Commissioners to "determine whether any and what amount shall be allowed." Commissioners were appointed, a hearing had and a report made in favor of the defendants. Upon appeal the plaintiff recovered a verdict.

Held:

That the appointment of Commissioners upon the defendants' application and hearing had before them operate as a waiver of any defect or insufficiency in the claim as presented.

On exceptions by defendants. An action against the administrators of the estate of the late Fred E. Richards, to recover on notes given to plaintiff by one Ludwell L. Howison bearing the endorsement of intestate. A claim in writing was presented to the administra-

tors by plaintiff under R. S., Chap. 92, Sec. 14, which the defendants contend did not conform to the requirements of the statute. Defendants made application for the appointment of commissioners under R. S., Chap. 68, Sec. 55, to "determine whether any and what amount shall be allowed on each claim." Defendants filed a plea of the general issue and a brief statement alleging insufficiency of the claim in writing as presented to them. The jury returned a verdict of $5,900 for plaintiff. Defendants took exceptions, first to a ruling of the presiding Justice on the admission of evidence, second to a denial by presiding Justice of a motion for a directed verdict for defendants, and third, to a part of the charge of the presiding Justice to the jury. Exceptions overruled.

Case is stated in the opinion.

Bradley, Linnell & Jones, for plaintiff.

Woodman, Whitehouse & Littlefield, for defendants.

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

DEASY, J. This is an action against the administrators of the estate of the late Fred E. Richards. The plaintiff recovered a verdict. The only question now before us arises out of the defendants' contention that the claim as presented to the administrators under R. S., Chap. 92, Sec. 14, does not conform to the requirements of the statute.

In the case of *Hurley* v. *Farnsworth,* 107 Maine, 308 the court by Emery, C. J., says: "At the least the administrator is entitled to as much particularity of statement in the prior presentation of the claim as he would be entitled to in the declaration in an action against him."

In *Palmer's Appeal,* 110 Maine, 447, this doctrine is qualified in a slight degree as follows: "They are entitled to have the claim stated with as much particularity but perhaps not with as much formality as would be required in a declaration in a suit on the claim."

Applying to the claim presented in the pending case the test prescribed in *Hurley* v. *Farnsworth,* even as qualified in Palmer's Appeal, it may be insufficient.

It is, however, unnecessary to pass upon this question for the reason that any irregularity or insufficiency in the claim as presented has clearly been waived.

The defendants did not rely upon the information furnished them by the claim as presented but made application under R. S., Chap. 68, Sec. 55, for the appointment of commissioners to "determine whether any and what amount shall be allowed on each claim."

Courts uniformly hold that submission of a case to arbitration or reference is a waiver of all defects in pleading.

Adams v. *Hill*, 16 Maine, 215; *Hicks* v. *Sumner*, 50 Maine, 293; *Greenleaf* v. *Allen*, 83 Maine, 335; *Page* v. *Monks*, 5 Gray, 492; *Ames* v. *Stevens*, 120 Mass., 218.

Our court has held that where no claim whatever is filed such failure is waived by the appointment of commissioners upon the defendants' application. With greater reason is this true where a claim is filed which tested by the strict rules of common law pleading is technically defective.

"The parties are at issue whether the claim was duly presented in writing by the plaintiff and their testimony is directly in conflict. We do not deem it material to determine which should be believed as we think the petition of the defendant for the appointment of commissioners to determine the validity of the claim was an admission or waiver of a presentation and demand." *Whittier* v. *Woodward*, 71 Maine, 162. This case was approved and followed in *Hatch* v. *Dutch*, 113 Maine, 407.

Exceptions overruled.

DAVID C. JOHNSON *vs.* FRED T. BURNHAM et als.

Washington. Opinion November 15, 1921.

An alleged oral modification or rescission of a written contract, must be by contract for a consideration, otherwise it cannot be made the basis of a valid judgment. Reformation of a written contract on the ground of mistake, is an equitable, not a legal remedy.

A parol agreement may contradict or vary the terms of a written contract, and in either case, such oral agreement cannot be made the basis of a valid judgment, unless such changes, variations, modifications, or rescission, are by contract for a consideration which must be clearly proved. A written contract may be reformed if it is clearly shown that something was omitted in the written contract by mistake, but such reformation is an equitable, not a legal remedy, and an equitable answer to a legal defense as authorized by R. S., Chap. 87, Sec. 18, must be set up.

On general motion for a new trial and exceptions by defendants. An action of assumpsit to recover damages which plaintiff alleges he suffered by way of loss of profits resulting from an alleged breach of an oral contract made subsequently to the execution of a written contract for sawing lumber. Defendants plead the general issue, and a brief statement setting up a written contract. A verdict for the plaintiff for $1,275 was returned by the jury, and defendant excepted to rulings of the presiding Justice on the admission of evidence, and also filed a motion for a new trial on the usual grounds. Exceptions sustained. Motion sustained.

Case is fully stated in the opinion.

Gray & Sawyer, for plaintiff.

R. J. McGarrigle, for defendants.

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

DEASY, J. About July, 1918 the parties to this suit entered into a contract, whereby the plaintiff agreed to set up his portable saw mill upon the defendants' land in Steuben and saw logs for $5.00

per M. Pursuant to this contract the mill was set up, 640 M. of logs were sawed and the sawing paid for as agreed.

But the plaintiff contends that the defendants agreed to deliver to him for sawing 1,500 M. of logs. The defendants deny this and say that there was no agreement to deliver any specified quantity. This issue was submitted to a jury. The plaintiff recovered a verdict.

It appears that on July 19, 1918 the parties made and signed a contract in writing in the following form:

"AGREEMENT. July 19-1918.

Agreement between C. D. Johnson of East Orland, Maine party of the first part; and Burnham Brothers, party of the second Part; for sawing of timber on Nash lot and McDavitt lot adjoining, also, if Party of the second Part desires, timber, on Leighton lot, at Steuben, Maine, as follows: Party of the first part agrees to locate his portable saw mill on Nash lot together with necessary fixtures, boiler, etc. ready to begin operations on or before September, 1918. Party of the first part to furnish all necessary labor, mill supplies etc. and saw timber into lumber of thicknesses desired by party of the second part, as much as possible to be sawed square edged. Party of the first part agrees to saw and deliver at mill, to party of the second part, sufficient board sticks to stick all lumber, Party of the first part to saw at his own expense boards for covering in mill, but to leave same on lot when through sawing. Party of the second part agrees to deliver logs on skids at the mill, and remove lumber as fast as sawed, from tail of mill. Party of the second part agrees to pay party of the first part weekly, for sawing as shown by survey, at the rate of $5 (Five) per thousand, except that pay for about one week's work shall be held back until completion of job Party of the first part to use slabs and waste wood for fuel, but however, the party of the second part is to have the privilige, if he so desires, to put in a so called "Dutch Oven" at his own expense, and in such case party of the first part agrees, as far as is possible, to use sawdust for fuel, the party of the second Part agrees to remove slabs as fast as made.

Sig. BURNHAM BROTHERS
Sig. D. C. JOHNSON
Sig. A. H. BLAISDELL
Sig."

The written contract obviously contains no agreement to deliver for sawing 1500 M. or any specified quantity of logs. Unless such agreement is shown by legally competent evidence outside the written contract the verdict cannot be sustained.

By uncontradicted evidence it appears that the defendants advertised for a mill to saw 1500 M. of logs and that the plaintiff having answered the advertisement, received from the defendants a letter saying—"Our timber is located in Steuben near Dyer Bay—about 1,500,000 mixed wood."

Testimony was introduced by the plaintiff, (strenuously denied and disputed), tending to show that the defendants verbally agreed that the quantity of logs to be delivered for sawing should be 1500 M.

All the evidence in this paragraph referred to was admitted against the defendants' objection and subject to their exceptions.

The defendants rely upon two correlated legal principles, which may be stated thus:—where parties have entered into a written contract on its face appearing to be complete it presumptively embodies the entire contract between them relating to the subject matter; and, in an action at law evidence of communications prior to or contemporaneous with the making of a written contract cannot be admitted to vary or contradict such contract.

These principles are elementary. The plaintiff does not dispute them but says that they do not apply to the facts in the pending case.

The plaintiff contends, (1) that the evidence admitted subject to the defendants' objection neither contradicts nor varies the written contract. The contract is an "agreement—for sawing of timber on the Nash Lot and the McDavitt Lot"—

The plaintiff seeks to inject into it a parol agreement on the defendants' part to deliver for sawing 1500 M. of lumber—irrespective of the amount of lumber upon the specified lots. Even if this does not contradict the written contract it assuredly varies it— (2) that the alleged agreement to deliver for sawing 1500 M. of logs was an independent collateral contract and as such is provable by parol.

It is, of course, true that no law forbids parties to make two contracts, one written and the other oral, respecting the same subject matter— If the fact is clearly shown; if there is no conflict between the two and if the oral contract does not violate the statute of frauds, both will be given effect by courts. If, however, the written contract is not "of a skeleton nature" (*Gould* v. *Boston Excelsior Co.*,

91 Maine, 220) and is not "apparently incomplete" (*Vumbaca* v. *West,* 107 Maine, 133) but is on its face complete, it presumptively contains the whole agreement (*Chaplin* v. *Gerald,* 104 Maine, 192) and the presumption can be overcome only by clear, strong and convincing evidence—(*Chaplin* v. *Gerald,* supra).

Moreover, in case of conflict the oral contract, in a suit at law, must yield to that in writing.

"In order to let in evidence of a collateral agreement between the parties such agreement must be consistent with the terms of the writing; if the evidence tends to vary or contradict the terms of the written instrument or to defeat its operation it cannot be received."

22 C. J., 1248 and many cases cited.

In *Neal* v. *Flint,* 88 Maine, 72, evidence was admitted of an oral warranty of quantity where no warranty was contained in the written bill of sale.

In that case there is a dissent, and the court has ruled emphatically that the doctrine of the majority opinion is not to be extended—*Burnham* v. *Austin,* 105 Maine, 199. *Saunders* v. *Middleton,* 112 Maine, 434.

The rule which the plaintiff seeks to establish outruns *Neal* v. *Flint* and it involves a variance if not a contradiction of the written contract.

But the plaintiff further urges (3) that the written contract does not include the entire agreement; that through some mischance a part of the contract which the parties had orally made was omitted in the writing.

This if clearly shown is a reason for reforming the contract. But reformation is an equitable not a legal remedy. It could only be availed of in this suit if it had been pleaded by counter brief statement setting up an equitable answer to the defense as presented by the defendants' brief statement R. S., Chap. 87, Sec. 18. In this suit at law with its purely legal pleadings we cannot reform the contract and enforce it in its new form even if the evidence warranted such course.

However, with the view of making an end of the litigation we have examined the case fully to ascertain if it presents the clear and convincing evidence that would justify a reformation of the contract if the process and pleadings permitted. *Liberty* v. *Harris,* 103 Maine, 191. There is no suggestion of fraud and while it is probable

that the plaintiff did not understandingly read the contract there does not appear to have been such a mutual mistake as justifies a reformation of a contract. All the above relates to transactions prior to or contemporaneous with the execution of the written contract.

Its subsequent waiver, rescission or modification could, of course, be proved by parol—*Ockington* v. *Law*, 66 Maine, 555. *Hilton* v. *Hanson*, 101 Maine, 21. *Storer* v. *Taber*, 83 Maine, 388. As Peters, C. J. aptly remarks in the case last above cited: "Parties may contract about a contract as well as concerning anything else." But there must be another contract. A consideration must appear, 22 C. J., 1275 and cases cited. A conversation about a written contract will not modify it even though it discloses that the parties concurred in the same misinterpretation of it.

The evidence of communications prior to the written contract do not sustain the verdict, because so far as they tend to do so they are inconsistent with the writing. There is no evidence that the contract written and signed by the parties was superseded or supplemented by any subsequent oral contract.

It is unfortunate if the plaintiff did not understand the instrument that he signed, but the binding force of a written contract cannot for such reason be relaxed.

Exceptions sustained.
Motion sustained.

STATE OF MAINE *vs.* PAIGE TOURING CAR.

Somerset. Opinion November 16, 1921.

The rights of an innocent mortgagee, and also of an innocent vendor under an agreement duly recorded, that title shall not pass until the purchase price is paid in full, in an automobile seized while in the possession of the purchaser, and being used for illegal transportation of intoxicating liquors in violation of the provisions of Chapter 294, Public Laws, 1917, prior to amendment of Chapter 63, Public Laws, 1921, are not effected by such seizure. The rights in such automobile of the offending party in all cases are liable to forfeiture and sale under said Chapter 294, Public Laws, 1917, prior to said amendment. The interpretation of said Act as amended not determined.

An automobile bought under an agreement duly recorded whereby a certain sum was paid in cash, the balance of the purchase price to be paid in monthly payments stipulated in the agreement to be regarded as rental, and title not to pass until purchase price was fully paid, was seized while in the possession of the purchaser and being used for the illegal transportation of intoxicating liquors and claimed by the vendor,

Held:

That Chapter 294, Public Laws, 1917, prior to amendment of Chapter 63, Public Laws, 1921, does not contemplate the absolute forfeiture of the offending vehicle as a thing outside the protection of the law regardless of the knowledge or consent of the owner, but on the contrary expressly provides for the determination of the rights of the innocent claimant;

It is not within the contemplation of this Act, however, that the proof of a claim however small of a person without knowledge of the illegal use will rescue the interests of the guilty party therein from the operation of the law;

It matters not whether the rights of the offending party were those of a mortgagor, or a purchaser under a conditional sale, lease, or what is termed in this state a Holmes note. Such as they were, they were liable to forfeiture and sale under this Act subject to the rights of the innocent claimant provided he established his claim in court;

Owing to the manner in which this case is brought before this court, not only must the rights of the claimant be determined, but the rights of the purchaser under the agreement must be disposed of according to the views expressed in the opinion;

The court expresses no opinion as to the interpretation of the Act as amended by Chapter 63, Public Laws, 1921.

On an agreed statement. A proceeding for the condemnation of an automobile under Chapter 294, Public Laws, 1917. On August 7, 1920, the Jesse E. Knight Automobile Company, claimant in this case, agreed to sell to one Narcisse Drouin the automobile in question for $1,800, of which amount $300 was paid in cash, and the balance in notes maturing on various dates, with a condition that upon payment of said notes as rental, the rent should cease, and the automobile to become the property of the purchaser, all of which was incorporated in a so-called lease or conditional sale duly recorded. On September 8, 1920, the automobile was seized for a violation of Chapter 294, Public Laws, 1917, and duly libelled, and claimant filed in the Western Somerset Municipal Court, where the proceedings were pending, its claim for said automobile as owner and proved that the use of said automobile for the illegal transportation of intoxicating liquors was without its knowledge or consent. The Judge of the Municipal Court denied the claim of the petitioner and declared the automobile forfeited, from which finding claimant appealed to the Supreme Judicial Court. Upon an agreed statement of facts the cause was submitted to the Law Court. Rights of purchaser forfeited subject to claim of petitioner.

The case is fully stated in the opinion.

James H. Thorne, County Attorney, for the State.

George W. Gower, for claimant.

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

WILSON, J. August 7th, 1920, the Jesse E. Knight Automobile Co. and Narcisse Drouin entered into written agreement of sale of an automobile, under which agreement Drouin was to pay the Automobile Company the sum of three hundred dollars in cash and

thereafter monthly the sum of seventy-five dollars for a period of eleven months and a final payment at the end of one year of six hundred and seventy-five dollars. All the future payments were evidenced by the promissory notes of Drouin payable in accordance with the agreement, and by the terms of the agreement were to be treated as rental; and upon their payment all rental for the use of the automobile by Drouin was to cease and the automobile was then to become his property. The agreement of sale was duly recorded and the automobile delivered to Drouin.

On September 8th, 1920, the automobile while being used by Drouin for the unlawful transportation of intoxicating liquors was seized upon a warrant issued out of the Western Somerset Municipal Court under Chapter 294, Public Laws, 1917. It was thereupon duly libelled and the Jesse E. Knight Automobile Co. appeared in due course and filed its claim under the above described agreement of sale.

The Judge of the Municipal Court denied the claim of the Automobile Company and ordered the automobile forfeited to the County, from which decision an appeal was taken by the claimant to the Supreme Judicial Court, from which court the case is now presented to this court on an agreed statement of facts, which admits on the part of the claimant that the automobile was at the time of the seizure being used in the unlawful transportation of intoxicating liquors, and on the part of the State that such use of the automobile was without the knowledge or consent of the claimant.

The facts set forth in the agreed statement raise the issue for the first time before this court as to the meaning and effect of the Act of 1917, Chapter 294, authorizing the forfeiture of vehicles of all kinds, excepting common carriers, engaged in the transportation of intoxicating liquors intended for illegal sale prior to its amendment by Chapter 63, Public Laws, 1921. Did the Legislature of this State intend by the original Act of 1917 to authorize the absolute forfeiture of the offending vehicle, as a thing outside the protection of the law by reason of its unlawful use, regardless of the knowledge or consent of the owner, as in the case of vehicles and teams used in violating the Federal Revenue Acts, or of automobiles under the Federal Act of March 2nd, 1917, for the Suppression of the Traffic in Intoxicating Liquors among Indians, *United States* v. *Mincey*, 254 Fed., 287; *Commercial Investment Trust* v. *U. S.*, 261 Fed., 330; *White*

Automobile Co. v. *Collins*, 136 Ark., 81; or did the Legislature intend to protect innocent parties to the extent of their right in such vehicles, as under the Federal Act originally prohibiting the introduction of liquors into "Indian Country," Comp. St., 1916, Sec. 4141, and the statutes of Alabama, Georgia, North Carolina and other States authorizing the forfeiture of vehicles when used in the illegal transportation of intoxicating liquors? *Shawnee Nat. Bank* v. *United States*, 249 Fed. Rep., 583; *Maples et al.* v. *State*, 82 So., 183, (Ala., 1919); *Seignious* v. *Limehouse*, 93 S. E., Rep. 193, (S. Car., 1917); *White* v. *State*, 98 S. E., Rep., 171 (Ga., 1919); *Spencer et al.* v. *Thomas*, 87 S. E. Rep., 976, (N. C., 1916); *One Hudson Super Six Automobile, etc.* v. *State*, 187 Pac., Rep., 806, (Okl., 1920).

Clearly the latter. While the first part of the Act is in as general and absolute terms as either of the Federal Acts first referred to or the Arkansas statute, it expressly provides for the rights of any claimant being determined upon its being shown that such use was without his knowledge and consent.

Obviously the effect of such statutes must be either to forfeit the vehicle as an offending thing, without protection of the law, regardless of the want of knowledge of its unlawful use by its owner, or they must be construed as authorizing the forfeiture of only such rights as the person unlawfully using or consenting to its unlawful use may have in it, and exempting from forfeiture the interest of the innocent claimant.

It would also render such a statute practically impotent to give it a construction under which a claimant, however small, having established his lack of knowledge of or consent to the unlawful use, could by the proof of his claim rescue also the interests of the guilty therein from the operation of the law. Otherwise, an automobile worth several thousand dollars might be put to such unlawful use without fear of forfeiture by the owner placing a mortgage thereon to secure some small indebtedness, or in case of purchase for use in such unlawful traffic under a lease or conditional sale agreement, by paying all but a small amount, obtain protection against forfeiture under this Act so long as the seller could prove his want of knowledge of the unlawful use of such vehicle. We cannot presume that the Legislature by throwing a shield of protection around the rights of the innocent party intended that it might also be used to protect

the rights of the guilty from forfeiture. While it is clear that the Legislature intended to protect the rights of innocent parties, it is equally clear that the real purpose of this Act was to subject the property of the guilty to forfeiture.

And it matters not, we think, whether the rights of the offending party were those of a mortgagor, or a purchaser under a conditional sale, lease or what is in this State termed a Holmes note. Such as they were, they were liable to forfeiture and sale under this Act, subject, of course, to rights of the innocent claimant provided he establishes his claim in court; the purchaser in case of sale acquiring the same rights under any contract, mortgage or lease, as the person whose interest was forfeited had therein. In case no claimant appears, the interest of the person unlawfully using such vehicle, must under the Act be presumed to be absolute.

The statutes of other States while differing somewhat in terms from that of the Act under consideration, have in many instances been so construed. *U. S.* v. *One Automobile,* 237 Fed., 891; *Bowling* v. *State,* 85 So. Rep., 500 (Ala., 1920); *One Packard Automobile, (Denegre Car and Truck Co., claimant)* v. *State,* 84 So. Rep., 297, (Ala., 1919); *Spencer* v. *Thomas,* supra; *State* v. *One Lexington Automobile,* 84 So. Rep., 297, (Ala., 1919); *One Hudson Super Six Automobile, etc.* v. *State,* supra; *White* v. *State,* supra; *Seignious* v. *Limehouse,* supra.

In *Bowling* v. *State* and *Seignious* v. *Limehouse* the right of a mortgagor was forfeited and ordered sold subject to the mortgage, while in the case of *One Packard Car, Denegre Car and Truck Co., claimant* v. *State,* there was a conditional sale contract under which the claimant asked to intervene. The court allowed its contention and remanded the case back to be determined by the ruling in *Bowling* v. *State* in which case, as stated above, the rights of the mortgagor were forfeited and sold subject to the rights of an innocent mortgagee. Also see *U. S.* v. *One Automobile,* supra.

Under such construction the rights of innocent parties are fully protected and the rights of the guilty are forfeited, which we think accords with the legislative intent under Chapter 294, Public Laws, 1917. The court, however, expresses no opinion as to the effect of the amendment of 1921, Public Laws, Chapter 63.

Owing to the manner in which the case is brought before this court not only must the rights of the claimant be determined, but

the rights of Drouin must also be disposed of according to the views herein expressed.

Entry will therefore be:

Rights of Narcisse Drouin in said Paige Touring Car on September 8th, 1920, under the lease or agreement of sale with Jesse L. Knight Automobile Co. forfeited to the County of Somerset to be sold in accordance with the provisions of Chapter 294, Public Laws, 1917; subject, however, to the claim of the Jesse E. Knight Automobile Co., under said agreement of sale.

STELLA B. NIGHTINGALE *vs.* CHARLES A. LEITH.

Aroostook. Opinion November 18, 1921.

A rescission by agreement of a contract to marry is a matter of mutual intention on the part of both parties to the contract, and implies an existing and unbroken contract.

In an action for breach of promise of marriage in which the plaintiff recovered a verdict of $6,000, and now before this court on defendant's general motion, it is,

Held:

1. That the making of the contract is conceded.
2. That its breach by defendant is clearly shown by the evidence.
3. That the letter written by the plaintiff, on the next day after the breach, neither in fact nor in law proved a mutual rescission of the contract. Rescission by agreement is a matter of intention and taking the entire contents of the letter together it is obvious that no such intention existed in the plaintiff's mind.
4. Moreover, rescission by agreement implies an existing and unbroken contract, not a broken one, and in this case the contract was broken before the letter was written.

On motion for a new trial. This is an action for breach of promise of marriage. The defendant pleaded the general issue, and under a brief statement alleged "that if any contract existed between the parties to this action it was rescinded by mutual agreement." A verdict for the plaintiff was returned by the jury of $6,000, whereupon the defendant filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

Shaw & Cowan, for plaintiff.

Powers & Guild, and W. R. Pattangall, for defendant.

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

CORNISH, C. J. The material and uncontroverted facts are as follows: The plaintiff, a school teacher, and the defendant, a prosperous farmer, both of admittedly good standing and character, after an acquaintance of several months entered into a contract of marriage on November 5, 1918. The following Christmas the defendant gave the plaintiff a diamond ring in token of their engagement. These relations continued without interruption during the following year, and in the fall of 1919 the parties made their plans for marriage and a winter in Florida. About Thanksgiving 1919, however, the defendant's attentions began noticeably to wane. He visited the plaintiff less frequently than in the past and his promises to call on various occasions were not kept.

One day the plaintiff happened to overhear a telephone conversation between the defendant and a Miss Ginn, in which they were arranging for a meeting the next day and also for dates near Christmas. Later the same day, the plaintiff telephoned the defendant and evidently desired an explanation. He replied that she should not be "rubbering," and said that he would come in and see her. This he did, on the same day when the following conversation took place:

"Q. What talk did you have at the store?

A. He came into the store; I was near to the door, right up next to the door.

Q. Inside the store?

A. Inside the store. He says 'are you ready to give me that ring'?

Q. Go ahead.

A. I told him no I wasn't ready.

Q. Did you have some talk with him?

A. He said it didn't make any difference whether I gave it to him or not, he was all done with me. I told him I didn't think he had any reason for being done with me, and he had better think over what he was saying." Clearly this was a breach of the contract of marriage on the part of the defendant. He was "all done" with the plaintiff, that is, he no longer bound himself by the engagement and he would no longer keep his promise.

The next day the plaintiff saw the defendant on the street talking with the woman with whom he had been telephoning but no conversation was then held between the plaintiff and defendant. On January first the plaintiff met and talked with the defendant when he reiterated his renunciation of the engagement in no uncertain language. Her testimony on this point is as follows:

"Q. Did you have some talk with him there?

A. Yes. I asked him to think over what he had been doing. He told me it didn't make any difference what I said; I might as well keep still; he was all done with me."

The latter part of January, however, the defendant seemed repentant. He called upon the plaintiff, told her that he was very sorry he had "treated her so mean," and asked her if she did not think he had. She assented. Whether the defendant was sincere in this may well be doubted. No old promise was renewed, and no new one was made, but the statement may have served to temporarily allay the plaintiff's anxiety. The plaintiff was out of town for a time after this and after her return she telephoned the defendant's house. A woman's voice answered the call. The defendant then was summoned and the plaintiff told him that she wanted to see him and asked him to call. Concealing the true situation he promised to do so, but did not. That was on March first. The next morning she learned from an independent source that he was already married. This recital of undisputed facts proves absolutely both the existence of a valid contract of marriage and its breach by the defendant.

The defendant did not see fit to take the stand himself, nor did he introduce any evidence in his behalf. His defense, as set out in

his brief statement, and now in argument, is an alleged rescission of the contract by mutual agreement, and he rests this contention upon a letter which the plaintiff wrote to the defendant the next morning after he had bluntly, if not brutally, asked for the return of the engagement ring and added that it made no difference whether she gave it to him or not, as he was all done with her. That letter is in these words:

"Fort Fairfield, Me.,

Dec. 23, 1919.

DEAR CHARLIE:—

Thought I would write to you this morning. You seem to put me pretty low. I will tell you that I only listened twice and both times I was not sly enough to keep still. If I had been listening before, you would have heard something too. Besides we haven't been on Ginn's line two months. I am not sly and sneaky as you seem to think. I try to be square and I say just what I think and there isn't anything kept back. Perhaps that is why I don't get along so well as some.

You excuse her because she cares for you, perhaps she does. Perhaps you think I don't care. But as I see that you don't care for me and want to call it off you may. I don't want to thrust myself on anyone.

I don't feel that I have done anything wrong. I haven't done any little mean tricks which I could have done. If you cared for me, I wouldn't have to think of you running after other girls. Besides I can't treat you as nice as I could when I know you run after other girls and say that you are engaged to me. I notice that it didn't take much for you to lose confidence in me, but you expect me to have great confidence in you, no matter what you do. You have been only looking for a chance on me and this is the only chance you have had, and you have taken advantage of it.

Your friend,

STELLA."

The defendant relies wholly upon the two sentences: "But as I see that you don't care for me and want to call it off you may. I don't want to thrust myself on anyone" as proving a mutual agree-

ment of rescission. These two sentences should not be isolated. The rescission of a contract, like its creation, is a matter of joint agreement, a matter of intention, and taking the entire contents of the letter together it is obvious that no such intention existed in the plaintiff's mind. The defendant had already afforded the plaintiff the opportunity to rescind on the previous evening when he began the conversation by asking her if she was ready to surrender to him her engagement ring, which was the outward and visible sign of their plighted troth. She could then and there have released him if she desired to do so, and the contract might then have been rescinded by mutual consent. But she stoutly refused and replied "no" she was not ready to surrender the ring. She retained it. That attitude she consistently maintained throughout the entire transaction. This letter written within twelve hours after his repudiation of their betrothal, is merely the natural outcry of a young woman who felt that her affianced lover had deceived her in his attentions to another, and had eagerly taken advantage of an unimportant act on her part to break an engagement which he was seeking to avoid. In her sense of outraged pride she says that she does not wish to thrust herself upon anyone, and that if he wishes to call the engagement off he may do so, but nowhere does she say or intimate that she absolves him either from the contract itself or from the consequences of its breach. The whole spirit of the letter negatives such a claim and is in substance, "I am in no way at fault. If you wish to break the engagement of course you have the power to do so." But that is far different from a voluntary agreement to rescind. In fact it is quite the reverse.

Another difficulty with the defendant's contention on this point is that he had already broken the contract before the letter was written. There was nothing to mutually rescind. Rescission by agreement implies an existing and unbroken contract, not a broken one. There might of course be a waiver on the part of the plaintiff, the voluntary relinquishment on her part, of a known right, but there is nothing on which to base such a waiver here. The plaintiff distinctly testified that she had never released the defendant from the engagement and there is no evidence that she released him from the consequences of his breach. It is significant that the defendant did not take the stand to make any claim of rescission or waiver or state any facts to substantiate the same, but rested his whole defense upon two excerpts

from a letter written by the plaintiff under the stress and strain of shattered hopes and expectations. It is also significant that in the conversation between the parties about the first of January, a week after the letter was written, he did not claim any mutual rescission by virtue of that letter or otherwise, but on the contrary told her it made no difference what she said, she might as well keep still, because he was "all done with her." A broken not a rescinded contract was firmly fixed in his mind as well as in hers.

The finding of the jury in favor of the plaintiff upon this, as upon all other material points, should stand.

Motion for new trial overruled.

JOHN L. WILLIAMS *vs.* CHARLES E. DUNN.

Aroostook. Opinion November 21, 1921.

The taking of property on a replevin writ without taking a bond as required by statute is unauthorized, but if plaintiff in replevin action is entitled to possession of the property under a mortgage, he is liable for nominal damages only, but if not entitled to such possession under a mortgage, he is liable for such actual damages as would be recoverable on a statutory bond had one been taken. Where the delivery of a commodity named constitutes the consideration for a mortgage note, and such commodity is not delivered as required by conditions of the contract, such note is unenforceable and the mortgage securing same is likewise effected. If such note is payable either in a commodity or cash, and promisor offers to pay before maturity in cash for such part of the commodity constituting the consideration for the note as has been delivered, which is refused by payee, then all rights of possession of the mortgaged chattels under the mortgage are lost. If the property taken is not returned, the value of the property taken constitutes the damage recoverable, less amount due for such part of the consideration for the note as was delivered after deducting damages for failure for complete delivery.

The deputy sheriff failing to take the bond required by the statute was without authority to take the property of the plaintiff in this action on the replevin writ, but if the plaintiff in the replevin writ was entitled to possession under his

mortgage, then the plaintiff in this action suffered no actual damage and the defendant would be liable for only nominal damages;

If the plaintiff in the replevin suit was not entitled to possession under his mortgage, the plaintiff's damages in this action are measured by the actual damages recoverable by him in an action on the statutory bond, if one had been taken

If the mortgage note given by the plaintiff in this action was payable only in the commodity named, the failure of the payee, who was the plaintiff in the replevin suit, to carry out the contract on his part and deliver the entire amount of fertilizer for which the mortgage note was given, rendered the note unenforceable according to its terms and being unenforceable the mortgage given to secure its performance fell with it;

If the note was payable either in the commodity named or in cash, which is held to be the true construction, the plaintiff having offered to pay in cash before the date of maturity for all fertilizer actually delivered, which was refused, such offer *ipso facto* put an end to the rights of the mortgagee to possession of the mortgaged chattels and restored the sole right of possession to the mortgagor;

If the potatoes had been returned by the plaintiff in the replevin suit, the plaintiff in this action would still have been liable to him for the value of the fertilizer actually delivered, less such damages as were suffered by reason of a failure to fulfill the agreement, which the jury have assessed by a special finding in this action at $600;

By retaining the potatoes, the plaintiff in the replevin suit was estopped from recovering of the plaintiff in this action for the value of the fertilizer actually delivered; and in a suit by this plaintiff on the replevin bond, if one had been taken, upon the bond being chancered by the court, the damages recoverable would have been the value of the potatoes taken, less the sum due for fertilizer actually delivered after deducting the damages for failure of complete delivery.

On report. This is an action brought by John L. Williams against Charles E. Dunn, sheriff of Aroostook County, for the illegal taking from the plaintiff, by George W. Graves, a deputy of the defendant, of one thousand two hundred sixty-three barrels of potatoes of the agreed value of six thousand three hundred and fifteen dollars, on a replevin writ, without taking from the plaintiff in replevin the bond required by statute. After the testimony was completed, and after special findings by the jury, and under a certain stipulation agreed upon, by agreement of the parties the case was reported to the Law Court for final determination. Judgment for the plaintiff in the sum of $4,387.50 with interest from date of writ.

Case is fully stated in the opinion.

Powers & Guild, and Howard Pierce, for plaintiff.

Archibalds, for defendant.

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

WILSON, J. An action on the case against the defendant as sheriff of Aroostook County for damages resulting from failure of one of his deputies to take a bond from the plaintiff in a replevin suit which was dismissed for want of proper service and the chattels replevied ordered returned to the defendant in the replevin suit, who is the plaintiff in this action, which the plaintiff in the replevin suit refused to do, claiming title to them under a foreclosed chattel mortgage.

In the spring of 1919 one Sylvester entered into an agreement with the plaintiff Williams to furnish him with thirty tons of potato fertilizer at $84.25 per ton for use on his farm during the season of 1919, and took from the plaintiff his note for the sum of $2,527.50, payable in 1,263 bbls. of potatoes on December 1st, 1919, to secure the payment of which the plaintiff executed a chattel mortgage to Sylvester of all the potatoes grown on his homestead farm during that season.

At the close of the planting season the plaintiff notified Sylvester that he had not received all the fertilizer due him under the agreement, and after some inquiries and investigation by Sylvester with a view to determining the amount actually delivered, the plaintiff, upon Sylvester refusing to deliver any more, notified him that he should not deliver the potatoes in payment of the note; and before the note was due offered to pay for the fertilizer actually delivered which was refused by Sylvester.

On the first day of December, 1919, when the note became due, Sylvester placed a replevin writ in the hands of one of the defendant's deputies directing him to replevy thereon 1,263 bbls. of potatoes then in the hands of the plaintiff Williams, and being the amount due Sylvester under the terms of the note and part of those covered by the chattel mortgage. The deputy sheriff, however, before service of the writ, through an oversight, failed to take the bond required by Sec. 10, Chap. 101, R. S., from Sylvester, the plaintiff in the replevin suit, and also failed to properly serve the writ, by reason of which lack of service the writ was dismissed upon motion of Williams, the defendant in that action, and return and restitution of the chattels was ordered by the court.

In February, 1920, foreclosure proceedings on the chattel mortgage given by the plaintiff Williams were begun by Sylvester, but as we now view the case, it in no way effected the rights of the parties in this action.

It is clear that the deputy sheriff upon failing to take a bond as required by statute was without authority to take the property then in the possession of Williams on the replevin writ and became thereby a trespasser and also liable to him in damages in this action. *Tuck* v. *Moses,* 54 Maine, 115; *Parker* v. *Hall,* 55 Maine, 362; R. S., Chap. 101, Sec. 18.

If Sylvester was entitled to possession as mortgagee, and the title finally vested in him by the foreclosure proceedings, then the plaintiff has suffered no actual damage, and the defendant would be liable in this action for only nominal damages; inasmuch as if the deputy had taken the statutory bond, the title not being determined in the replevin suit, Sylvester's title in a suit upon the bond by the plaintiff could have been shown and only nominal damages recovered thereon. *Harmon* v. *Flood et als.,* 115 Maine, 116.

But if Sylvester was not entitled to the possession of the potatoes under his mortgage, then the plaintiff's damages in this form of action are measured by the actual damages recoverable by him against Sylvester in an action upon the statutory bond in case one had been taken.

We think Sylvester was not entitled to possession of the potatoes under the mortgage. The instrument signed by the plaintiff in the form of a promissory note for $2,527.50 and payable in 1,263 bbls. of potatoes was either an agreement to pay only in the commodity named, or to pay in the commodity named or in cash, at the option of the promissor. *Heywood* v. *Heywood,* 42 Maine, 229; *Strout* v. *Joy,* 108 Maine, 267; 3 R. C. L., 890; 24 Am. Dec., 422, note. We think the latter upon the authorities cited. But if the former, the jury found that there was a breach of the agreement on the part of Sylvester through his failure to deliver the entire amount of fertilizer in payment of which the note was given, and also found that the plaintiff was damaged by said breach to the amount of six hundred dollars. The plaintiff notified him of the breach before the close of the planting season, and some time before its maturity, that he should refuse to deliver the potatoes on the day named in the note.

If the note be construed as payable only in the commodity named, upon failure by Sylvester to carry out his part of the agreement, the note or agreement of the plaintiff became unenforceable, and being no longer enforceable by Sylvester, the mortgage given to secure its performance must fall with it.

No doubt Sylvester could recover on a *quantum meruit* for the fertilizer actually delivered and used by the plaintiff, less the damages resulting to the plaintiff for a failure to fulfill the express contract, the amount of which damages the jury have already determined. *Holden Steam Mill* v. *Westervelt,* 67 Maine, 446; *Hattin* v. *Chase,* 88 Maine, 237; *Viles* v. *Kennebec Lumber Co.,* 118 Maine, 148. But a mortgage to secure the performance of a special agreement cannot be held to be a valid security for an obligation of an entirely different nature though springing from the same transaction.

Upon this view of the agreement the mortgage cannot be construed as a security for the indebtedness merely, nor be treated as a mortgage to secure future advances, and good to the amount advanced. It must be viewed as a security for the performance on the part of the plaintiff Williams of his part of the agreement, and being relieved of that performance by the breach on the part of Sylvester, the mortgage became unenforceable, and Sylvester, on December 1st, 1919, had no rights thereunder.

If the note is to be construed as payable either in the commodity named or in cash, which we think is the true construction, it then appears that the plaintiff offered to pay before the date of maturity all sums due for fertilizer actually delivered, which was refused by Sylvester. Tender of performance *ipso facto* puts an end to the interest of the mortgagee and restores the sole right of possession to the mortgagor. *Ramsdell* v. *Tewksbury,* 73 Maine, 197, 199; R. S., Chap. 96, Sec. 3.

Sylvester not being entitled to possession of the potatoes upon any view of their agreement, they should have been returned in accordance with the order of the court.

What loss, then, has the plaintiff in this action suffered by reason of the failure of the officer to take from Sylvester the statutory bond. If the potatoes had been returned, the plaintiff would still have been liable for the value of the fertilizer delivered less the damages suffered from the breach of the agreement. By retaining the potatoes Sylvester is estopped from recovering of the plaintiff the value of the

fertilizer. Obviously, in the final analysis, the actual loss suffered by the plaintiff from the fault of the officer is the value of the 1,263 bbls. of potatoes, admitted to be $6,315, less the value of the fertilizer delivered, which, after deducting the damages suffered by the plaintiff, according to the special finding of the jury, is $1,927.50. We think on a suit on the bond, if one had been taken, upon its being chancered by the court in the exercise of its equity powers, such would have been the result. *Burbank* v. *Berry*, 22 Maine, 483, 485; *Clifford* v. *Kimball*, 39 Maine, 413; *Lewis* v. *Warren*, 49 Maine, 322; *Philbrook* v. *Burgess*, 52 Maine, 271; *Corson* v. *Dunlap*, 83 Maine, 32, 40.

While the court in chancering the penalty of a bond would not adjust all claims between the parties, it would determine what in view of their rights growing out of the transaction in connection with which the bond was given equity and good conscience required the obligor to pay. As the court said in *Burbank* v. *Berry*, supra: "The damages actually sustained was the equitable and proper measure of the plaintiff's claim," and in *Sevey* v. *Blacklin*, 2 Mass., 541: "When it shall appear that the penalty is forfeited; then the equity powers of the Court commence; and the Judges are authorized to enter judgment for so much money as in equity and good conscience the plaintiff can claim."

The plaintiff in a suit on a replevin bond, if one had been taken from Sylvester, being relieved by Sylvester's acts in refusing to restore the potatoes, of all liability for the value of the fertilizer delivered, could not in equity and good conscience claim more damages from the failure to return the potatoes than the difference between their value and his own liability for the fertilizer in case they had been returned.

Judgment must, therefore, be entered for the plaintiff in this action in the amount of $4,387.50 with interest from the date of the writ.

So ordered.

ERNEST L. PIKE *vs.* NORMAN A. SMITH.

Oxford. Opinion November 23, 1921.

A presiding Justice should direct a verdict when upon the evidence a different verdict could not be sustained.

From the testimony in this case the conclusion is inevitable that the parties intended to settle and did settle every claim existing between them under the agreement in writing by them signed under date of October 4, 1917, and that the jury would not have been warranted by the evidence in finding a verdict contrary to the one ordered.

On exceptions. An action of assumpsit to recover for labor of plaintiff and wife performed for defendant. Plea, general issue, with brief statement alleging a special contract, and also a release and discharge in writing. At the close of the testimony upon motion by counsel for defendant, the presiding Justice ordered a verdict for defendant, and plaintiff excepted. Exceptions overruled.

Case is stated in the opinion.

Wilfred G. Conary, and Alton C. Wheeler, for plaintiff.

Clifford A. McGlauflin, for defendant.

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

HANSON, J. This is an action of assumpsit to recover for labor of the plaintiff and his wife from November 20, 1916, to November 20, 1917, at $150 per month. The writ contained a quantum meruit count and a money count.

After the evidence was taken out, upon motion of defendant's counsel, the presiding Justice directed a verdict for the defendant. The case is before the court on the plaintiff's exceptions to such order.

It is not disputed that the plaintiff and his wife performed certain labor as stated in the account annexed to the writ, but the defendant pleads the general issue and by way of brief statement

says, "that whatever labor was performed by the plaintiff was performed under a special contract; and that prior to the commencement of this action, to wit, on the fourth day of October, 1917, the said plaintiff by his release, by him signed and sealed with his seal, did release and abandon all his rights under said contract, and thereby did discharge the said defendant from all actions," etc.

On October 21, 1916, the plaintiff and defendant entered into a written agreement, which was later, on the 24th of October, amended by making the plaintiff's wife a party to the agreement, wherein the defendant undertook to finance for them the redemption of the plaintiff's homestead in Waterford. The plaintiff under the agreement conveyed the homestead farm to the defendant, the defendant giving to the plaintiff a bond for a deed. The agreement provided that the defendant should place stock upon the farm, the purpose being to continue the agreement for a series of years, the ownership of the stock remaining in the defendant, the plaintiff having the beneficial use of the same, and an interest in the increase and ultimate sale of the stock.

It is in evidence that Mrs. Pike on November 10 following "told him (defendant) that if we did come, if we didn't stay on the place he had got to pay us, and he agreed to it, said he would." The testimony shows that about two weeks later the plaintiff and his wife removed to the farm. On November 28, part of the stock stipulated for was placed upon the farm, and in January, 1917, the balance of the stock was sent to the farm, following which the parties entered into another contract merging therein the agreement of October 21, 1916.

The new contract contained a list of the horses and cattle placed on the premises, provided that the ownership should be in the defendant, that the plaintiff should care for and feed the cattle, using the hay raised on the farm; also should raise all the offspring of the stock, cut and store the hay each year, and fill the silo each year. The plaintiff was to have the use of the horses and cattle, and the use of the surplus milk from said cattle, the use of all the farming tools on the premises, and the right to use and dispose of all the products raised from said farm, excepting the hay, which which was to be fed on the premises. Provision was made for the sale of cattle and the increase by the defendant, the profits after paying necessary expenses to be credited to the plaintiff and his wife.

It is claimed by the plaintiff that for some reason the contract was not delivered until the last of March, 1917, that the defendant brought the papers, that changes had been made in the meantime in relation to the stock, to his disadvantage, and that he was dissatisfied and told the defendant "I guessed he had better pay us and we get out." He (defendant) says, "You stay here and everything will be all right."

The conversation between plaintiff's wife and defendant, before referred to, and the statement last referred to made by the plaintiff, are relied upon by him to establish a new and special agreement aside from the written agreement herein, and in addition it is urged that the plaintiff used two or three days of his time in helping to drive cattle from Standish to Waterford, and that for these reasons the case should have been submitted to the jury to determine the value of the services in these instances. Finally, counsel urges that plaintiff's claim that changes were made in the contract after signing should have been submitted to the jury, and that therefore the order directing a verdict was erroneous.

As to the conversation with plaintiff's wife, and the item of driving cattle from Standish to Waterford, the first occurring before the preliminary agreement, and the latter occurring before the signing of the agreement of January 27, 1917, both must be held to have been merged in that agreement. In any event the charge for labor of plaintiff's wife cannot be sustained in this action. R. S. Chap. 66, Sec. 3.

The remaining errors assigned relate to: (1) The plaintiff's claim that in March, 1917, the defendant said to him, "You stay here and everything will be all right," and (2) the alleged changes in the contract after signing. That there was disagreement between the parties appears from the testimony of the plaintiff: "Q—Along about October, 1917, you and Mr. Smith had some disagreement, did you not, ... A—No, sir; the first disagreement we had in August. Q—Sometime in August? A—Yes, sir. Q—You had your first disagreement? A—Yes, sir. Q—Now at that time Mr. Smith claimed, did he not, that you had forfeited your agreement? A—I don't know what he claimed, he claimed a good deal. Q—I am not asking you about the merits of the thing; I am just asking you if he didn't make that claim to you? A—O, yes. Q—And afterwards he wanted you to leave the premises?

A—Yes, sir. Q—And you refused? A—Of course we did. Q—And Mr. Smith brought an action of forcible entry and detainer against you in the court at Norway in this county? A—Yes. Q—And while that matter was pending you and Mr. Smith and Mr. Pike and myself met at the office of Mr. Wheeler and drew up an agreement marked Exhibit No. 8, Defendant? That is correct, is it not? A—Yes, sir."

The agreement referred to as Defendant's Exhibit No. 8 follows: "Memorandum of Agreement.

This agreement is entered into this fourth day of October, 1917, at South Paris, Maine, by and between Norman A. Smith of Standish in the County of Cumberland and State of Maine on the one part and Ernest L. Pike and Susan S. Pike, both of Waterford, in the County of Oxford and said State on the other part. Norman A. Smith agrees to convey by Quit claim deed all the right, title and interest of himself and his wife Ella M. Smith in the John C. Pike farm so called in said Waterford and the Bell lot so called in the Town of Sweden in said Oxford County to Susan S. Pike upon receipt of the sum of Sixty-five Hundred Dollars ($6500.00) cash and the assumption of all obligation to place a gravestone on the grave of the mother of Ernest L. Pike on or before the first day of November, 1917, and also convey to the said Susan S. Pike the tools on said premises and the hay on the John C. Pike farm and the hay in the Irving Bell barn so called. Said Smith further agrees that the said Ernest L. Pike and Susan S. Pike may remain on said premises until the first day of November, 1917, aforesaid, and that the said Pikes may gather the apples on said premises providing they deliver to him the said Smith one-half of the same.

In case the said Susan S. Pike and Ernest L. Pike do not raise and tender to said Smith the said sum of Sixty-five Hundred ($6500.00) dollars cash, on or before said November 1st, 1917, they hereby agree to quit the said premises without further notice of legal process, leaving all tools and materials on said premises except their own furniture and their proportionate part of the apples and they further agree to surrender and abandon all further claim in and to said premises to the said Norman A. Smith and the said Ella M. Smith. The said Ernest L. Pike and Susan S. Pike hereby further agree to abandon any and all claims in and to any cattle

that have been delivered on said premises by the said Norman A. Smith.

In Witness Whereof the said parties have hereunto affixed their names this said day and date.

NORMAN A. SMITH (seal)
ERNEST L. PIKE (seal)
SUSAN S. PIKE (seal)

Witness: Clifford E. McGlauflin."

From the testimony the conclusion is inevitable that the parties intended to settle and did settle every claim existing between them —all were included in the agreement of October 4, 1917.

As to the alleged change in the contract while in the hands of the defendant's attorney, examination of the papers discloses that the language of the preliminary contract relating to the cattle, which the plaintiff says has been changed, is identical with that in the contract between the parties under which the work was done.

The main purpose of the second written agreement was "to carry out the terms of said agreement relative to stocking said farm with young cattle." It clearly appears that the plaintiff was to have the beneficial use of the large stock placed on the farm by the defendant.

The contract made ample provision for his protection, and it nowhere appears that defendant sought to do or did anything to hinder or delay the plaintiff. He was in full charge of a very large stock on a large farm, and had an opportunity to do business as he desired. That he did not succeed does not appear to have been the fault of the defendant.

We are satisfied that the jury would not have been warranted by the evidence in finding a verdict contrary to the one ordered. It is the duty of the presiding Justice to direct a verdict when a verdict to the contrary could not be sustained. *Royal* v. *Bar Harbor and Union River Power Co.*, 114 Me. 220.

The entry will be,

Exceptions overruled.

CITY OF BELFAST *vs.* HAYFORD BLOCK COMPANY.

Waldo. Opinion November 23, 1921.

Assessors of taxes may correct an error by them made in making the original assessment, and such correction if of such a nature as to decrease the amount of tax as assessed originally, is not an abatement within the meaning of the law. Embracing property exempted under the law in the valuation constitutes such error, which may be corrected.

Under Sec. 10, Chap. 4, of the R. S., assessors of taxes are authorized to correct any omissions or errors in their assessment by amendment, while in office or after they cease to hold office, on oath, according to the fact, and such amendment or correction does not constitute an abatement within the meaning of the statute relating to abatements.

On report on an agreed statement of facts. An action of debt to recover an unpaid balance of taxes as originally assessed. The assessors in their valuation included property exempted under the statute and after discovery of their error, corrected it as they had a right to do under Chap. 4, Sec. 10, R. S., by reducing the amount of tax as assessed. Plaintiff alleges that such action by the assessors constituted an abatement and that the statute authorizing abatement of taxes was not conformed to by the assessors. Defendant contended that the act of the assessors did not constitute an abatement within the meaning of the statute, but simply a correction. The case was submitted on an agreed statement of facts to the Law Court to render such judgment as the law and the facts required. Judgment for the defendant.

Case is stated in the opinion.

Robert F. Dunton, for plaintiff.

Arthur Ritchie, for defendant.

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

HANSON, J. Action of debt to recover the unpaid balance of taxes assessed against the defendant corporation in 1920, amounting to $248.71, and before the court on an agreed statement of facts.

From the agreed facts it appears,

1. That the total of defendant's taxes for 1920 is $1,153.45, and payments and discount amount to $904.74, leaving an unpaid balance of $248.71.

2. That on the second floor of defendant's building, assessed as "Hayford Block," is a hall known as "Belfast Opera House," which was leased by the defendant to one Williamson for a term of five years from and after January 1, 1919.

3. That on or about August 4, 1919, said Williamson, with the written consent of defendant, leased said hall to the City of Belfast for one year. The principal object of the city in taking said lease was to provide an armory for a military company, but it was also used for other purposes for which the city had a right to use it under its lease.

4. That on November 27, 1920, the assessors made a record of abatements containing the following item: "Hayford Block Co., Sec. 97 Chapter 259, R. S. To correct an error of the assessors in making the original assessment R. E. $248.71." And in the list of abatements given by the assessors to the collector is the following item: "Hayford Block Co. Armory exempt, $248.71, 15/68 of tax."

5. That no written application was made to the assessors for this abatement.

The assessors in the foregoing record state frankly that they make the same "to correct an error of the assessors in making the original assessment," and while recorded in the list of abatements it is not an abatement within the meaning of the statute relating to abatements, but an amendment correcting an error. The reason for the correction is given in the agreed facts, namely, that the second floor of the Hayford Block Co. building was used as an armory, and therefore exempt from taxation.

The action of the assessors in making the amendment is authorized by law. Sec. 10, Chap. 4, R. S., provides that "when omissions or errors exist in the records or tax lists of a town or school district, or in returns of warrants for meetings thereof, they shall be amended, on oath, according to the fact, while in or after he ceases to be in office, by the officer whose duty it was to make them correctly. If the original warrant is lost or destroyed, the return, or an amendment of it, may be made upon a copy thereof."

The reason assigned for making the amendment is ample, as the case falls within the meaning and intention of Chapter 259, Public Laws, 1917, Sec. 97, thereof providing that "All armories, drill rooms, offices, headquarters offices, and target ranges, owned by the state or by any municipality, or by any organization of the National Guard, and all buildings and lands leased by the state, or by any municipality, or, by an officer or organization of the National Guard, to be used as an armory, drill room, headquarters' office, target range, or for other military purposes, shall be exempt from taxation for all purposes during the period of such ownership, lease and use."

It is urged that no written application was presented for an abatement by the defendant, but the position is not well taken, because as above stated, no abatement within the meaning of the law has been made, or attempted to be made. A correction of their own error was made by the assessors, and this under the statute they were authorized to do.

Judgment for defendant.

GERTRUDE G. WEBB *vs.* CHARLES L. DOW et als.

Cumberland. Opinion November 23, 1921.

An appeal by an executor in a bill in equity praying for a construction of a will cannot be sustained, unless the performance of his duties under the will as executor may be effected. An appeal under such circumstances where there is a guardian ad litem should be made in the name of the wards as principals, and not in the name of the guardian ad litem as principal, otherwise the appeal is a nullity.

A bill in equity to construe a will cannot be sustained upon the complaint of any person, executor or otherwise, unless the construction may effect his rights in person or property, or unless it may effect the performance of his duties under the will as executor, trustee or otherwise.

It follows that an appeal by an executor in such procedure cannot be sustained.

An appeal by a guardian ad litem from a decree of the sitting Justice, when made in his own name as principal cannot be sustained, as he is but an agent of the wards, and in a proper appeal the wards should appear as principals and the appeal made in their name by the guardian ad litem.

On appeal. A bill in equity seeking the construction of the will of Sarah J. Penney, who died in New Gloucester, Maine, on February 7, 1921. The will was allowed in the Probate Court and Charles L. Dow was appointed executor and was also appointed guardian ad litem of four minor children of Gertrude G. Webb, the complainant in the bill in equity.

Upon a hearing of the cause the sitting Justice decreed that the bill be sustained, and that Gertrude G. Webb took a fee simple estate in all of the property of the estate, less $500 bequeathed to Herbert D. Penney under Clause I; and that the third clause of the will was null and void. From which decree Charles L. Dow as executor, and as guardian ad litem, took an appeal. Appeal dismissed. Decree affirmed.

Case is stated in the opinion.

Clifford E. McGlauflin, for complainant.

Arthur Chapman, for respondent.

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

HANSON, J. Bill in equity asking construction of the will of Sarah J. Penney, who died in New Gloucester, Maine, on the 7th day of February, 1921.

The will was proved and allowed on the 15th day of March, 1921, in the Probate Court for Cumberland County, and Charles L. Dow, one of the defendants, was appointed executor of said will. Said Charles L. Dow was also appointed guardian ad litem of the four children of Gertrude Webb, the plaintiff herein.

All the parties to the bill joined in the prayer for interpretation of the will.

The clauses under consideration by the sitting Justice are as follows:

"Second:—I give to my beloved daughter, Gertrude G. Webb, wife of Berton Webb of New Gloucester, Maine, my homestead farm of one hundred seven acres more or less situated in the town of New Gloucester, Maine, on the Penney Road, so called. Also all my household goods during her lifetime, if she is left a widow or becomes separated in any way from her husband, Berton Webb, I hereby give

her full right to sell any or all of the goods and farm and use the proceeds as she sees fit. I also give and bequeath to my daughter, Gertrude G. Webb, all the rest, residue and remainder of my property real, personal and mixed wherever found and wherever situated.

Third:—If my son-in-law, Berton Webb, should outlive his wife, Gertrude G. Webb, he shall during his lifetime have the use of said farm and household goods during his lifetime and income of same while he shall live upon and operate said farm and only while occupied and operated by him. At his death or at such a time as he may have moved away from said farm all of said property shall be divided as follows equally between my daughter's children, Elsie Mae Webb, Ray Carleton Webb, Iva Florence Webb, and Merle Wilfred Webb, also any of my daughter's unborn children, if none of these my grandchildren are living the property shall then go to my daughter's nearest heirs."

The sitting Justice filed a final decree as follows:

"This cause came on to be heard this day and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, as follows, viz:—

That the plaintiff's bill be sustained with costs to be paid out of the estate, together with Twenty-five ($25.) Dollars each to Arthur Chapman and Clifford E. McGlauflin, counsel for Charles L. Dow and Gertrude G. Webb, on account of their fees in said cause; that the true construction of the second clause of the will mentioned is that Gertrude G. Webb takes a fee simple estate in all the real and personal property of the estate of Sarah J. Penney, less the Five Hundred Dollars disposed of by the first clause of said will; that the third clause of said will is null and void and of no effect."

From this decree Charles L. Dow in his capacity as executor, and as guardian ad litem, appeals to this court.

In his answer in each capacity he denies the allegations set forth in Paragraph 8 of the bill in which it is claimed that the true construction of the will is "that the plaintiff is entitled to the fee of all the property left by the said Sarah J. Penney, except the legacy left to her brother Herbert D. Penney and so much of said property as is necessary to pay outstanding bills."

We are unable to discover where appellant is in any manner interested or aggrieved by the decree or that he is a proper party to the bill. His rights and duties as executor are defined by statute, and these he can exercise, and must exercise in this instance, regard-

less of the construction of the will. The final decree in no way interferes with the performance of his full duty as executor. No duty is imposed upon him by the will except those that the statute prescribes, and when he has paid the legacy and debts and funeral charges, he will turn over all the property remaining, real and personal, to the plaintiff and his responsibility is ended. What the legal and equitable rights of the parties thereafter may be is no concern of his.

A bill to construe a will cannot be sustained upon the complaint of any person, executor or otherwise, unless the construction may affect his rights in person or property, or unless it may affect the performance of his duties under the will as executor, trustee or otherwise. *Burgess* v. *Shepard*, 97 Maine, 522; *Torrey* v. *Torrey*, 55 N. J. Eq., 410; Gardner on Wills, 317; *Greeley* v. *City of Nashua*, 62 N. H., 166.

It follows that an appeal by the executor herein cannot be sustained. Where an executor was a proper party, it has been held that "an executor, who brings suit to determine which of two contending legatees is entitled to a certain fund, has no interest sufficient to entitle him to appeal from a judgment construing the will in favor of one of the legatees." *Barth* v. *Richter*, 12 Colo., App., 365, 55 Pac., 610.

Appellant stands no better in his attempt to appeal from the decree of the sitting Justice as guardian ad litem. In the first instance there is error in the body of the appeal, inasmuch as he therein describes himself as executor, and in the second instance has signed the appeal in his own name, thus, "Charles L. Dow, Guardian," a proceeding wholly unauthorized by law. He has signed as a principal, when he is but an agent. In a proper appeal the wards should have appeared as principals and the appeal made in their name by the guardian ad litem. *Harlan* v. *Watson*, 39 Ind., 393; *Soule* v. *Winslow*, 64 Maine, 518; *Leavitt* v. *Bangor*, 41 Maine, 460.

It follows then that as guardian appellant has no standing in the instant case, and consequently any appeal by him is a nullity.

It is sufficient to say that the construction given to the will by the sitting Justice but restates the well settled law, and citation of authorities is unnecessary.

The entry will be,

Appeal dismissed.
Decree affirmed.

HANNAH E. RAND *vs.* STUART O. SYMONDS.

Cumberland. Opinion November 23, 1921.

There must be a fair preponderance of evidence to sustain the claim of title to real estate by adverse possession. The acts of cutting timber and wood in small quantities and occasional cutting of firewood and marsh grass are not sufficient to sustain a claim of title by adverse possession against a record title.

At a former trial of the case (see 120 Maine, 126) the plaintiff claimed both by adverse possession and record title. In the instant case the presiding Justice withdrew from the jury the question as to record title, and submitted the case upon the one issue of adverse possession.

In the former case upon the question of adverse possession it was held that "a careful examination of the testimony does not disclose a fair preponderance of evidence in favor of the plaintiff's claim by adverse possession, although there is evidence of certain acts upon which the defendant might claim trespass if he maintains his ownership of the premises in dispute." It was held, too, that the defendant had the better title. A second trial has not resulted in the production of evidence to meet the deficiency so pronounced in that case.

On motion and exceptions by defendant. A real action brought by plaintiff to recover possession of certain real estate situate in the town of Cape Elizabeth. The plaintiff relied on both record title and adverse possession, but the presiding Justice withdrew from the jury the question as to record title, and submitted the case upon the issue of adverse possession. The jury returned a verdict for plaintiff, and defendant filed a general motion for a new trial, and also took exceptions to the refusal of the presiding Justice to direct a requested verdict for defendant. Motion sustained. New trial granted. Exceptions not considered.

Case fully stated in the opinion.

W. R. & E. S. Anthoine, for plaintiff.

Frank H. Purinton, for defendant.

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

HANSON, J. This is a real action wherein the plaintiff demands possession of certain real estate situate in the town of Cape Elizabeth.

The jury returned a verdict for the plaintiff, and the case comes to the Law Court on general motion and exceptions by defendant.

At a former trial of the case (see 120 Maine, 126) the plaintiff claimed both by adverse possession and record title. In the instant case the presiding Justice withdrew from the jury the question as to record title, and submitted the case upon the one issue of adverse possession.

In view of the very full statement of titles involved set out in 120 Maine, 126, it will be unnecessary to restate the same.

In the former case upon the question of adverse possession we held that "a careful examination of the testimony does not disclose a fair preponderance of evidence in favor of the plaintiff's claim by adverse possession, although there is evidence of certain acts upon which the defendant might claim trespass if he maintains his ownership of the premises in dispute." It was held, too, that the defendant had the better title. A second trial has not resulted in the production of evidence to meet the deficiency so pronounced in that case.

The acts upon which the plaintiff bases her claim to adverse possession, appearing in evidence, were cutting timber and wood in small quantities in 1905, 1909 and 1918, and occasional cutting of firewood and marsh grass for bedding. These cuttings of the plaintiff were on land, and the plaintiff says were intended to be on land described in the following deed from the Pillsbury heirs to her:

"KNOW ALL MEN BY THESE PRESENTS: That we, Tobias Pilsbury Joshua Pilsbury and Daniel Pilsbury all of Cape Elizabeth county of Cumberland and State of Maine and Mary E. Webb of Portland county and State aforesaid in consideration of the Sum of one Hundred and Forty-five Dollars Eighty two cents paid by Hannah E. Rand of Portland county and State aforesaid the receipt whereof we do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever Quit-claim unto the said Hannah E. Rand her Heirs and Assigns forever, all the right, title and interest in and to A certain Piece or Parcel of Land Situated in Cape Elizabeth aforesaid known as the little marsh Lot containing Six Acres and one Hundred and Six Square Roods be it more or less it being one third part of Twenty Acres conveyed by Joshua Woodbury to Joshua Woodbury by his Deed dated April first 1748 and recorded in Cumberland Record Volume 9th Page 214th to which Deed reference is had to a more full description.

TO HAVE AND TO HOLD the same, together with all the privileges and appurtenances thereunto belonging, to her the said Hannah E. Rand her Heirs and Assigns forever.

And We do covenant with the said Hannah her Heirs and Assigns, that We will WARRANT and forever DEFEND the Premises, to her the said Hannah her Heirs and Assigns forever, against the lawful claims and demands of all persons claiming by, through or under us but none others.

IN WITNESS WHEREOF, We the said Tobias Pilsbury Joshua Pilsbury & Daniel Pilsbury and Mary E. Webb have hereunto set our hands and seals this Eighteenth day of April in the year of our Lord one thousand eight hundred and sixty four.

TOBIAS PILSBURY (Seal)
JOSHUA PILSBURY (Seal)
DANIEL PILSBURY (Seal)
MARY E. WEBB (Seal)

Signed, Sealed and Delivered
In presence of
EMMA PILLSBURY
DAVID TORREY

Cumberland, ss. Cape Elizabeth April 27 1864. Personally appeared the above-named Tobias Pilsbury, Joshua Pilsbury and Daniel Pilsbury, and acknowledged the above instrument to be their free act and deed.

Before me,

DAVID TORREY, Justice of the Peace."

The description in the deed of Joshua Woodbury to Joshua, Jr. of April 1st, 1748, to which the foregoing deed refers, is as follows: "also one third part of two ten acre lots called the Little Marsh lots, which I purchased of John Perry and Colonel Thomas Westbrook, bounded reference being had unto said deeds. That third part which adjoineth unto Joseph Cobb's Ten acre lot." What particular portion of the land in the vicinity was intended by these two deeds? The plaintiff's quit-claim deed of 1864 gives no sufficient description, but refers to a deed one hundred and sixteen years earlier, which is

even more deficient than the former, the description in the earlier deed being "that part which adjoineth unto Joseph Cobb's Ten acre lot." From the various surveys and the testimony of surveyors and others appearing at both trials, a true location of the Pillsbury lot, or a Pillsbury lot, is an impossibility. This conclusion was reached by the presiding Justice who said in his charge to the jury, "Now, I am not aware that anybody has been able to say just what land could be that six acre lot; but the plaintiff claims that that six acre lot which has been marked upon the plan as the Pillsbury lot, she bought in 1864, under this deed and has had possession of it and occupied it in a manner and for a length of time which gives her title to it as against the Symonds title which as I have said, is the better title under the deeds." Plaintiff's counsel in his brief frankly admits "that the deed from the Pillsburys, after the lapse of sixty years, gives us a very vague idea of the land intended to be conveyed, but it was full of meaning to the parties to the transaction who lived near the premises and who understood and knew the full meaning and the parcel of land referred to. It did convey 6 1-3 acres of land somewhere, and it was the same land which Joshua Woodbury conveyed to Joshua Junior April 1, 1748. How it reached the Pillsbury's or where they got the title, we do not know." Again counsel in his brief says: "It is admitted on the part of the plaintiff, however, that there is a vague uncertainty as to the location of the 6 1-3 acres which the Pillsburys conveyed to Hannah Rand, if we relied entirely on the deed. But there is no doubt whatsoever as to the location of the 10 acres which George and Asa Webster conveyed to John D. Buzzell." Even so, the Pillsbury deed attempted to divide 20 acres into three parts, not 10 acres, and the uncertainty remains and will remain indefinitely. In the circumstances, with the presiding Justice and counsel for plaintiff holding such views, and the evidence failing utterly to locate a lot such as plaintiff describes in her declaration, it is evident that the jury failed to understand the very clear and explicit instructions of the presiding Justice with reference to the location and identity of the land claimed, and the definite location of the acts claimed to have been performed by the plaintiff, as well as what constitutes adverse possession.

From the testimony in the case the jury would be as much warranted in including land of another adjoining owner not a party to the suit, or to take all the defendant's land. If the Pillsbury lot

cannot be located, what lot from the testimony did the jury have in mind when returning their verdict? The testimony does not disclose its proportions or extent, the writ gives no aid, and a judgment based on the verdict would be meaningless. The verdict is clearly wrong. It will be unnecessary to consider the exceptions.

Motion sustained.
New trial granted.

LIZZIE E. COOKSON *vs.* H. G. BARKER COMPANY.

Androscoggin. Opinion November 23, 1921.

The inconsistencies in the testimony of a plaintiff and his witnesses, and in the acts of plaintiff prior to the date of the alleged accrued cause of action, which produce a conviction that the jury must have been actuated by sympathy, bias or prejudice, warrants the granting of a new trial.

Action on the case to recover damages for personal injuries claimed to have been received by the plaintiff because of the falling of snow and ice from the defendant's building. The jury returned a verdict for the plaintiff, and the defendant filed a general motion for a new trial.

The testimony shows that the plaintiff had suffered from neurasthenia for several years before the date claimed in her writ as the commencement of her suffering. It appears, too, that she had previously brought suit in another county against another defendant for the same claim, reference to which is unnecessary further than to say that the inconsistencies appearing in the instant case are accentuated by the recital of the testimony in the former case, and leave no ground for hesitation in holding that the jury must have been actuated by sympathy, bias or prejudice, and that the verdict is manifestly wrong.

On motion for new trial by defendant. An action on the case to recover damages for personal injuries alleged by plaintiff to have been suffered by her by reason of snow and ice falling from the roof of a building owned by defendant and striking her on the head. The jury

returned a verdict of $1,098 for plaintiff, and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

Case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

Pattangall & Locke, and Charles A. McGraw, for defendant.

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

HANSON, J. Action on the case to recover damages for personal injuries claimed to have been received by the plaintiff because of the falling of snow and ice from the defendant's building. The jury returned a verdict for the plaintiff, and the defendant filed a general motion for a new trial.

The plaintiff in her declaration alleges, that "on the eighth day of February, 1918, she was walking along on the sidewalk on Water Street, in the City of Gardiner; that the defendant owned a building on Main Street in the City of Gardiner on that day, and on the roof of said building was an accumulation of snow and ice which made it unsafe for passers upon the sidewalk, in that snow and ice were likely to become loose, and to fall upon persons so walking along, and the plaintiff further says that the defendant carelessly and negligently allowed said snow and ice to accumulate upon the roof of said building on the said Street aforesaid, on the day aforesaid, and she further says that on said day, and at such time, she was walking along the sidewalk in a proper and prudent manner, when suddenly and without any warning the snow and ice fell from the roof of the building of the said defendant, so carelessly and negligently allowed by him to there remain, and struck her upon the head and seriously injured her, and the plaintiff further says that for a period of three days and nights after the injury she was 'out of her head and unconscious much of the time,' and that she was confined to the house for two months before being able to go out, and that she was so severely injured that she has not yet recovered from the effects thereof and probably never will, and the plaintiff further alleges that this injury happened to her solely through the negligence and want of care of the defendant, and through no negligence or want of care upon her part."

It is not disputed that the plaintiff was in front of the defendant's premises on the day set out in the writ, or that snow fell from the

defendant's building striking the plaintiff. The plaintiff and her daughter-in-law testify that snow and ice fell, striking the plaintiff and injuring her, and the vital question in the case aside from the injury, if any resulted, was whether any ice fell from the building at the time complained of. As to this question it is sufficient to say that from the plaintiff's own witnesses it clearly appears that the plaintiff was not struck by ice as alleged in the writ. It further appears from her witnesses, as well as from defendant's, that a small amount of snow, varying in quantity from a half dustpan to a shovelful did fall from the defendant's building, striking plaintiff's head, and the testimony is overwhelming that she "just smiled and brushed it off."

Her principal physician, whose advice plaintiff says she sought first, testified that he treated her for traumatic neurasthenia as the result of injury to her head, but his diagnosis and treatment and testimony were based upon a history of the patient inconsistent with the facts in the case. A recital of his evidence in this connection follows:

"Q. Was there anything in the condition of Mrs. Cookson's head that observation would show that she had had any blow on the head, any bruises?

A. No; there was no contusions or bruises; no objective signs.

Q. No way you could tell, except by her speaking of it?

A. Her story.

Q. After a thorough examination of the case and treatment of it you diagnosed it as traumatic neurasthenia. Could such a condition come about from a light fall of snow, perhaps a shovel full, striking a woman's head, who had on a hard hat, from the second story of a building?

A. Depends on how far it fell! if it had fallen far enough to crush her hat—

Q. From the second story of a building.

A. It would depend entirely on the amount of course. Will you please repeat the question?

Q. A fall of light snow, not exceeding a shovel full, coming from the eaves of a two story building, striking on a woman's head who had on a hard hat, could that produce traumatic neurasthenia?

A. No; if that were true I should think it could not.

Q. To produce that condition would it require a somewhat severe blow?

A. Rather severe. Of course the fright attending it would also affect her as well as the actual force of the blow.

Q. You wouldn't expect any fright in the case of an adult person to attend a condition where a shovel full of snow fell on him from the eaves of a building?

A. No, sir.

Q. And in order to make that diagnosis you are obliged to assume a somewhat severe blow from something besides a light flurry of snow?

A. Yes, sir.

Q. And as the case was related to you you understood that a substantial quantity of ice fell, didn't you?

A. Ice and snow.

Q. What?

A. Ice and snow.

Q. But the ice was the important factor, wasn't it?

A. Likely to be; yes.

Q. What?

A. Yes, sir."

The testimony shows that the plaintiff had suffered from neurasthenia for several years before the date claimed in her writ as the commencement of her suffering. It appears, too, that she had previously brought suit in another county against another defendant for the same claim, reference to which is unnecessary further than to say that the inconsistencies appearing in the instant case are accentuated by the recital of the testimony in the former case, and leave no ground for hesitation in holding that the jury must have been actuated by sympathy, bias or prejudice, and that the verdict is manifestly wrong.

Motion sustained.
New trial granted.

EDWARD R. KINGSBURY *vs.* FLORA H. BEELER.

SAME *vs.* SAME.

York. Opinion November 23, 1921.

A line between two parcels of real estate both of which originally were owned by the same party if fixed and agreed to by such original owner, is the true line between subsequent and different owners of such parcels, and the lack of knowledge on the part of such subsequent owners of the existence of monuments is unimportant.

Plaintiff's title originated from the same source as defendant's. The deeds to the various members of the family of Nathaniel Brooks reserving to himself in each one a life interest, in addition to the fact that from time to time he lived in the family of each grantee and actually benefitted by the reservation, his ownership and control of the entire tract for more than thirty years, and the ownership and control of plaintiff's land for substantially forty years, the middle lot with his occupation and control and the extent thereof known to all concerned in the other lots, leads to but one conclusion, namely,—that the westerly side line of the middle lot, or the lot now owned by plaintiff, was as described in the deed from Nathaniel Brooks to Martha A. Brooks.

On report. Two actions tried together, the first being a real action to determine title to certain real estate situate in the town of York in the County of York, and the second action is to recover damages for trespass committed by defendant. After the testimony was completed and the evidence all in, by agreement of the parties the case was reported to the Law Court for its determination upon so much of the evidence as was admissible. Judgment for plaintiff in both cases, and damages assessed in the trespass case in the sum of $25.00.

Case is stated in the opinion.

E. P. Spinney, for plaintiff.

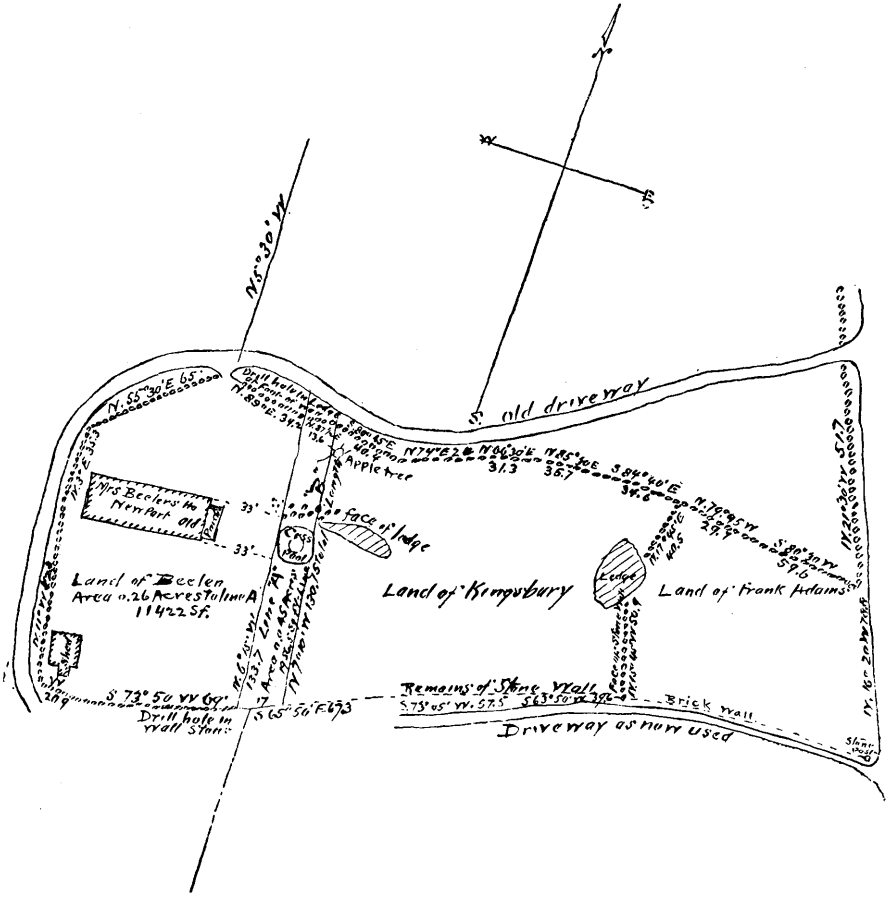
Ray P. Hanscome, for defendant.

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

HANSON, J. Two actions tried together, the first a real action, the latter an action of trespass, and both before the court on report.

The only issue in the cases necessary to be dealt with is the location of the true line between the parties to the actions.

So far as the testimony discloses, the record history of the lands in question commences January 5, 1831, when Ebenezer Littlefield conveyed to Nathaniel Brooks "two lots of land laying in said York . . . . bounded by the road leading to bald head, six rods on the road, running back twenty rods from the road by Staples land, the small lot laying six rods from the other, more or less." It is not disputed that by the above named deed Nathaniel Brooks acquired all the lands comprising the three lots delineated upon the court surveyor's plan, and which are herein substantially reproduced.



It is deemed to be advisable, in view of the dates of execution appearing upon the various deeds, to mention first the contention of the defendant.

It is conceded that until the year 1855, Nathaniel Brooks owned all the land comprising the present three lots designated on the plan. On March 26, 1855, he conveyed the east lot to his son Nathaniel, Jr., and on January 6, 1866, Nathaniel Brooks, Sr., was again owner of the entire tract. On that date Nathaniel Senior executed a deed to his son George Brooks of "a certain lot of land with a dwelling house thereon, situated in York and bounded as follows, viz.: the said lot of land containing one half acre more or less, on the south and west and north by land belonging to William Norton's heirs, late of York deceased, and on the east by land of the said Nathaniel Brooks. I hereby reserve the use and improvement of the said dwelling house and land during my natural life." This deed was not recorded until November 12, 1870. The defendant acquired title to the above described land and buildings thereon by a deed from the administrator of Martha Brooks, widow of George Brooks, by deed dated December 15, 1904, and by deed from the heirs of George Brooks, dated December 16, 1905.

While the defendant thus acquired title in 1905, she did not occupy the house until 1909, in the meantime renting the same. Under these deeds the defendant claims to own the land between the lines marked "A" and "B" upon the plan. On this strip of land she has caused a cess-pool to be placed.

The action of trespass was brought to recover damages for the excavating and maintaining such cess-pool.

The plaintiff's title originated from the same source as defendant's. He claims under the following deeds. On July 26, 1866, six months and twenty days after the first deed in the defendant's chain of title, Nathaniel Brooks executed a deed to his daughter-in-law Martha A. Brooks, of Wells in the County of York, of "two certain lots of tillage land situated in the towns of York and Wells, together with all the buildings thereon, bounded as follows, viz: beginning at the southerly corner to a stone in the wall by the old road, and from thence running up about a west course by land owned by the heirs of William Norton late of York deceased, to George Brooks land and to a large stone in the wall with a hole drilled in said stone, and from thence running about a north course and running two rods distance

from the east end of George Brooks dwelling house on a parallel line to a large ledge with a hole drilled in the same, and from thence running about an east course by land owned by the heirs of William Norton, deceased, to the old road & from thence running west by the old road to the first mentioned bounds containing one acre be it more or less." This deed was duly recorded July 27, 1866. Martha A. Brooks reconveyed the same to Nathaniel Brooks November 26, 1870. January 25, 1875, Nathaniel Brooks conveyed the same to Lyman Staples, and on September 23, 1909, the plaintiff acquired the property marked "Kingsbury" on the plan by deed from Bertha H. Keyes, heir at law of Lyman Staples.

The description in the two last named deeds is by lots named and abutting land and lends no aid in solving the question presented. Inasmuch as no claim by adverse possession is set up by either side, the oral testimony presented, standing alone, is of little assistance as well. But when the deed of Nathaniel Brooks to Martha A. Brooks is considered, together with the oral testimony and the circumstances in the case, the solution of the question as to the true line is simplified, and the conclusion inevitable. The deeds to the various members of the family of Nathaniel Brooks reserving to himself in each one a life interest in addition to the fact that from time to time he lived in the family of each grantee and actually benefitted by the reservation: his ownership and control of the entire tract for more than thirty years, and the ownership and control of the plaintiff's land for substantially forty years, the middle lot with his occupation and control and the extent thereof known to all concerned in the other lots, leads to but one conclusion, namely,—that the westerly side line of the middle lot, or the lot now owned by the plaintiff, was as described in the deed from Nathaniel Brooks to Martha A. Brooks; in other words, from "a large stone in the wall with a hole drilled in said stone, and from thence running about a north course and running two rods distance from the east end of George Brooks dwelling house on a parallel line to a large ledge with a hole drilled in the same, and thence running east," etc., etc.

The deeds with the oral testimony are sufficient to warrant this conclusion, without reference to the legal effect of the unrecorded deed from Nathaniel Brooks to George Brooks, dated January 6, 1866, which deed was not recorded until November 12, 1870. With this record in the case, the conclusion that the plaintiff owns to the

line marked "A" on the plan is imperative, because it is supported by the law and the evidence in the case.

The meagre description in all the deeds save the deed of July 26, 1866, gave rise to the general and continued ignorance as to the location of the true line on the part of all concerned until within seven or eight years before these actions were commenced.

In the progress of the case it became necessary to have a surveyor appointed by the court to assist in locating the true line between the parties. His report has been of great assistance, particularly so as he discovered the drill holes marking the north,—west and south-west corners of the plaintiff's land, as described in the deed of July 26, 1866, above referred to. The drill holes could not have been made without the knowledge of all the occupants in the dwelling of George Brooks, and it is unimportant that none of the owners of the various lots in the intervening years knew of the existence of the drill holes. It was the line fixed and agreed to by the original owner, and is necessarily the true line now.

The entry in both cases will be,

Judgment for the plaintiff, and in the trespass case damages to be assessed in the sum of $25.00.

EDGAR S. NORTON, In Equity *vs.* HERBERT L. BERRY.

Cumberland. Opinion November 26, 1921.

A deed absolute in form, although from a third party, may be shown to be an equitable mortgage between the parties to a suit, but the proof, it is true, must be clear and convincing.

A person acting as a friend and agent for another, and from time to time advances to such person money to assist him in carrying out any purpose he may have in mind, and takes from such person a deed absolute in form of real estate, or purchases and forecloses a mortgage on such real estate, if such transactions between such parties are entered into under an understanding that the party holding the deed and the foreclosed mortgage is to transfer or turn back to the other party property, title to which is in his name, upon payment to him of all that is due him with interest, has in said property the interest only of a mortgagee under an equitable mortgage. Their relations are those of debtor and creditor. The criterion always is whether the transaction was intended to secure one party for claims against the other. Where a deed absolute in form is held as security only, the fact may be proved by parol. So long as the instrument is one of security, the borrower has a right to redeem upon payment of the loan.

On appeal by defendant. This is a bill in equity to establish that the conveyances under which the defendant holds title to the premises described in the bill constitute an equitable mortgage, and for redemption. Upon a hearing on bill, answer, replication and proof, the sitting Justice decreed that the bill be sustained with costs, and that the matter be referred to a Master in Chancery, from which decree defendant took an appeal. Appeal dismissed. Decree affirmed with additional costs.

Case is fully stated in the opinion.

Charles E. Gurney, for plaintiff.

Frank H. Haskell, for defendant.

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

HANSON, J. This is a bill in equity to establish that the conveyances under which the defendant holds title to the premises described in the bill constitute an equitable mortgage, and for redemption,

and is before the Law Court on appeal from the decree of the sitting Justice sustaining the bill, referring the matter to a master to take an account of the sum equitably due the defendant, and directing procedure for redemption, and establishing defendant's title in default of redemption by the plaintiff.

The record title before it was conveyed to the defendant was in the plaintiff's wife, Elizabeth C. Norton, who held it since 1898. In 1917 the plaintiff and his wife became estranged and the plaintiff commenced action against her to recover the real estate described in the bill.

The plaintiff was indebted to the defendant for money advanced to pay a mortgage to one Cressy and for other sums advanced by defendant to pay expenses of the foregoing action. Acting for the plaintiff, the defendant took an assignment to himself of the Cressy mortgage, and admittedly at the time, and for a long period thereafter, was by agreement, and having a power of attorney as well, acting for the plaintiff and in his interest, consulting him, advising him in relation to his property, the ways and means of securing a deed from his wife, and as to the cancellation of a timber contract which the wife had entered into for sale of the valuable timber on the land, and furnishing the funds therefor.

During all the period, covering many transactions, and the payment of all required money therefor, the defendant admits he was acting for the plaintiff to accomplish one special object—using defendant's own language—, "to fix it so that nobody could get it away from him." And the defendant also admits that such was the purpose and intention up to the date of the deed, when he claims that the plaintiff abandoned his desire to pursue the equity further, and said to defendant in effect,—"I will give you a deed of my part of the property for what I owe you."

The defendant therefore claims the property under a foreclosure of the Cressy mortgage above named, which became absolute May 4, 1918, and a warranty deed from Elizabeth C. Norton, wife of the plaintiff, in which the latter joined, dated September 8, 1919.

The sitting Justice found that "the evidence satisfactorily establishes, and the defendant in effect admits, that the transactions resulting in the acquisition and foreclosure of the Cressey mortgage, and thereafter up to September 8, 1919, constituted an equitable mortgage, as between the plaintiff and defendant."

"But the defendant contends that when he obtained the deed of September 8, 1919, his relations with the plaintiff were changed and that the plaintiff's right of redemption was extinguished and the defendant became the absolute owner of the property.

"That a deed absolute in form, although from a third party, may be shown to be an equitable mortgage between the parties to the suit, is well settled. The proof, it is true, must be clear and convincing.

"I think that the evidence introduced by the plaintiff measures up to this standard, and I find the fact to be in accordance with the plaintiff's contention."

The sitting Justice also found that the original relations existing between plaintiff and defendant were never expressly terminated. A careful examination of the record discloses that the finding is fully sustained by the testimony, and appellant has failed to maintain the burden assumed on appeal of showing the findings of the sitting Justice to be clearly wrong.

The findings of the sitting Justice in equity proceedings upon questions of fact necessarily involved are not to be reversed upon appeal unless clearly wrong, and the burden is on the appellant to satisfy the court that such is the fact; otherwise, the decree appealed from must be affirmed. *Haggett* v. *Jones*, 111 Maine, 348.

The defendant frankly admits the relation of debtor and creditor up to September 8, 1919, the date of the deed from the plaintiff and his wife. It will be remembered that securing a deed of the wife's interest, the recovery of the property from the wife from whom the plaintiff was estranged appears throughout the case to have been the chief purpose of the plaintiff. It was for that declared purpose principally that plaintiff sought the aid of the defendant. It was in the accomplishment of that purpose that much of the indebtedness between the two arose. The means taken to bring this about, the best method of securing the wife's consent and signature, were not devised by the plaintiff, but by the defendant, who was, at the request of the plaintiff, getting the title out of the plaintiff's wife and into defendant's name, "so that no one could get it away from the plaintiff." He had already paid the Cressy mortgage, and in addition had paid bills and executions, and loaned plaintiff money, all while acting as the financial and interested friend of the plaintiff, holding the Cressy mortgage as security, and a power of attorney, and up to the very day of the deed of September 8, 1919, he asserted he was

doing it all as the friend and agent of plaintiff, and that all he wanted from the transaction was the money due him and interest thereon. That in addition to these items he paid plaintiff's wife for her interest does not strengthen the defendant's position. Securing a deed from Mrs. Norton was the principal object of his agency and friendly co-operation, and he had agreed to furnish the money to pay her. Plaintiff could not get her signature. Defendant said he could, and that he could effect this even in the face of outstanding contracts with third parties which Mrs. Norton had entered into for the sale of timber. The event shows that he could do and did all he claimed, and that in addition to paying Mrs. Norton for her interest, he paid $500 to one Clark for a release of a timber contract made with Mrs. Norton.

All of these facts appear of record. All the details of the business up to the date of the deed show an unbroken, continuous relation of debtor and creditor. What is there in the evidence tending to show a change of that relation? The defendant says that before and on the 8th day of September, 1919, the plaintiff said to him "You may take my part of the property for what I owe you," and that then and there the relation ceased; that the plaintiff was no longer his debtor; the incident was closed; he was no longer a creditor of the plaintiff. A witness for the defendant who witnessed the signature of plaintiff to the deed testified that after signing the plaintiff said, "I have sold everything to Berry."

The plaintiff denies these statements, and reasserts his claim in the bill. Advanced in years and at the time of hearing weak mentally, plaintiff does not present as consistent personal support of his claims in the bill as is usually seen in equity proceedings, but the record amply discloses his honesty of purpose and his consistent continuous claim of the main point in the whole case, that on payment of the amount due defendant he was entitled to a conveyance of the property. The evidence is very clear upon the point, and clear as well that the defendant so understood their relation, and intended to convey to the plaintiff on such payment; that such was his intent and purpose after the deed was signed by plaintiff and his wife, and that in fact he did not change his purpose until the plaintiff demanded a deed the second time, a year after the deed was made to defendant. A recital of the plaintiff's version is here given. He testified: "I went to Mr. Berry and told him the situation I was in, and he said he

would buy the Cressy note and loan me money and help me out; and then he said he would do all he could for me . . . . he loaned me money along from time to time and advised me what to do, and come to you (Mr. Gurney) as my attorney, and then he says to me, 'Give him the whole swing,' that is, the whole thing in his name and he give me my property back, and deed it over to me as he didn't want the property."

The attorney for the plaintiff after testifying in reference to his connection with incidents in the case, was asked in cross-examination: "Q—In making this transfer of September 8, 1919, you were acting for Mr. Norton, were you not? A—Well, now I recall that Mr. Berry came to my office and stated what he had bought from Mrs. Norton, and I prepared the deed and told him it couldn't be signed until her attorney had seen it, that it was a very rainy night, and Mr. Berry in his automobile went out to Westbrook to exhibit that to her attorney, Judge Lyons. I don't think that—I think those were the circumstances. Mr. Berry came to my office and told me what he had bought from Mrs. Norton, and wanted a deed prepared.

Q—At that time was while Mr. Norton was consulting with you as counsel? A—Yes, it was.

Q—Now if this transfer was to be considered an equitable mortgage, can you explain why you didn't draw some instrument which would show the exact intent of the parties?

A—I can; because Mr. Berry assured me particularly that he was doing this to help Mr. Norton, and that was all; that all he wanted out of it was his money, and I never had any misgivings concerning Mr. Berry's intentions, and he himself said that was his intention."

The plaintiff's daughter and son-in-law testify to substantially the same expression of intention by the defendant at the date of the deed.

The defendant himself testified "that Mr. Norton came to me and said they were trying to get his place away from him, and he told me it was in his wife's name, and he wanted to get it back, and he wanted to know if I wouldn't lend him some money to help him do it and I told him I would . . . . I advised him to go to an attorney . . . . and he went to an attorney with me at the time."

In the presence of facts in many respects similar to the instant case, and identical in the equities involved, this court has said: "Transactions like these constitute equitable mortgages. The

criterion always is whether the transaction was intended to secure one party for claims against the other. As was said in *Reed* v. *Reed*, 75 Maine, 264, 272: 'It is therefore a question of fact, whether, on looking through the forms in which the parties have seen fit to put the result of their negotiations, the real transaction was in fact a security or sale.' " *Bradley* v. *Merrill*, 88 Maine, 332. Where a deed absolute in form is held for security only, the fact may be proved by parol. *Libby* v. *Clark*, 88 Maine, 32. So long as the instrument is one of security, the borrower has a right to redeem upon payment of the loan. *Linnell* v. *Lyford*, 72 Maine, 283. If there was in fact an indebtedness or liability secured by the transaction, that was sufficient. *Reed* v. *Reed*, 75 Maine, 264, 272; *Bradley* v. *Merrill*, supra.

The evidence is clear and convincing that the deed of September 8, 1919, was and is an equitable mortgage between the parties. The defendant admits that the relation of debtor and creditor subsisted for a long period, as pointed out herein. The evidence fails to show any change in that relation. On the contrary, the evidence is overwhelming that there was no change, and that the equities in this case are with the plaintiff.

The entry will be,

Appeal dismissed.
Decree affirmed with additional costs.

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

MITCHELL WOODBURY CO. *vs.* N. P. M. JACOBS.

York County. Decided March 25, 1921. The plaintiff company in 1916 sold to "Passaconaway Inn, Charles G. Magee, York Beach, Maine," a bill of goods consisting of crockery, china, &c., which goods were used at the Inn during the season of 1916, but were never paid for. The Inn was owned by Townley and Vermeule, and Magee was their manager. In 1917 the defendant was employed as manager. Quite a portion of the goods had survived the wear and breakage of the previous season and were at the hotel when the defendant took charge. In May, 1917, after the defendant had assumed the management of the hotel, the plaintiff caused an inventory of the remaining goods to be made. There was some talk at that time about taking the remaining goods back to the Boston store of the plaintiff, but it was suggested that the goods remain a short time until the defendant could confer with his employers, then at New York, with a view to possible purchase. The purchase not having been made the goods were taken back to the Boston store where another inventory was made which showed a shortage between the latter inventory and the May inventory of $413.49. The plaintiff seeks to recover this sum, depending upon what it alleges was a contract of bailment made by the plaintiff and defendant at the time of taking the May inventory. The burden of proving this contract rested upon the plaintiff but a careful examination of the testimony fails to disclose that it has sustained this burden. The case is before us on report for a finding and final judgment. Judgment for the defendant. *Sewall & Waldron,* for plaintiff. *John C. Stewart,* for defendant.

SILAS M. GRANT *vs.* FANNIE HALL FEGAN.

York County. Decided March 30, 1921. The court has carefully considered the evidence and briefs of counsel. Inasmuch, however, as the case involves only a dispute as to facts, and no issue of law, it is unnecessary and would be unprofitable to publish an extended opinion.

One Clara E. Bourne bought wood of the plaintiff on the credit of the defendant for the use of the defendant's uncle. If Mrs. Bourne's testimony is credited the defendant gave her express authority to make the purchase. If the defendant's testimony is to be relied upon she gave no authority to Mrs. Bourne to purchase anything on her account.

The jury heard the testimony and returned a verdict for the plaintiff. The verdict is not manifestly wrong. Motion overruled. Judgment on the verdict. *E. P. Spinney,* for plaintiff. *William M. Tripp,* for defendant.

BASIL W. MACDONALD'S CASE.

Androscoggin County. Decided April 4, 1921. Appeal from decree sustaining decision of the Industrial Accident Commission awarding claimant damages for an injury alleged to have been sustained by him on May 15, 1920, while employed by the Bates Manufacturing Company.

Two issues are involved, first, whether the claimant sustained an injury, and second, whether the employer or his agent had knowledge of the accident. Both are questions of fact. On both the Commissioner has found in favor of the claimant, and the record contains evidence upon which if deemed true the findings could be based. The question of credibility was for the Commissioner and his decision thereon was final. Appeal dismissed with costs. Decree of sitting Justice affirmed. *B. L. Berman,* for plaintiff. *Andrews & Nelson, and W. T. Gardiner,* for defendant.

CHARLES F. DRAKE *vs.* WALTER J. BICKNELL et al.

Waldo County. Decided April 5, 1921. This is a bill in equity in which the plaintiff seeks to restrain the defendant from enforcing a judgment and the execution issued thereon. The special findings of the sitting Justice aptly and correctly state the case and the contentions of the parties. Those findings and the decree based thereon are as follows:

"Charles F. Drake, the plaintiff, and Walter J. Bicknell one of the defendants in this bill in equity, having certain claims each against the other, met on November 9th, A. D. 1916, at Hampden, Maine and entered into a valid agreement upon a sufficient consideration, whereby all claims which each then had against the other, including the claim which said Bicknell then had against said Drake on said judgment and on the outstanding execution issued thereon, became and then were completely satisfied and extinguished. The terms of said agreement were that said Drake was forthwith to send his check for sixty-two dollars and fifty cents to said Bicknell, and in addition thereto Drake was to pay the bill of Messrs. Mayo and Snare for their services rendered and their disbursements made as attorneys for said Bicknell in the action wherein said judgment was rendered, when said Drake should have been advised as to the amount of said bill. Drake never was advised as to the amount thereof, Pursuant to said agreement said Drake on the following day, seasonably sent to said Bicknell by mail, postage prepaid, his check payable to the order of said Bicknell for sixty-two dollars and fifty cents, which Bicknell received endorsed in blank, and accepted in part performance of said agreement. Bicknell's subsequent conduct in connection with said check does not affect the legal or equitable rights of the parties.

"After said agreement was made and partially performed by said Drake by payment of his check as aforesaid, to wit, on the fourteenth day of December 1916, certain real estate of said Drake was taken by the sheriff of the County of Waldo, on an execution issued on said judgment, and advertised to be sold as alleged in said Plaintiff's bill in equity: but said judgment and execution thereon were not then in full force and effect, but were both completely satisfied and extinguished by said agreement.

FINAL DECREE

"This cause having been heard by me upon bill, answer, replication and proofs, and having been argued by counsel, came on this day to be further heard; and thereupon, upon consideration thereof, the plaintiff's bill is sustained with costs, as against the defendant, Walter J. Bicknell, and it is ordered, adjudged and decreed as follows, namely: That a writ of injunction issue against the defendant, Walter J. Bicknell, his attorneys and agents, perpetually enjoining and restraining said Walter J. Bicknell, his attorneys and agents from enforcing or attempting to enforce or satisfy either wholly, or in part, the judgment which was recovered by said Walter J. Bicknell against said Charles F. Drake on June 9th, 1916, by the consideration of the Supreme Judicial Court held at Bangor within and for the County of Penobscot, in said State of Maine, at the April A. D., 1916 term of said Supreme Judicial Court, for the sum of $352.00, debt or damage and $25.87, cost of suit, which said judgment is described in said plaintiff's bill in equity, and all executions which have issued out of said court on said judgment: and from all attempts directly or indirectly to accomplish such object."

No error of fact or law having been discovered in these findings or decree the same are adopted and sustained. Appeal dismissed. Decree below affirmed with costs, against defendant Bicknell. *Walter A. Cowan,* for plaintiff. *Mayo & Snare,* for defendant.

CATHERINE QUINN, Appellant from Decree of Judge of Probate
In Re, Estate of MICHAEL MCCARTHY.

Androscoggin County. Decided April 5, 1921. This is an appeal to the Supreme Court of Probate from the findings and decree of the Judge of Probate in Androscoggin County, allowing the will of said Michael McCarthy. A jury trial was requested and ordered by the Justice at nisi prius. The following questions, by agreement, were submitted to the jury for answers, to wit:

FIRST:—At the time of the execution of the instrument purporting to be the last Will and Testament of Michael McCarthy to wit:—February 2, 1919, was the said Michael McCarthy of sound mind?

SECOND:—Was the execution of said instrument procured by the undue and improper influence of Mary Kalesparaky, alias Mary Thelasinou, or of any person or persons?

When the evidence was all in, the presiding Justice withdrew the case from the jury and subsequently made a decree that the appeal be dismissed, that the decree of the Judge of Probate be affirmed, that the instrument purporting to be the last Will and Testament of Michael McCarthy be allowed, and that the cause be remanded to the Probate Court of Androscoggin County for further proceedings.

To this decree, the appellant excepted and now asks that her exceptions be allowed. The appellant seasonably moved the court not to enter any final decree pending exceptions to the Law Court on the issues presented, but decree being made, notwithstanding such motion, said appellant excepted to the making of such decree and asked that her exceptions be allowed. The latter exception was not pressed in argument and must therefore be regarded as waived.

The issues upon which the presiding Justice made his finding and decree were wholly issues of fact. The law is well settled in this State that the findings of a Justice in the Supreme Court of Probate are conclusive on issues of fact if there be any evidence in support of those findings, and when the law invests him with the power to exercise his discretion, that exercise is not reviewable on exceptions; although if he finds facts without evidence or if exercises discretion without authority his doings may be challenged by exceptions. *Palmer's Appeal*, 110 Maine, 441; *Gower, Appellant*, 113 Maine, 156. The record discloses evidence upon which the findings of the Justice below could properly be made and no abuse of discretion appears. The mandate of the court, accordingly, will be. Exceptions overruled. Decree of Supreme Court of Probate affirmed with costs. *McGillicuddy & Morey*, for plaintiff. *Benjamin L. Berman, and George S. McCarty*, for defendant.

CATHERINE QUINN, In Equity

vs.

MARY THALASINOU, Alias, MARY KALESPARAKY.

Androscoggin County. Decided April 5, 1921. This is a bill in equity heard by single Justice upon bill, answer, replication and proof. The plaintiff is sister and heir at law of Michael McCarthy, late of Lewiston, deceased, and she brings this bill praying for the cancellation of a deed of real estate given by him to the defendant, the cancellation being asked for on the ground that at the time of executing the deed he was of unsound mind and not of sufficient mental capacity to transact business or to legally make and execute said deed; and that by reason of the condition of his mind, the defendant by fraud and undue influence procured the execution and delivery of the deed to her.

The presiding Justice in his findings, made an elaborate, accurate and impartial statement of the facts which were developed by the testimony. The issues were wholly issues of fact and it would serve no useful purpose for us to repeat the findings of the sitting Justice in this opinion. They are on file at the office of the Clerk of Courts for the County of Androscoggin, where they are accessible to the parties interested. Upon those findings, the following decree was made.

DECREE

This cause came on to be heard at the Supreme Judicial Court at Auburn, within and for the County of Androscoggin, at a term thereof begun and held on the Third Tuesday of January, A. D., 1920, and was heard upon bill, answer, replication and proof; and now after hearing and upon consideration thereof:

IT IS ORDERED, ADJUDGED AND DECREED:—

I. That the bill is sustained with costs.

II. That the deed described in the second paragraph of plaintiff's bill, drawn, signed, executed and delivered by Michael McCarthy,

under the name of Mike McCarthy, purporting to convey to the said Mary Thalasinou, as grantee, a certain lot or parcel of land with the buildings thereon, situated in Lewiston, in said County of Androscoggin, and bounded as follows, to wit:—Commencing at a point in the Westerly line of a proposed passageway running Southerly from a proposed street, known as North Street, to the land of the Union Water Power Company, said line being one hundred and fifteen (115) feet Westerly from and parallel to the Westerly line of Lincoln Street, said point being fifty (50) feet Southerly from the Southeasterly corner of land conveyed by the Franklin Company to the Lewiston, Augusta & Waterville Street Railway, by deed dated April 13, 1915; thence running Southerly by the Westerly line of said passageway twenty-five (25) feet; thence Westerly at right angle one hundred (100) feet to a proposed street; thence Northerly at a right angle by the Easterly line of said proposed street, twenty-five (25) feet; thence Easterly at a right angle one hundred (100) feet to the point of beginning, it is decreed to be null and void, and that the records thereof in the Androscoggin Registry of Deeds be cancelled and discharged.

III. That the said Mary Thalasinou, alias Mary Kalesparaky reconvey said real estate, above described, to the lawful heirs at law of the said Michael McCarthy, alias Mike McCarthy, by good and sufficient warranty deed.

From this decree an appeal was seasonably taken and a full report of the evidence was presented to us for consideration.

The rule, that the finding of the sitting Justice as to matters of fact is to be sustained, unless clearly erroneous, has been so frequently stated that it is not necessary to make citations of authorities. After a careful and painstaking examination of the testimony, the court is of the opinion that the sitting Justice was right when he decreed that the deed in question was null and void and that the record thereof in the Androscoggin Registry of Deeds be cancelled and discharged.

But it is to be observed that the decree went farther than that and ordered the defendant to reconvey the real estate described in said deed to the lawful heirs at law of the said Michael McCarthy by good and sufficient warranty deed. It is the opinion of the court that this part of the decree should be stricken out. The cancellation of the deed restores the title to the channels in which it existed prior to the date of the deed, to wit, February 22, 1917. It would not be just or

equitable to require this defendant to give a warranty deed to heirs at law of Michael McCarthy for non constat what may have occurred to affect the title since that date.

The decree should be modified, therefore, by striking out paragraph III, and as so modified is affirmed and the mandate of the court will be issued accordingly. No costs are allowed to either party. *McGillicuddy & Morey*, for plaintiff. *Benjamin L. Berman and George S. McCarty*, for defendant.

RAYMOND H. STEVENS *vs.* MERTON L. CHASE.

Kennebec County. Decided April 5, 1921. Soon after haying time in 1919, the defendant went to plaintiff's Fairfield farm seeking to buy hay. Declining to meet plaintiff's asking price he went away. A later conversation, on meeting in the highway, did not result in making a trade. In October, at the plaintiff's place, they entered into an oral contract concerning the subject, defendant paying as earnest the sum of $150.00. Now they are in disagreement regarding the terms of the agreement which they made. Plaintiff says it was agreed that he was to sell and the defendant to buy all the hay in a certain barn, excepting that contained in a specified mow, at the price of $16.00 a ton plus the benefit of advance in the market price, if any there should be, to the time of delivery during the winter on board railroad cars at Hoxie's siding; he to make delivery there after defendant had pressed the hay. Defendant's version is that he promised to pay $16.00 a ton, and no more, for all the hay in the barn; he to press it and the plaintiff thereafter to make delivery on the cars. Plaintiff further says that, in his absence from home one day in January, some of the excepted hay was pressed. This he retook for himself. The rest of that pressed, amounting to slightly more than thirty tons, was delivered in February; four hundred and fifty dollars in all having been previously paid on account of the purchase price.

Plaintiff sued on the contract as he claims it was made. Following a keenly contested trial, in which veracity became a determining

element, the jury awarded plaintiff damages in the sum of $301.00, which verdict the defendant moves by usual form motion to set aside.

The verdict is not palpably wrong. It may be a bit close on the facts in spots, but it is far from being obviously erroneous. Standing out in significant prominence in the testimony is the answer of the defendant as a witness, that, when the plaintiff, just before delivering the hay, inquired of him, over the telephone, as to whether he stood ready to pay the additional amount of the market advance, he instantly replied, "I aint said I aint going to."

Defendant has exceptions to refusal of the Judge to charge, in substance, (1) that if the jury found that plaintiff sold defendant all the hay that was pressed, then and in such event plaintiff would not be entitled to recover in the absence of proof of full performance on his part, or some sufficient reason for the want of it, (2) that a finding of the contract to be as defendant claimed would preclude recovery in the instant suit.

The Judge already had given equivalent instructions. Even had he not, the requested instructions were predicated upon findings of fact, against the existence of both of which it is plain, from the verdict, that the jury must have found. No injustice has resulted from the refusal to rule. Motion for new trial overruled. Exceptions overruled. *Carroll N. Perkins*, for plaintiff. *Percy A. Smith*, for defendant.

ADOLPHUS ORINO *vs.* ALBERT BELIVEAU.

Oxford County. Decided April 23, 1921. This is an action for money had and received and comes to the Law Court upon the following exceptions:

"This was an action of Assumpsit, wherein plaintiff, as assignee of one Oscar U. Sullivan, sought to recover the sum of six hundred and twenty-five dollars paid to defendant in satisfaction of a judgment in favor of said Sullivan against one Daniel H. McCafferty entered on Dec. 3, 1917, in the Supreme Judicial Court for Oxford County, and was tried by the Court without the intervention of a jury, right to

except as to matters of law being reserved, and after hearing the evidence submitted by the parties and the admissions made by them the Court found and decided and gave judgment in favor of the defendant and against the plaintiff and in and by said findings, decision and judgment ruled that defendant was entitled to credit for and on account of said sum of $625.00 for the following amounts, to wit, for the sum of $25.00 applied by defendant as due him for the costs of said action of *Sullivan* v. *McCafferty* and for the sum of $300.00 applied by defendant as compensation due him for his services as attorney for said Sullivan in said action under agreement made by and between said Sullivan and defendant, and for $280.97 paid Rumford Trust Co. and for $25.00 paid said Sullivan and to said rulings, findings, decision and judgment in so far as thereby defendant was found entitled to credit for said sum of $25.00 costs and for said sum of $300.00 as agreed compensation and to each of said rulings, decisions and findings plaintiff excepts and prays that his exceptions may be allowed."

Upon the facts, the Justice ordered judgment for the defendant. From that finding, it appears that the defendant had collected $625.00 on the judgment in favor of Sullivan and had paid out over $300.00 of it, on Sullivan's account and retained $300.00 for his services, under a contract which Sullivan claims to be champertous. The plaintiff, Sullivan's assignee, accordingly brought an action for money had and received for the recovery from the defendant of the $300.00. No question is raised as to the money paid out on Sullivan's account.

There is little question that the agreement between Sullivan and the defendant was champertous, under the provision of R. S., Chap. 124, Sec. 12. Many states however, hold the other way.

The defendant claims that, even though the agreement was champertous, he is entitled to receive the value of his services upon a quantum meruit. It is the opinion of the court, however, that he cannot so recover, and that, consequently, the three hundred dollars which he held in his hands should not have been allowed against the plaintiff's claim. Exceptions sustained. *Joseph E. F. Connolly, and Clinton L. Palmer,* for plaintiff. *Albert Beliveau, pro see,* for defendant.

BARNEY DOHERTY *vs.* ELIAS R. HUGHES.

Aroostook County. Decided June 25, 1921. Whether, as defendant asserted the fact to be, a mutual settlement between the plaintiff and himself, had before action begun, extinguished liability on his part, was the chief question of this case, as a jury dealt with it. No previous adjustment of their affairs, so the plaintiff replied, embraced the items involved here. Plaintiff and defendant alone testified. Other evidence there was none, excepting two paid promissory notes, and three small books of pocket size, the latter containing memoranda made by the defendant in relation to the business involved, about which the plaintiff cross-examined.

Defendant now urges, in his effort to have a usual form motion to vacate the verdict prevail, that the jury erred in finding against him. Perhaps it did so. But at the utmost he has shown seeming, rather than manifest error, and there is vast difference in the aspect and the import of the two.

No useful purpose would be served in attempting to trace out the exact avenue along which the jury traveled to finality. Be it sufficient to say that regarding certain bags and a bale of hay wire, for which the plaintiff declared as having sold and delivered, he failed to make proof, and therefore these items apparently were discarded. With relation to all other matters in dispute, it is plain that the plaintiff's version was received, excepting therefrom however, for some reason not presenting itself in the general verdict, the sum of somewhat more than twenty-one dollars. But this omission is of no avail to the defendant. It is of an undue assessment of damages, and not of an insufficient award, that he complains. Certainly the verdict is not glaringly erroneous. This lawsuit is ended. Motion overruled. *Herschel Shaw,* for plaintiff. *William S. Lewin,* for defendant.

C. C. PENLEY *vs.* LITTLEFIELD & SONS COMPANY.

Androscoggin County. Decided July 14, 1921. Action of assumpsit for the price of a hog alleged to have been sold and delivered. The plaintiff recovered a verdict. The case comes to this court on the

defendant's motion. The plaintiff's agent brought a live hog and left it at the defendant's slaughter house in Auburn. During the following night or day the hog died, without the fault of either party.

The plaintiff claims that the animal was sold and delivered to the defendant to be paid for at the rate of twenty cents per pound dressed weight. The defendant's contention is that the hog was left at its slaughter house after some negotiations about a sale but that there was no sale. The defendant says it was expressly agreed that the hog should be left at the plaintiff's risk. The jury accepted the plaintiff's version.

If a sale and purchase were intended by the parties and the hog delivered in pursuance of such intent, it matters not that the determination of the amount to be paid was deferred until after the slaughtering and weighing. The rule as stated in Benjamin on Sales, quoted by the defendant's counsel, is not decisive. More nearly in point are the many authorities cited in Bennett's Notes to the same work, sustaining the proposition that "where the whole thing sold is delivered it is reasonable to expect that the vendee will do the weighing, measuring, etc., and the title may pass even before he has done it." Benjamin on Sales, 7 Ed., Page 297. Whether the transaction wherein personal property is delivered is a completed sale or a mere bailment is a question of fact. In this case the jury have found this fact against the defendant. The verdict is not manifestly wrong. Motion overruled. *Frank A. Morey,* for plaintiff. *Ralph W. Crockett,* for defendant.

NATHAN GOLDSTEIN *vs.* JACOB SHAPIRO.

Cumberland County. Decided July 16, 1921. Action of assumpsit to recover commissions in the sale of real estate. The defendant filed a general motion to set aside a verdict rendered for the plaintiff. *Held:*

That the points in controversy were purely issues of fact and their decision depended largely upon the credibility of the witnesses. The verdict of the jury is supported by the evidence of the plaintiff if believed. This court cannot say that the jury manifestly erred in believing it. Motion overruled. *Max L. Pinansky,* for plaintiff. *Maurice E. Rosen,* for defendant.

FRED H. SHORT *vs.* PRESIDENT AND TRUSTEES OF COLBY COLLEGE.

Kennebec County. Decided August 25, 1921. The controversy in this case is essentially one of fact. With respect thereto men of equal intelligence, justness, and impartiality may reasonably differ. Submitted to ascertainment by a jury, decision was favorable to the plaintiff. The motion for a new trial does not survive the test of showing the verdict to be clearly, manifestly wrong. Motion overruled. *C. A. Blackington, and Mark J. Bartlett,* for plaintiff. *Carroll N. Perkins,* for defendant.

NICK GINGEROUS et al *vs.* D. E. MCCANN'S SONS.

Cumberland County. Decided October 25, 1921. Action for money had and received to recover the sum of six hundred dollars, partial payment made by the plaintiffs in the purchase of a second-hand automobile.

The plaintiffs alleged and claimed that the defendant corporation agreed to sell and deliver this car to them in good running order and that in consequence of its bad condition the car was wrecked soon after its purchase. The jury found in favor of the defendant, and the plaintiffs in their motion for new trial urge the single issue of the condition of the car.

Held:

That the evidence was flatly contradictory and its force depended very largely upon the credibility of the witnesses. The jury believed the testimony introduced by the defendant, and a careful study of the case fails to convince the court that their finding is clearly wrong. The car was evidently wrecked not because of its own defects but of the criminally reckless speed at which it was being driven in the attempt to pass another car around a dangerous curve. For this the defendant was not responsible. The verdict must stand. Motion overruled. *H. E. Nixon,* for plaintiff. *Henry Cleaves Sullivan, and Francis C. Sullivan,* for defendant.

BRUNSWICK MOTOR MART *vs.* MILDRED STROUT, Trustee.

Cumberland County. Decided November 25, 1921. Petition for partition of land in Brunswick of which the petitioner owns one-sixth and the defendant five-sixths in common.

Judgment for partition was rendered and commissioners appointed. The report of the commissioners sets off to the petitioner two contiguous parcels and to the defendant the remainder of the property. The report further finds that the parcels set off to the petitioner are of greater value than its share and awards $267 to be paid the defendant as owelty. No objection is made to this feature of the report.

For reasons hereinafter stated the petitioner moved that the report be recommitted. This motion was denied and the petitioner reserved exceptions.

The case discloses that the petitioner has occupied a part of the land at the corner of Middle and Elm Streets under two leases from its co-owner, and that the land set off to it by the commissioners is the same premises described as demised in the leases.

The bone of contention is a small parcel, fifteen feet wide on Elm Street. The petitioner in its bill of exceptions says: "According to the true construction of the leases as the petitioner claims they include while the construction of the commissioners excludes (the fifteen foot strip). The sole purpose of the exceptions is to correct this alleged error." The petitioner makes no claim under R. S., Chap. 93, Secs. 16 and 17.

Its contention is that properly construed the leases include the fifteen foot parcel; that the commissioners intended to set off to it all land leased including the parcel in question, and that through error they failed to do it.

But an examination of the evidence discloses no error. What the commissioners undoubtedly intended to assign to the petitioner was the land *described* in its *recorded* leases. This they did using descriptions precisely the same in effect as and almost identical in language with those contained in the leases. If the coveted parcels were included in the descriptions contained in the leases it would also be included in the part assigned to the petitioner. Not being so included it is not so assigned.

It is true that the parties interested, or some of them at the time the leases were given, believed that they included the fifteen foot strip. But this mistaken notion which was speedily corrected by survey cannot be assumed to have been taken by the commissioners as the basis of their partition.

The "true construction" contended for by the petitioner is reformation rather than construction. It may be that equity would compel a reformation of the instruments. But the commissioners adopted actual descriptions contained in existing leases not suppositious descriptions that might be contained in leases if reformed.

The commissioners found the petitioner in occupation of two contiguous parcels described in recorded leases. They determined that these parcels were more than equivalent to the petitioners one-sixth interest, but set them off to it subject to payment of owelty. The petitioner is not entitled to any more. The refusal to recommit deprived it of no legal right. In declining to recommit the report, the presiding Justice exercised a discretionary power vested in him.

No abuse of discretion and no denial of legal right is shown. Exceptions overruled. *Arthur J. Dunton, and Barrett Potter,* for plaintiff. *Wheeler & Howe,* for defendant.

MAUDE N. PACKARD, Aplt. from Decree of Judge of Probate.

Knox County. Decided November 7, 1921. Appeal from a decree of the Judge of Probate of Knox County, allowing a certain instrument as the will of Mary A. Norwood, late of Camden, deceased. The case was heard in the Supreme Court of Probate by the presiding Justice, without the intervention of a jury. The appellant requested a ruling that upon the facts presented the testatrix was not of sound mind when said instrument was made; this request was denied.

In a careful opinion the presiding Justice held (1) upon the issue of fraud and undue influence, that "there is not sufficient evidence of undue influence to outweigh the evidence of the counsel drafting the will that it was her own free and voluntary act;" (2) upon the issue of testamentary capacity: "I am, therefore, after considering

all the evidence, constrained to find that Mary A. Norwood was possessed of testamentary capacity on November 17, 1917, even though evidence of equal weight may cast doubt on her capacity at times even prior to that date;" and thereupon dismissed the appeal, and affirmed the decree of the Probate Court. The appellant has exceptions to said ruling, findings and decree.

The rule is firmly established that, upon exceptions to findings of the sitting Justice in the Supreme Court of Probate, upon questions of fact, if there is any substantial evidence to support the findings, the exceptions must be overruled. *Eacott Aplt.*, 95 Maine, 522. *Costello* v. *Tighe*, 103 Maine, 324. *Palmer's Appeal*, 110 Maine, 441. *Gower Aplt.*, 113 Maine, 156. *Cotting* v. *Tilton*, 118 Maine, 94.

A careful examination of the record discloses very substantial evidence to support the findings of the sitting Justice upon both issues presented. Exceptions overruled. *Z. M. Dwinal, and J. H. Montgomery*, for appellant. *A. S. Littlefield*, for appellee.

RALPH M. COLLEMER *vs.* PRESTON PLAYER.

Waldo County. Decided November 7, 1921. Action to recover damages for personal injuries suffered through alleged negligence of defendant. The plaintiff was employed by defendant, during the fall and winter of 1917-18 as caretaker on Mark Island, owned by defendant, off the coast of Maine about three miles from Dark Harbor. On the twenty-first day of January 1918 he returned to the Island from Dark Harbor in a motor boat during a cold, stormy afternoon. For hauling up the boat beyond danger from the sea, the defendant had provided a substantially constructed railway on which ran a car or cradle; this cradle was heavily weighted with stone that it might be run down the railway into the water beneath the boat; both were then hauled upon the railway to a place of safety, by means of a rope and winch. The plaintiff was injured while removing ice from the railway in order to let the cradle run down to the water.

The case is before the Law Court upon general motion by defendant to set aside a verdict for plaintiff. The testimony of the plaintiff is the only evidence as to the circumstances of the injury.

Upon a careful examination of the record the court is constrained to find that it entirely fails to sustain the verdict upon both grounds essential to the maintenance of the action.

1. *Alleged negligence of defendant.* The declaration charges negligence in that the defendant "provided for the plaintiff's use a cradle or run-way for handling and hauling out said boat which was unsafe, unsuitable and out of repair." The evidence shows that both cradle and railway were substantially built and in good repair; whatever slight repairs were needed from time to time had been made by the plaintiff in the performance of his duty as caretaker. The unsuitableness claimed was that the cradle was too heavy for one man to handle.

However, the plaintiff testifies that the winter was severe and that during that winter he used the cradle ten or twenty times, and that on the night when he was hurt his wife, a small woman, alone turned the winch and hauled up the cradle loaded with rock, so that he could get out from under it.

But the case shows affirmatively that his injury cannot be attributed to any unsuitableness of the railway or cradle but to the action of the elements, during a severe wintry storm. He testifies:

"Q. How far had you gotten the cradle down at the time of your injury? A. Probably half way or nearly half way.

Q. It was cold? A. Very cold; the sea coming up would make ice and it would freeze as fast as it struck. It would freeze right in the air.

Q. It was very cold? A. Yes.

Q. And was sleeting? A. Yes.

Q. And very wet? A. Yes.

Q. All the trouble you were having was caused by the weather? A. Caused by the weather and by the sea, I suppose that caused the sea to be bad.

Q. If you had not had such a cold day and such a sea running, you wouldn't have had any trouble? A. I had had a great deal of trouble before that with ice cakes.

Q. You can push those out of the way? A. You can if they don't weigh too many tons.

Q. So that the trouble you were having that night in the dark was with the elements, wasn't it? A. Pretty much.

Q. You don't blame Mr. Player for that? A. No, I don't blame Mr. Player for that, and I don't think it was any of my fault."

2. *Contributory negligence of plaintiff.* In that winter's storm the ice formed on the railway preventing the weighted cradle from running down to the water. The plaintiff accordingly slacked the rope for a foot or more and then removed the ice from the railway letting the cradle run down the length of the slack rope; he then repeated the operation. While so doing he placed himself directly in front of the cradle and was injured. He describes the accident as follows:

"Q. This particular time that you worked there some time, just tell us what you did immediately before you received your injury? A. Well, I let my rope out possibly a foot or a foot and a half, and I tried to pry it down with a stick I had, and I couldn't start it; and I took my crow-bar and went down in front of it.

Q. What do you mean by in front of it? A. The end that was going down toward the water.

Q. Where did you go down there? A. I went right down around the north side of it and knocked the ice off of the north rail.

Q. Where were you then, inside or outside of the rail? A. I was right outside when I was at the north rail.

Q. North of the north rail then? A. Yes, sir.

Q. What did you say you cleaned the ice off with? A. With a crow-bar.

Q. An iron bar? Is it square on one part of it? A. I think down towards the point it was square.

Q. After cleaning the north rail off, what did you do? A. Well, I started to go across to the other rail, and my foot slipped or both of my feet rather slipped, and when I slipped my feet went toward the table, and I suppose the bar I had in my hand—

Q. Never mind what you suppose,—what became of the bar you had in your hand? A. The bar I know hit the cradle, and as far as I know I hit it myself when I fell; and the cradle rolled on me and caught my foot.

Q. How far were you from the cradle when you were going across to the other rail? A. I should say, I always took precaution to be careful,—when I started I was probably two feet away, and but when I slipped I got too close to the cradle."

Also on Cross-Examination:

"Q. Just before you got hurt, if I understand you correctly, you took your crow-bar and went down in front of the car on one side and

knocked the ice off the rail on that side, and then passed across the track in front of the car to knock the ice off on the other side? A. Yes.

Q. And while you were on the track, your bar fell on the car or you fell on the car and the car came down on you? A. Yes.

Q. What made the car start up so suddenly? A. The bar that struck the car.

Q. You had removed the cakes out of the way? A. The cakes were out of the way because I had removed those out of the way.

Q. You had got the ice off of one track? A. Got it off of both as I supposed.

Q. You say you had loosened the rope up on the top so that the rope was slack? A. Yes, sir.

Q. The rope wasn't holding the car? A. No.

Q. The car was loaded with rock frozen on and was very heavy? A. Yes, sir.

Q. And the car was on that track? A. Yes, sir.

Q. And you had removed the cakes of ice from in front of that car and you removed the ice as far as you could from both tracks? A. Yes, sir.

Q. And knowing that, you walked in front of that car? A. Yes, sir, because I knew there was ice on the other rail, I didn't know how much, but I knew there was ice there."

Such voluntary exposure to danger falls nothing short of negligence. The cradle was not over twelve feet long and by going around the upper end he would have avoided all danger; the ice would not have appreciably increased in the time required to do so.

The verdict is so clearly wrong as to require us to set it aside. Motion sustained. Verdict set aside. New trial granted. *A. S. Littlefield*, for plaintiff. *Andrews, Nelson & Gardiner*, for defendant.

GUY D. FOSTER *vs.* HERBERT G. DIBBLEE.

Aroostook County. Decided November 16, 1921. The plaintiff bought an automobile of the defendant, the purchase price being $450.00, of which sum $225.00 was paid in cash and the balance by

delivery to the defendant of plaintiff's promissory note for $225.00 due in six months. The automobile was held as collateral security for the payment of this note. The plaintiff claims that before the maturity of the note he sold the same automobile back to the defendant for $225.00, which sum the plaintiff claims the defendant agreed to pay when the latter should have sold the automobile, and got his pay for same. The plaintiff claims that the defendant finally sold the car but that the latter refused and still continues to refuse to pay the plaintiff the sum of $225.00, or any part thereof.

The defendant denied the claims of the plaintiff and the trial upon issues of fact resulted in a verdict for the plaintiff. The defendant's motion for a new trial is based entirely upon findings upon issues of fact which have been passed upon and determined by a jury who saw the witnesses and heard them testify. After careful examination of the record we are not able to say that the jury so manifestly erred that we should be justified in setting aside the verdict. Motion overruled. *R. W. Shaw,* for plaintiff. *W. S. Lewin,* for defendant.

ALLEN L. SHAW et al. *vs.* JOHN STEWART.

Lincoln County. Decided November 18, 1921. Trespass quare clausum. Ownership of the locus is claimed by both parties to the suit. Both agree that John Huston once owned a large tract including the parcel in dispute, and that upon his death it descended to his children who divided it among themselves by deeds. The plaintiff claims under Josiah Huston one of the heirs, and the defendant claims under another heir named John.

In 1836 all of the heirs including John united in a deed to Josiah. The disputed line is a part of the Southern line of the property thus conveyed. The record title depends upon this deed. Earlier deeds and instruments are superseded. Contemporaneous and later deeds do not change nor purport to change the line.

The line in dispute begins at a stake and stones (being the terminus of the next preceding call) and "thence running West 23 rods and 7 links to the town road."

The burden was upon the plaintiff to prove the location of this line. Its location depends of course upon where the stake and stones are or were. The rest is simply the running of a line due West. The jury evidently found that the plaintiff had failed to sustain the burden. This conclusion is not manifestly erroneous. The plaintiff also set up title by adverse possession. The jury were abundantly justified in finding the evidence insufficient to establish such title.

We have carefully read and examined all of the testimony and exhibits, but as the only questions in the case are questions of fact interesting only to the parties, we have not deemed it profitable to extend this opinion by a recital or analysis of the evidence. Motion overruled. *George A. Cowan,* for plaintiff. *M. A. Johnson, and A. S. Littlefield,* for defendant.

RULE OF COURT

STATE OF MAINE

SUPREME JUDICIAL COURT

In vacation as of the
June Law Term,
Portland, 1921.

ORDER OF RESCISSION

ALL THE JUSTICES CONCURRING,

ORDERED: That the Rule of Court requiring the filing of affidavit by plaintiffs before the issuing of judgment or decree against defaulted defendants, which was established in accordance with the Act of Congress approved March 8, 1918, be and hereby is rescinded, as the occasion therefor has ceased to exist.

By the Court,

LESLIE C. CORNISH,
Chief Justice.

July 30, 1921.

STATE OF MAINE

SUPREME JUDICIAL COURT.

TO THE CLERKS OF THE SEVERAL COUNTIES:

In order to establish a uniform practice in the taking of bail by Bail Commissioners it is ordered:

Every Bail Commissioner upon taking bail shall either endorse upon the warrant or precept upon which the prisoner is held the following facts:

Date and place (town or city) of taking bail.

Court and term at which prisoner is required to appear.

Offense of which he is accused.

Amount of bail.

Names and residences of principal and each surety; or if the bail is taken after arrest and before the issuing of a warrant, shall forthwith deliver to the officer having the prisoner in charge a printed memorandum signed by such Bail Commissioner of the following form:

STATE OF MAINE.

.....ss.

Memorandum of Recognizance

Date.....

Offense.....

Amount of Bail $.....

Returnable.....

.....of.....Principal.

.....of.....Surety.

.....of.....Surety.

.....Bail Commissioner.

All recognizances taken by Bail Commissioners shall be reduced to writing in the usual form and be certified to by the Commissioner and returned to the County Attorney or to the Magistrate or Clerk of the Court at or before the time at which the principal is required to appear.

The Clerks of the several Counties shall forward a copy of the above order to each Bail Commissioner within his County.

LESLIE C. CORNISH,
Chief Justice Supreme Judicial Court.

July 28th, 1921.

STATE OF MAINE

Supreme Judicial Court. In Law Term at Augusta, 1921
December 23, 1921.

It is ordered that the following Equity Rule be adopted, viz.:

DISPOSITION OF DORMANT CASES.

A cause in Equity remaining on the docket for a period of two years or more without any action therein being taken, shall be dismissed for want of prosecution unless good cause is shown to the contrary.

By the Court,

LESLIE C. CORNISH,
Chief Justice.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE LEGISLATURE APRIL 7, 1921, WITH ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THEREON.

STATE OF MAINE

IN HOUSE OF REPRESENTATIVES

April 7, 1921.

In accordance with report of joint committees on Judiciary and Military Affairs accepted in the House of Representatives April 5, 1921, on Bill an Act entitled, "AN ACT TO CREATE THE NATIONAL GUARD PAY FUND."

ORDERED, the Senate concurring that, according to the provisions of the Constitution of this State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give this Legislature their opinion on the following questions:

QUESTION No. 1. Is Chapter 101 of the Resolves of 1917, taken in connection with the intention of the Legislature in passing said Resolve as expressed by the motions and speeches regarding it in the official stenographic records, repealed by Chapters 276 and 277 of the public Laws of 1917?

QUESTION No. 2. If said Resolve is not so repealed, did compliance by the State with said Chapters 276 and 277 constitute compliance with said Chapter 101?

HOUSE OF REPRESENTATIVES
April 7, 1921
READ AND PASSED
Sent up for concurrence
CLYDE R. CHAPMAN
Clerk.

IN SENATE CHAMBER
April 8, 1921
READ AND PASSED
L. ERNEST THORNTON
Secretary.

A true copy,
Attest: L. ERNEST THORNTON,
Secretary of Senate.

TO THE LEGISLATURE OF MAINE:

The undersigned Justices of the Supreme Judicial Court hereby give the following answers upon the questions submitted under joint order of the Senate and House of Representatives finally passed on April 8, 1921.

QUESTION No. 1 is as follows:

"Is Chapter 101 of the Resolves of 1917, taken in connection with the intention of the Legislature in passing said resolve, as expressed by the motions and speeches regarding it in the official stenographic records, repealed by Chapters 276 and 277 of the Public Laws of 1917?"

Answer.

Chapter 101 of the Resolves of 1917 reads as follows:

"RESOLVE, RELATING TO PAY FOR NATIONAL GUARD AND NAVAL RESERVES OF THE STATE OF MAINE.

PAY OF NATIONAL GUARD AND NAVAL RESERVES. RESOLVED: That there shall be paid from any funds in the State treasury to each person who shall enlist and each person now enlisted in the National Guard of the State of Maine, and who shall be mustered into the service of the United States on the quota of this State, not exceeding the sum of one dollar for each and every day he shall be in the service of the United States during the existence of war or during the existence of a state of war. Such sum shall be paid to such person at the expiration of his service upon cessation of the state of war; or if such person shall have any person or persons dependent upon him for support said sum shall be paid monthly to such dependents as the soldier shall designate."

APPROVED APRIL 7, 1917.

The history of the legislation is as follows:

This Resolve was introduced in the House of Representatives on April 2, 1917, and in its original form provided a definite sum of "one dollar for each and every day," instead of "*not exceeding* the sum of one dollar for each and every day."

The resolve was tabled on April 2d for twenty-four hours to await the drafting of the so-called military laws.

On April 3d it was taken from the table, and after some debate, the draft of military laws not having been completed, it took its two readings in the House and was tabled on its passage to be engrossed. Later in the same day the resolve was taken from the table, and upon the reported suggestion of the Governor was amended, so that the amount should read "not exceeding the sum of one dollar" instead of "the sum of one dollar" and was then passed to be engrossed in the House. It was finally passed in both branches and was approved April 7, carrying an emergency clause.

Public Laws, 1917, Chapter 276.

An Act to provide for the support of Families of Volunteers.

This Act authorized the cities, towns and plantations in the State "to raise money by taxation or otherwise to be applied to aid in the support of the wife, aged, infirm and dependent father, mother or other member of the household of which a soldier, sailor or marine is the head and children under the age of fifteen years, being inhabitants of such city, town or plantation, of any soldier, sailor or marine, who may be actually in the military or naval service of the United States or of this State . . . . the money so raised to be expended under the direction of the municipal authorities . . . ."

Then follow provisions for the amounts to be paid, the method of payment and accounting and reimbursement by the State.

This bill, which carried an emergency clause, was introduced in the House on April 6, 1917, by the same member who introduced the resolve, Chap. 101, already considered, and at the time of its introduction this member stated that when the proper time arrived he would move the indefinite postponement of the prior resolve. But such indefinite postponement was not subsequently moved. The

resolve was finally passed and this bill was finally enacted both being approved on the same day, April 7.

Whether this was because of an excusable oversight amid the rush of business in the closing days of the session or whether it was afterwards decided that, because of the elastic provision in the resolve as amended as to amount, its passage could do little practical harm, it is of course impossible to state. In any event the resolve was duly passed and was not expressly repealed.

Did the passage of Chapter 276 repeal it by implication? We think not. In order to effect a repeal by implication "the later statute must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject matter and to displace the prior statute, or the two must be so plainly repugnant and inconsistent that they cannot stand together. . . . The Court will if possible give effect to both statutes and will not presume that the Legislature intended a repeal." *Eden* v. *Southwest Harbor*, 108 Maine, 489.

In the first place, it is impossible to state whether Chapter 276 was approved by the Governor subsequently to the approval of the resolve, or the resolve was approved later than the act It is this approval which gives life to all legislative enactments. Both the resolve and the act were approved on the same day and "nothing appearing to the contrary they are presumed to have been approved contemporaneously." *Stuart* v. *Chapman*, 104 Maine, 17.

Even if the act was in fact approved subsequently to the resolve it does not necessarily displace the resolve. They are neither repugnant to nor inconsistent with each other. To illustrate. The resolve provides for the payment of no definite sum. The amount cannot exceed one dollar per day, but it may be any sum less than that. The act specifies definite amounts. The resolve provides for the payment of the whole to the volunteer himself at the end of the service if he has no dependents; if dependents, then monthly payments to such dependents as he shall designate. The act contemplates no payments to the volunteer himself, but only to dependents. The resolve provides only for volunteers who are mustered into the United States service by way of and through the National Guard; the act provides for all volunteers, whether soldier, sailor or marine, who shall be in the military or naval service either of the United States or of this State.

It is apparent from a study of the resolve and the act that they can stand together, especially as the amount under the resolve is wholly within the power of the legislature. The resolve, therefore, was not impliedly repealed by the passage of Chapter 276.

Chapter 277.

An Act to provide State Pay for Soldiers and Sailors in the Volunteer Service of the United States.

This Act provided for the payment by the State to each non-commissioned officer, soldier, sailor and marine mustered into the military service of the United States as a part of the quota of this State or enrolled in the naval service . . . a sum not in excess of ten dollars per month, as may be necessary, in order that every such non-commissioned officer, soldier or sailor shall receive from the United States and this State in the aggregate the sum of twenty-five dollars per month.

This sum was to be paid monthly at the office of the Adjutant General and to continue until March 1, 1919, unless the service was sooner terminated.

This bill was introduced in the House on April 6, 1917, was passed to be enacted in both branches and was also approved on April 7, contemporaneously with the Resolve and Act already considered.

Under the rule of legal construction already stated it is evident that this act did not repeal by implication the resolve. It was passed in order that the pay of enlisted men might be increased to $25 per month until the National government should increase the pay to that amount, but not after March 1, 1919, or the expiration of service. This act had no connection whatever with dependents.

Our answer to Question No. 1, as to the repeal of Chapter 101 of the Resolves of 1917 by Chapters 276 and 277 of the Public Laws of the same year must be in the negative.

Question No. 2.

"If said resolve is not so repealed, did compliance by the State with said Chapters 276 and 277 constitute a compliance with said Chapter 101?"

Answer.

We cannot answer this question categorically. It is not so much a matter of law as of morals and good faith. This the Legislature must determine after a careful consideration of all the facts, having a due regard to the rights of the volunteers on the one hand and of the people of the State on the other. Possibly the amendment to the resolve leaving the precise amount undetermined was made in anticipation of this very situation. In any event the determination can now be made by the Legislature in the light of all the circumstances.

Very respectfully,

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

LUCILIUS ALONZO EMERY

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT BANGOR, JUNE 7, 1921, IN MEMORY OF

HONORABLE LUCILIUS ALONZO EMERY,

FORMER CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT, BORN JULY 27, 1840, DIED AUGUST 26, 1920.

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

Resolutions of the Hancock Bar, and the remarks of HARRY L. CRABTREE, Esq., a member of the Hancock County Bar Association, in presenting them:

MAY IT PLEASE YOUR HONORS:—

Representing the Bar of Hancock County it becomes my sorrowful part at this time to address the court in memory of our beloved and revered former Chief Justice, LUCILIUS A. EMERY, who completed his work on earth and appeared before the Supreme Court above on the twenty-sixth day of August, nineteen hundred and twenty.

LUCILIUS ALONZO EMERY was born at Carmel, Maine, on July twenty-seven, eighteen hundred and forty. Upon his graduation

from Bowdoin College in eighteen hundred and sixty-one he began the study of law by reading in the office of A. W. Paine of Bangor, and in August, 1863, he was admitted to the Bar of Penobscot County. He came to Ellsworth during the following October, at once became enrolled as a member of the Hancock County Bar, and from thence forward remained a citizen of Ellsworth until the day of his death.

His ability as a lawyer soon brought him to the forefront, and in 1867 he was invited by the late Senator Eugene Hale to become his law partner; and the law firm of Hale and Emery became a power, a force to be seriously considered and reckoned with in legal circles in Maine.

Mr. Justice EMERY served his County and State as prosecuting attorney for Hancock County, State Senator and Attorney General for the State of Maine. He was elevated to the Bench of the Supreme Court of Maine in 1883 and was three times reappointed Associate Justice. Upon the death of former Chief Justice Wiswell in 1906, Justice EMERY was appointed Chief Justice and held that high office until his resignation from the Bench in 1911.

It was my privilege to number him among my friends from the very beginning of my experience as a lawyer. I was admitted to the Hancock County Bar at a term of court over which he presided, and from that day forward until his death there was no one of my professional brethren to whom I would so quickly go for consultation and wise counsel—sure of a hearty and sincere welcome. He was ever ready to give his help to a young lawyer, and despite his somewhat austere mien, we who knew him best never hesitated to ask, at any time, for his keen, crystal-clear opinion on intricate legal points, knowing full well that he loved to render assistance to us.

As a jurist his deep knowledge of the basic principles of the law, his keen perception and ready grasp of the issues involved in the cases brought before him, and his unexcelled ability to express himself in clean-cut English has caused his many written opinions to be regarded by the Bench and Bar alike as examples of the very high degree of perfection to which judicial opinions may be carried.

He was a deep thinker and was bountifully endowed with that peculiar attribute which enables its possessor to follow a line of thought to its proper and logical conclusion, quickly and unerringly—and having once decided in his own mind respecting the merits of an argument, or the salient points in a case, he never avoided opposi-

tion, but would fearlessly and boldly proclaim his views, even though he found a large majority arrayed against him.

Although last summer he had reached the age when men realize that their days are indeed numbered, yet to us, his friends, the knowledge of his death came as a great shock. He was a virile man, and, in our office, but a very short time before, had completed the details of a business matter in which he was interested, in the same firm, masterful manner which had always characterized his business dealings, and then he seemed no nearer departure from this life than did the much younger men who conferred with him at that time. Although his physical powers were weakened, perhaps, yet his splendid mental forces remained unimpaired up to the hour of his spirit's departure from this world.

A power for the establishment of truth, a mighty fortress of legal and judicial strength, a just judge, a good man—God rest him!

And now, with the permission of Your Honors, I will present the following resolutions:—

Whereas, our distinguished brother and former Chief Justice of this Court, LUCILIUS ALONZO EMERY, has passed on, after a life full of years and of high accomplishments, be it therefore

RESOLVED,—That in his death the Bench and Bar of this State recognize the loss of one of its most eminent brethren—one who as lawyer, as Associate Justice and as Chief Justice contributed much to raise and sustain the dignity and worth of both Bench and Bar in our State, and who, in his individual, family and civic life has left an impress that will long endure; be it further

RESOLVED,—That these resolutions and the proceedings accompanying them be made a part of the records of this Law Term, June, A. D., 1921.

HENRY M. HALL,
HARRY L. CRABTREE,
WILEY C. CONARY,
Committee on Resolutions.

Remarks of CHARLES H. BARTLETT, Esq., of the Penobscot Bar.

MAY IT PLEASE THE COURT:

When invited recently to take part in these exercises a scene of forty years ago came to my mind—the old court house in Ellsworth on the western hill, one of those historic buildings so regretfully abandoned in the march of progress. A trial was in progress. A dark, spare man, dressed in black, was opening the case to the jury. This was MR. EMERY, about two years afterwards appointed a Justice of this Court.

I was then a law student in the office of Wilson & Woodard. Mr. Woodard, having occasion to consult MR. EMERY over a law case, was to drive by carriage to Ellsworth and asked me to accompany him, which I did, and there in the evening met MR. EMERY at his office for the first time. It was the next morning when we visited the court house and saw MR. EMERY addressing the jury. The only thing I can recall about his remarks was that he made some reference to Shakespeare, but to what play and its application to the case I fail to recall. It may be of passing interest to state that the case which Mr. Woodard was to consult him about, which I think had then been tried and was going to the Law Court, was a case in which Wilson & Woodard were for the plaintiff and Hale & Emery were for the defendant and involved the construction of the words "including all the privilege of the shore to low water mark" contained in the defendant's deed. This was the case of *Dillingham* v. *Roberts*, which the Law Court decided in favor of the defendant as carrying a fee.

When I was admitted to the Bar, Judge EMERY had been appointed to the Bench only a little over a month and was one of several new appointments made about that time, the others being Messrs. Foster and Haskell who were appointed the next year.

I recall that the first nisi term at which Judge EMERY presided in this county was a criminal term, at which two Italians were convicted of murder committed in the outskirts of Brewer on the line of the railroad then being constructed to Ellsworth and Mt. Desert Ferry.

In later years I came to know Judge EMERY quite well so as to be able to form somewhat fixed ideas as to the salient traits in his character. He always impressed me as being one of those diligent

men, of good parts, who had made the most of his mentality, and such certainly are entitled to more credit in this life than great intellects who may slide through life without so much effort and are often dilatory and even lazy.

On such occasions as these we like to dwell upon the best characteristics of our departed brothers and provide if we can inspiration for those of us who are left behind and for those who are to succeed us, and in doing so it is our duty to make just judgments of character rather than flowery eulogies which are sometimes not substantiated in fact.

To my mind the foremost characteristics of the late Chief Justice were promptness, industry, (he was one of the most industrious men I ever knew) love of progress, and last, but not least, a desire to do even-handed justice. His mind seemed to work in a quite strictly legal way and a rule was a rule to him, to which he was loath to concede any exception, and if he erred it was not because he did not strive to do exact justice but rather because he felt bound by a rule of law or procedure in which exceptions had but small place. In court the leaders of the Bar were held as accountable as the humblest member, and while some were restive under what they may have considered undue interference with their methods, yet the desire of our late Chief Justice was for the orderly and expeditious trial of causes for the benefit of the community rather than for the pleasure of the Bar.

Some years ago, after the legal reform in England, Judge EMERY visited there and had the benefit of the acquaintance of eminent English Judges and an opportunity to study the procedure in the English Courts and see more clearly how our own practice could be improved.

I have spoken of his love of progress. He always had much of the teacher in him as well as of the scholar—one desirous to learn. This led him to lecture at Bowdoin, at our local Law School and at Yale, and the characteristics entered into his court duties. This was not from any vanity but from an inherent impulse to share his wide information for the benefit of others and this benefit has been great.

Just Judge—industrious and conscientious—Good Citizen—Good Husband and Father. He has gone to his reward. His memory will be cherished and the passage of time will not dim his attainments as a lawyer and a judge.

Remarks of WILEY C. CONARY Esq., of the Hancock Bar.

MAY IT PLEASE YOUR HONORS:

It is my pleasant, and at the same time sad duty to second the resolutions submitted to your Honors in commemoration of our late Chief Justice EMERY. We meet under the shadow of a common sorrow. Were I to speak of Justice EMERY'S eminent ability at the Bar, or of his distinguished services as Associate and Chief Justice of this court, or of his high merit as a citizen, I should only affirm what has been much more ably expressed than I could hope to do by my brethren of the Bar who have preceded me. I desire, however, on this occasion to add my tribute to the memory of one who, for many years, was my friend and adviser on many legal problems. I believe he inherited an aptitude for the law and a strong determination to pursue that profession, and never to rest until he had gained that eminence in it, which became the ruling principle of his life. He had confidence in his powers and never hesitated, after carefully forming his opinions, to stand by them to the uttermost. He loved the State of Maine, its institutions, had a profound belief in and respect for the law, and his devotion to the profession is conspicuously shown in his work and opinions, now standing as a landmark, so to speak, in the Maine Reports.

It was my good fortune to try many cases in Judge EMERY'S Court, and I can never forget how much I owe to him for his faithful instruction and wise counsel during my term of office as County Attorney, and for these I shall always remember him with feelings of the most profound respect and gratitude.

From the time of my admission to the Bar, to the time of his death, I always knew him as one to whom I could freely go for counsel and aid, and in his death I mourn not only the loss of an eminent member of the legal profession and judiciary, but the loss also of a sympathetic and personal friend. I am sure all younger members of the Bar will especially feel the loss of Justice EMERY. For them he was ever ready to open the rich stores of legal information which he had at command, and to assist them by his counsel in the intricacies of the profession.

We shall all miss him. The affairs of the state are influenced for good by his having lived. The brave and strong are rapidly

passing away, yet the affairs of the world do not stop. The horizon of the greatest mind is limited. To part during life, or by death, is sad, but hope of reunion dulls the sting of separation. Let it be simply farewell, to Judge EMERY.

Since God in his love
For his children denies
The glimpse of the end
To humanity's eyes,
Let each bravely answer
Life's manifest call
And rely on the Lord
For the end of it all.

Remarks of CHARLES W. HAYES, Esq., President of the Maine State Bar Association.

MAY IT PLEASE THE COURT:

LUCILIUS A. EMERY, whose admirable life and life-work, we are assembled to commemorate, and whose death we sincerely mourn, was endowed by nature with a logical mind, a giant intellect, and to an unusual degree, the capacity to acquire, retain and dispense wisdom. During his long life, he so occupied his time and talents as best to round out the true man.

Kindly in disposition, and courteous to all, he endeared himself to the Bench, Bar, and all with whom he associated.

Scholarly, with a mind polished and adorned with much good reading and study, he charmed all who came within the sphere of his activities.

His mental attainments, energy, and untiring industry, would have raised him to eminence in any calling in life. As a writer, because of his pure diction, his excellent rhetoric and knowledge of human virtues and frailties, he could easily have been a peer among American men of letters.

In Academic pursuits, because of his great learning and love of culture and knowledge, he would have become eminent among the professors of our best universities.

But we, the Bench and Bar of Maine, are glad today that he chose the profession of the law, and gave to the state of his nativity the benefit of his time and great talents to that profession whose activities tend most to the good of the whole people.

And we are also glad that he accepted a position on the Bench of Maine; a body always composed of able men, where he labored for nearly twenty-eight years as Justice and Chief Justice of that august and distinguished tribunal, so faithfully and ably. The Bar of the state and of the nation are indebted to the late Chief Justice EMERY for his expositions of law in his many opinions as reported in the Maine Reports. What wealth of learning those opinions contain! How logical the reasoning and how conclusive his arguments!

All those things the court knows better than we and we doubt not, rely upon his opinions and arguments with the same confidence as we.

Familiar with our form of Government in its every detail, knowing its history and its purposes, he viewed the Constitution of the United States not only through the eyes of a lawyer and a Judge, but through the eyes of broad-minded statesmanship.

His work in the little book published after his retirement from the Bench entitled "Concerning Justice," is worthy of being read and reread not only by those who are uninformed as to our principles of government, but by those of us who have given it mature study, and published as it was at a time when those high in authority were attempting, in the name of Progress and Liberty, to institute a system of government which would tend to make the tenure of Judges depend on the popular will, this work was timely. The light of his logical reasoning dispelled the obscurity of opposing argument, and demonstrated that the continuance of human liberty as established by our fathers, depended on an independent judiciary.

A great man has passed from earth, but his work will live so long as law and justice shall remain as a guide to, and an attribute of, humanity.

Tribute by Judge CLARENCE HALE of the United States District Court.

MAY IT PLEASE THE COURT; MR. CHIEF JUSTICE, AND BRETHREN OF THE BAR OF MAINE:

I thank you for asking me to join with the Court and the Bar of Maine in paying a tribute of respect and affection to the departed Chief Justice. He was my friend for more than half a century. In the autumn of 1869 I began the study of law with him in the office of Hale and Emery, at Ellsworth, where he and my brother practiced for many years. I was just out of college; I needed the discipline which he was so well fitted to give. He was my law school. I could not have had a more painstaking instructor. He attended to all the details of instruction. Every Saturday afternoon he went over me with great thoroughness. I thought he was didactic; I knew he was careful. He showed the contempt for half knowledge which the Bar of Maine learned to know so well in future years. I soon found that I had an accomplished teacher; but I am afraid I had no adequate notion of the broad range of philosophy, literature and legal attainment that MR. EMERY had, even when he was not quite thirty years old. It was only as life went on, and I saw more and more of his personal side, that I learned to appreciate his mind and character. He was an eminent scholar, a profound lawyer; but he was never legalistic. He knew how to relieve the stress of law study by wide general reading. He accepted the teaching of the old English jurist that no man could be a lawyer, in the largest sense, until he had entered upon the wide fields of learning that lie outside the curriculum of law study.

Judge EMERY'S career at the Bar and on the Bench has been clearly and well portrayed by my brethren who have just spoken. I want to say a word about his last years. Judge EMERY was fortunate in his old age. After a long life at the Bar and on the Bench he was vouchsafed a period for study and reflection. His mind was capable of appreciating this boon. While he was on the way from the great task of judging others to the Tribunal where he

himself was to be judged, he loitered lovingly by the roadside. These were his best years. In them he showed his range of research and of scholarship.

An eminent writer, in a late number of the North American Magazine, has said that Longfellow's "Morituri Salutamus" should be revised, and that Lord Bryce, by his *Magnum Opus*, written in his eighties, has added another member to that family of old men who have done great deeds. Judge EMERY did memorable things in *his* old age. At almost eighty he wrote his book "Concerning Justice." He had a right to discourse on justice, for he had been its faithful servant for a long life. His book is a memorial of mature thought and profound scholarship. During these later years he wrote, also, a series of papers on Ancient Trials in Greece and Rome, and a "Discourse on the life and death of Socrates." His mind broadened and deepened with his life; even to the last it was constantly active and alert under the discipline of labor. You remember that Mr. Joseph Choate, in his last years, said he did not like to have it said of him that, without labor, he had achieved anything worth doing. Judge EMERY is an object teaching of what the disciplined mind may achieve by constant effort. He strove for his education; he strove for his opportunity in life; he strove for his leadership at the Bar; he strove for the judicial excellence which made him an eminent Chief Justice; he strove to the end.

In the last years of his life it was my privilege to be associated with him as a Trustee of Bowdoin College, and in many business and social relations. Even then, I always found that his mind was constantly under stress; he was always working out something. During the last two years I saw much of him in Boston where he spent his winters, and was in close companionship with certain men of wide culture who became deeply attached to him, and who, even now, refer in tender tones to the evenings they spent with Judge EMERY, where the wide scope of his literary and historical research enriched and ennobled his conversation. I shall always be glad that I had the privilege of his intimate companionship in these last years. In the history of the State he will always be remembered as one of Maine's great Chief Justices.

Mr. Chief Justice, I am glad I could be here today, and say a word in appreciation of my life-long friend.

Address by Former Chief Justice WHITEHOUSE.

MAY IT PLEASE THE COURT:

Since the last session of this Court, we have been called upon to mourn the passing of one who had been a distinguished member of it and for four years and a half its Chief Justice, and had been engaged directly or indirectly in the public service during nearly the entire period of his adult life; and the occasion would be deemed manifestly incomplete if we failed to commit to the permanent records of the court an appropriate memorial to commemorate the life and public service of former Chief Justice LUCILIUS A. EMERY, who died at his summer home near Bar Harbor on the 26th day of August, 1920, at the advanced age of eighty years and one month.

Judge EMERY was born in Carmel, Penobscot County, Maine, July 27, 1840, and was graduated from Bowdoin College in 1861. With a serene and splendid courage he promptly entered upon the study of the most exacting and important of all the learned professions, and pursuing it with untiring industry, was admitted to the Bar in Bangor in 1863. He immediately settled in practice at Ellsworth, and identified himself with the public life of the community in which he lived, and of the County and State. He was elected County Attorney at the age of twenty-six and formed a partnership with the late U. S. Senator, Eugene Hale in 1869. He was a member of the State Senate at the age of thirty-four and Attorney General of the State at the age of thirty-six. In all of these positions he performed his duties with conspicuous fidelity and ability, reflecting credit upon himself and honor upon the State. In the Legislature his service was notable for the successful effort which he made to procure legislation conferring upon the Supreme Court of the State full equity jurisdiction and powers and rendering the procedure in both law and equity more simple, speedy and effective.

"The world," says Mr. Emerson, "is full of judgment days, and, into every assembly that a man enters, in every action he attempts, he is gauged and stamped." Judge EMERY had been promptly recognized as a young man of superior natural endowments and fearless integrity, and as a young lawyer of splendid promise; and he had continually added to the public estimate of the fullness of his learning and strength as a lawyer. He was known to be an extensive

reader of general history and a diligent and discriminating student of the history and philosophy of the law and of political science; and at the close of his service as Attorney General he was recognized as one of the leading lawyers of the State.

Thus when a vacancy occurred on the Bench of the Supreme Court of Maine in 1883, Hon. LUCILIUS A. EMERY was at once recognized as eminently qualified to fill the vacancy, and he was accordingly appointed an Associate Justice of that Court on the 5th day of October, 1883.

He came to the Bench of the Supreme Court fully qualified by intellectual endowments, liberal culture and experience at the Bar to render eminent judicial service to the State and make an honorable career for himself. He brought with him besides, not only high ideals of the honor of the legal profession and the dignity of the law and exalted conceptions of the judicial character and functions, but also the capacity and disposition for prolonged and arduous labor as well in the trial court as in the examination of the law for the preparation of the opinions of the Law Court. He also had the courage of his convictions and the faculty of clear and methodical statement which is ordinarily developed by clearness of apprehension. Thus, at the end of each juridical year his desk has disclosed no work unfinished, no duty unperformed.

At nisi prius he stated the law to the jury with absolute impartiality, in clear and simple language, without encroaching in the slightest degree upon their province to decide the issue of fact, but with a singleness of purpose to have the law correctly determined and the truth discovered and declared. He never forgot the distinction pointed out by Chief Justice Marshall that "judicial power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law."

It was his firm conviction that punctuality in the discharge of all public and official duties, and correct deportment and courteous manners in the court room have a tendency to facilitate the administration of the law as well as to enhance the respect that is due to the court, and he endeavored with all reasonable vigilance and appropriate methods to discountenance any disregard of such commendable and dignified practices. The ameliorating influence of his discipline in that behalf has been distinctly observable.

But his judicial opinions as a member of the Law Court, found in thirty-two volumes of the Maine Reports from the 76th to the 107th, constitute an enduring monument to his great intellectual gifts, the extent and variety of his learning, his accurate knowledge of the common law and his faculty of adapting its flexible principles to new enterprises, new developments and new conditions in industrial and social life. My attention was first attracted to the excellence of his work in the Law Court when in the second year of his service upon the Bench, his opinions in the important cases of *Eames* v. *Savage*, and *Andrews* v. *King*, appeared in the 77th Maine Report. The former involved a discussion of constitutional law and it was held that upon judgments against municipalities, execution may be issued against and levied upon the goods and chattels of their inhabitants and that this would be "due process of law." *Andrews* v. *King*, was a petition for certiorari to quash the proceedings of the Mayor and Aldermen of Portland in removing the City Marshal from office. The nature, powers and duties of special tribunals in such cases are fully considered and it was held that a hearing by the Aldermen alone, the Mayor being required to sit on the hearing, was not sufficient, even if no objection was made by the officer. *Warren* v. *Westbrook*, in the 86th Maine, is a leading case upon the exercise of the equity powers of the court in the apportionment of waters where there are two natural channels in a river caused by an island. In the subsequent opinions will be found luminous expositions of constitutional law relating to interstate commerce, the police power of the State and other questions of fundamental and far-reaching importance. In the opinion of the Justices prepared by Chief Justice EMERY in 1907, in answer to questions submitted by the Senate, this court, true to the motto of the State, led all others, State and Federal, in promulgating the beneficent doctrine of the conservation of our natural resources in the interest of the people. It is there held to be within the constitutional power of the Legislature to restrict or regulate the cutting of forest trees on wild or uncultivated land by the owner thereof, without compensation to such owner, in order to prevent injurious droughts and freshets and preserve the natural water supply of the State.

In all of these opinions his generous intellectual gifts, his vigorous original reasoning, the ripe fruits of his varied experience and his robust moral principles were employed to crystalize into judicial

decrees the justice of the State which has been made luminous by reason and conscience, and advanced to its ends with calm deliberation and the dignity and strength of impartial law. He was deeply impressed with the importance of the doctrine of stare decisis, as necessary to maintain the stability of the law and enable counsellors to advise with reasonable certainty and men of affairs to act with a reasonable sense of security. But he was a progressive jurist in the true sense of the term and never hesitated to recommend new legislation or adopt a new rule, which distinctly appeared to be an improvement either in substantive law or methods of procedure. Change is ever going on in a ceaseless round. Bewildering discoveries and developments are constantly being made involving radical changes in nearly all departments of human activity. Conservative as the law and the courts must necessarily be, they are compelled to catch the spirit that animates the progress of society and to keep in sympathy with the advancing thought and progressive tendencies of the age. But it will not fail to come to the younger generation as it has to us of the older that the principles of simple truth and justice and the instinctive conceptions of common right upon which in the last analysis, the protection of human rights and the redress of human wrongs must be founded, will remain the same from generation to generation now and forever.

Judge EMERY continued to serve as Associate Justice until December 14, 1906, when upon the decease of Chief Justice Wiswell, he was appointed Chief Justice and served in that capacity until June 28, 1911, when he voluntarily retired under the provisions of our statute.

At the banquet tendered to him after his retirement, in July, 1911, he said in his address to the Association:

"I carried to my place upon the bench beliefs and ideals formed during twenty years of study and practice, during fifteen years of which I had the benefit of association with that eminent lawyer and statesman, ex-Senator Hale. I beg leave to state some of them, not that the beliefs were correct or the ideals high, not that they were different from those of other lawyers and judges, but to indicate the motives of my judicial action. I believed then, and believe now, that the Court should first of all be loyal to the law, as expressed in the Constitution, the statutes, and the long accepted judicial opinions; that its justices should completely subordinate to that law their own views of principles and even of justice. I believed then, and believe

now, that the Court should regard the constitution as the supreme law and should enforce each of its guaranties of liberty or property against all efforts to override them, even against combined efforts of executive and legislature, though backed for the time by public opinion. I believed then, and believe now, that when the official comes in conflict with the citizen, the court should hold the official responsible to the citizen for all acts outside, or in excess, of his lawful authority in the premises, and should also hold him shorn of the protection of his precept if he neglects to execute it promptly and fully.

"On the other hand, I believed then, and believe now that the Court should not question the wisdom, nor even the justice, of acts of the executive within the law, nor of acts of the legislature not in conflict with some Constitutional provision, but should allow them full force and effect whatever the consequences. Further, I believed then, and believe now, that the Court should recognize that, except so far as the people have in the Constitution guaranteed the inviolability of personal and property rights, those rights are subject to such control, and even limitation, as the legislature may adjudge expedient for the public weal. Still further, I believed then and believe now, that where not bound by Constitution, statute or settled judicial rule, the Court should strive to develop principles consonant with modern conditions and enlightenment. I also believed then and believe now, in each justice of the court preserving his individuality; in his announcing his dissent from the majority in cases where he deems the principles important and the majority opinion erroneous and harmful. I think dissenting opinions are useful. If the majority opinion be sound, the dissenting opinion will only make that soundness more apparent. If the majority opinion be unsound, its unsoundness should be at once disclosed, and a contemporaneous dissenting opinion may serve that purpose. A majority opinion that will not stand firm upon its reasoning and authorities, unshaken by any dissenting opinion, should not be the majority opinion. Lastly, I believed, and still believe, that whatever the inconvenience to the state and the people, the Court and its justices, in obedience to Article III of the Constitution, should resist every attempt of the executive or the legislature to exercise judicial power, and should in turn refuse to exercise any executive or legislative power, though the legislature may require them to do so. So

long as the Court keeps, and is kept, strictly within the judicial field, it will be respected and loyally sustained; but it cannot enter other fields, whether by trespass or invitation, without danger to its dignity and authority.

"I also had beliefs and ideals as to the functions, duties and responsibilities of the presiding justice at nisi prius. I believed he was bound to obey faithfully the injunction of the Constitution that in this State 'right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.' I believed that while he was the servant of the law and the State, he was not the servant of the Bar or of the jury, but that they were to assist him in the search for the truth, whether of law or fact. I believed he was more than the chairman of a meeting or the umpire of a game, and had vastly greater powers and duties. I believed he should be the master in his court and control its proceedings; should himself be prompt and alert and insist on promptness and alertness in others; should insist on the respect due the court, on due order and decorum in the courtroom, on due observance of established rules of procedure.

"Of course I have not always lived up to these beliefs and ideals. Often, undoubtedly, I have seemed to ignore them. But who of us has always lived up to his ideals? Who of us has always been consistent? Let him who is without this sin cast the first stone.

"Undoubtedly, also, in the effort to carry out my views I have been at times exacting and severe, and have hurt. This has not been from unkindness nor from indifference, but solely from regrettable and regretted impatience of temperament and forgetfulness that my words or manner might needlessly wound. As the returned traveler soon forgets the annoyances encountered in his journey, so I hope, now that our journeying together as counsel and judge has ended, you will forget the annoyances I have caused you."

No eulogy upon the life of Chief Justice EMERY is required. He retired from the Bench in the fullness of labor and of fame. He erected his own monument more enduring than bronze. The deep impress which he made upon our jurisprudence and upon the public and professional life of the state will perpetuate his memory to generations beyond ours and cause his name to be inscribed among the highest on the roll of Maine's learned jurists and honored and successful magistrates.

After his retirement from the Bench he continued his service as lecturer in Roman law at the Maine College of Law, and to give lectures on a variety of legal questions in other law schools and clubs in New England. Some of his most learned and important opinions on constitutional questions were also given during this period, thus illustrating the poet's lines that—

"Age is opportunity no less
Than youth itself, though in another dress,
And as the evening twilight fades away,
The sky is filled with stars invisible by day."

In the words of the great dramatist in Henry VIII, with which he was familiar, Judge EMERY may contentedly have wished for

"No other speaker of his living actions,
Save an honest chronicler."

And the last sentence of the biography of Agricola by Tacitus, as liberally translated by Lord Campbell at the close of his life of Lord Mansfield, may be remembered here:

"All that was amiable in him, all that was admirable, remains and will forever remain, being narrated in the annals of his country, and embalmed in the remembrance of a grateful posterity."

Judge EMERY possessed the Christian faith which always "sees
The stars shine through his Cypress trees;"

and in his last conscious moments he doubtless recalled the closing stanza of Henley's "Late Lark singing," with which he was also familiar:

"So be my passing;
My task accomplished and the long day done
My wages taken and in my heart
Some late lark singing
Let me be taken to the quiet West
The sundown splendid and serene."

In November, 1864, Judge EMERY was married in Hampden, Maine, to Anne S. Crosby, who was born March 2, 1840 and died in Ellsworth, December 12, 1912. Judge and Mrs. EMERY were the parents of two children, viz.:

1. Anne Crosby Emery born January 1, 1871. She was graduated from Bryn Mawr College in 1892 and is now the wife of Prof. Francis Allinson of Brown University, Providence, R. I. She is an accomplished and successful authoress.

2. Henry Crosby Emery, born December 26, 1872 and graduated from Bowdoin College at the age of 19. He was professor of political economy at Bowdoin, 1894, 1900; professor of political economy at Yale, 1900-1909; Chairman of U. S. Tariff Board 1909-1913, and author of "Speculation on the Stock and Produce Exchanges in the United States;" Columbia University Studies, 1896. He is now connected with the Guaranty Trust Company of New York.

Response for the Court by Chief Justice LESLIE C. CORNISH.

BRETHREN OF THE BAR:

Oftentimes on occasions like this, when we meet to honor a friend and associate who has left us, the sorrow of an unfinished life broods over us like a pall and deep grief fills all our hearts. But today, while we sadly miss the familiar form that was with us in this court-room as an interested spectator only one year ago, yet his life was so rounded and complete, his days were so filled with worth-while labor, and the pale messenger had so kindly refrained from calling him until four score years had been completed, that the universal sentiment here this afternoon is one of thanksgiving for what we have received rather than of mourning for what has been withheld.

LUCILIUS A. EMERY, ninth Chief Justice of Maine, was born in Carmel on July 27, 1840, and that town was his home until he was ten years of age when his family removed to Hampden. His boyhood days were fettered neither by poverty nor riches, and he was permitted to live the life of the normal country boy of that period and to grow up in that helpful environment into the independent, self-reliant and ambitious young man. He fitted for college at Hampden Academy and graduated from Bowdoin with high rank in the class of 1861, one of the famous classes of that institution and

one whose cohesive strength has shown itself in its regular reunions down through all the years. It was a source of distinct gratification to Judge EMERY that its semi-centennial found him serving as Chief Justice of his native State.

After graduation Judge EMERY was fitted for his profession in the office of Honorable Albert W. Paine of Bangor, a familiar and honored name in the courts of this State for more than sixty years, and was admitted to the Penobscot Bar at the August term, 1863. He selected Hancock County as the scene of his professional labors, and Ellsworth as his future home. In October, 1863, he entered into partnership with Samuel Waterhouse, Esq., an old-time practitioner, and the docket of that October term contains the firm name of Waterhouse & Emery. The first time that Judge EMERY's name appears in the Maine Reports is in the case of *Walker* v. *Osgood*, 53 Maine, 423, in which the firm of Waterhouse & Emery is recorded as counsel for the plaintiff. The amount involved was twenty dollars, and the future Chief Justice won. The amount involved in Chief Justice Shaw's first case in the Law Court was five dollars, *Young* v. *Adams*, 6 Mass., 182, and the future Chief Justice lost.

Judge EMERY's rise in his profession was gradual and constant. He served as County Attorney four years, from 1867 to 1871, and in the midst of his first term formed a partnership with Honorable Eugene Hale. The burden of a large practice, however, soon fell upon the junior partner as Mr. Hale began his long and distinguished Congressional career in 1869, serving as representative for ten years and as United States Senator for thirty years. But the burden fell on receptive, willing, and competent shoulders. In fact it was not a burden to him because he loved the law and delighted in its study and practice. In 1876 he was elected Attorney General and most creditably filled that high office for three years. He served in the State Senate three terms, in 1874, 1875, and again in 1881, the last year as Chairman of the Judiciary Committee. Thus equipped through twenty years of close, studious and active practice, supplemented by official duties which were strictly along the line of his profession, he was appointed Associate Justice of this court on October 5, 1883, at the age of forty-three, seven years younger than the average of appointees. A continuous judicial service of twenty-eight years followed, of which during a little more than twenty-three he was Associate and a little less than five he was Chief Justice of this

court, his Chief Justiceship beginning on December 14, 1906, and ending with his resignation on July 27, 1911. For length of service upon this Bench he has been exceeded by only two of all the fifty-one Justices, by Chief Justice Appleton with his thirty-one years and Justice Walton with his unequalled term of thirty-five years. The people of this State received the fruit of Judge EMERY's judicial labors through the richest part of his life, from the age of forty-three to that of seventy-one. The value of this contribution to the common welfare cannot be over-estimated. The profession and his associates recognize it full well and we are met this afternoon to make record of our appreciation.

What then shall we say of Chief Justice EMERY, of his character and characteristics and judicial work? How was he distinguished from his fellows? What is the physical and mental picture of him which those who knew him best would be content to leave upon the printed page as true to fact?

The physical portrait is outstanding. Of something more than medium height, of slender figure, of apparently delicate health, of scholarly and cultured countenance, of reserved and dignified bearing, there was an atmosphere of scholastic distinction about him that was unmistakable. He could well be regarded as of the type of the old time college professor whose companions were books rather than men. A photograph taken when he was about sixty years of age shows him at his best and reveals clearly the man as he was.

What of his mental characteristics? In the first place, above all else, Judge EMERY during all his mature life was a student. He loved good books. He revelled in them. When he felt at home in your house he would drift around from shelf to shelf as among old friends. He was fond of history and philosophy and the law appealed to him as much as a science, a consistent and logical system of thought, as it did a means of applying justice to the affairs of men. The academic element was stronger in him than the practical. I have heard him say that he disliked to decide facts, that all facts looked alike to him, but he loved the determiniation of a legal proposition. Throughout his life and up to his very last days he maintained the habit of pursuing some course of solid reading outside the realm of the law, while in the realm of law he did not confine his study to the cases before the court but kept abreast of what might be termed the legal trend of the times and the thought of the best legal writers.

He loved travel, not as the seeker for mere amusement but for self-improvement, and his various foreign trips all brought back their cargo of enriched thought and experience. He enjoyed the society of cultured men and women and when in England sought the acquaintance of the Judiciary, sat with them upon the Bench, learned their customs and got himself in touch with the fountain of our jurisprudence. He did the same in this country and his acquaintance among the distinguished jurists of the United States was extensive. In fact he might be termed not a social but an intellectual aristocrat.

In the second place, his mind worked like a logical machine. Grant his premises and the conclusion was irresistible. It was a singularly clear vision that he had of a legal principle and in its development he shot with unerring aim. In consultations during the Law Court it was a pleasure to listen to his summing up of the arguments on either side of a legal proposition. He dissected it with the deftness and skill of a legal surgeon, and perhaps in truth it should be added that the consequent pain to the patient did not cause him to swerve a hairbreadth from what he deemed the legal line. He was fond of quoting the old maxim that hard cases too often make shipwreck of the law. He was inclined to be technical, and he believed in deciding but a single point if that would dispose of the case.

In the next place, Judge EMERY possessed a literary style of crystalline clearness. The mind of the reader easily follows the development of a principle when the mind of the writer perceives it distinctly, pursues it logically and expresses its thoughts simply and directly. Such power of expression was his, and it early attracted the attention of the profession.

Take for instance, the case of *Andrews* v. *King*, 77 Maine, 224, involving the removal of a police officer for cause, and the legal method of procedure. It is a landmark, one of those helpful cases to which the profession turn for assistance and guidance. It never fails of citation and quotation when this subject is before the court.

Another illustration is *Eames* v. *Savage*, 77 Maine, 212, involving the constitutionality of the statute authorizing executions upon judgments against municipalities to be issued against and levied upon the property of the inhabitants, a case taken to the United States Supreme Court on writ of error but not pressed there. 131 U. S., 435. This opinion discussed the legal history of municipal corporations and due process of law under the Federal Constitution. Certain

striking sentences in the opinion are so characteristic of the author as to warrant quotation: "The barons and the people insisted on general laws, leges terrae, on uniformity, due process of law. They insisted on law however harsh as better security than the prerogative power however indulgent. These phrases did not mean merciful nor even just laws, but they did mean equal and general laws, fixed and certain." This well represents Judge EMERY's undeviating devotion to the law as law, divorced from sentiment and policy.

Other instances of notable opinions revealing the characteristics we have described are: *Warren* v. *Manufacturing Co.*, 86 Maine, 32, and 88 Maine, 58, holding jurisdiction in the court in equity to make partition of water rights among riparian owners; *Miller* v. *Packing Co.*, 88 Maine, 605, prescribing pleading and practice under the law and equity act of 1893, for the passage of which he was largely responsible; the Town of Foxcroft note cases, so called, 91 Maine, 367; liability of a stockholder for difference between actual and agreed value of property paid by him for shares, where no fraud is shown, *Gillin* v. *Sawyer*, 93 Maine, 151; the careful explanation of the procedure in mandamus, *Hamlin* v. *Higgins*, 102 Maine, 510; the opinion of the Justices in 103 Maine, 506, holding constitutional an act restricting and regulating the cutting of trees on wild land in order to conserve the water supply, a doctrine rather more progressive than Chief Justice EMERY was accustomed to promulgate, and the case of *State* v. *Butler*, 105 Maine, 91, holding unconstitutional an act authorizing the Governor to establish the public office of special attorney for the State.

If we are to summarize Chief Justice EMERY's judicial characteristics and the things for which he stood, we are not left to conjecture. We have the statement from his own pen, deliberately and thoughtfully made for this very occasion.

At the close of the Memorial Services for the late Chief Justice Savage at the Portland Law Court in July, 1917, former Chief Justice EMERY who had taken a most important part in paying merited tribute to his former Associate, came back to the Judges Chambers and said to me, "What will you say about me when I am gone?" I replied that I hoped that day was far distant and perhaps it would never be my duty, but I added half in jest, because the occasion was becoming too solemn, if it does fall to my lot I shall tell the truth.

The next January he wrote to me, as he frequently did about various matters, and in the course of his letter said this: "I recall with something of a shiver your statement that when you replied for the Court at my obsequies you would tell the truth. I hope this does not mean that you would tell the whole truth, who of us wants that told? I trust however you will find it consistent with truth to say that I stood for the constitutional rights of the individual, for the strict performance of his duty by the official, and at the same time sought to speed up and make less costly legal procedure. I really would like something of that kind to be said and made a part of the record." I now gladly fulfill the injunction then made and I know that you all concur with me in emphasizing these three things for which Chief Justice EMERY always consistently stood, the constitutional rights of the individual, the strict performance of official duty and the prompt and inexpensive administration of law. It is all true and it is hereby most properly made a part of the record.

One of the finest tributes ever paid to the Supreme Court of the United States in a single sentence was that once rendered by the late Chief Justice White when he characterized it as "the offspring of the devotion of our forefathers to human liberty and their genius in creating institutions for its perpetuation." In this sentiment as applied to our own court Chief Justice EMERY would concur. He had the highest regard for the court as an institution, for its duties, responsibilities and obligations, and no member of the Bench was more solicitous for the maintenance of its proper dignity and decorum in the court-room or did more than he for their promotion. He was largely responsible for the adoption of the rule of court requiring attorneys to stand while examining or cross-examining a witness. This was not in vogue when I came to the Bar and was not adopted until after he came to the Bench. Like all innovations, however admirable, this did not meet with ready favor on the part of certain free and easy practitioners, but that fact did not deter Judge EMERY. The rule was adopted and enforced and I venture to say that the Bar would now be most reluctant to revert to the former undignified practice, a practice formerly in vogue in Massachusetts also as Dickens remarks with unfavorable comment in his American Notes.

Judge EMERY was nothing if not punctilious. He was impatient with lax and dilatory methods. He was insistent upon attorneys being familiar with the state of their docket at the opening of court

and upon their readiness for trial. This sometimes led to a bit of friction but its effect was healthy upon the whole. While he for the time being may have incurred the displeasure of some of the Bar his associates on the Bench fell heir to the good results. They have not ceased to profit by his performance of many similar duties that were in a measure not agreeable.

Again Judge EMERY was fond of rules and was glad to be governed by them. He did not relish discretionary power, but preferred to consider himself bound by some unyielding rule, rather than exercise his own choice. "You must treat with your adversary, I am powerless," was not an infrequent remark of his to an attorney who might be asking the granting of some motion. When the rule was adopted granting the right of trial at the first term if due notice was given therefor, judicial temperament construed it differently. To Judge EMERY it was inflexible, while to Chief Justice Peters it meant that trial could be had if both parties were ready and willing.

I speak of these peculiarities of Judge EMERY not in the spirit of criticism but as a part of a fair portrayal. None knew them better than he himself, and after his retirement he often referred to them when addressing gatherings of the Bench and Bar. He never apologized for them however, and we would not have had him do so. It is simple justice to say that no member of the court within the past half century at least has done more to raise the standard of court practice and decorum than he. The improvement is a daily and permanent tribute to his memory. It should be further said however, that when the preliminaries were over, assignments made and a cause opened for trial, he presided with marked impartiality and held the case to its proper channel. He ruled promptly and squarely. He preserved to all their legal rights. The cause moved on with precision from the reading of the writ to the rendering of the verdict. His presence on the Bench was graced by a natural dignity which rendered it impressive. He was not austere but there was a certain reserve about him that might be mistaken for austerity. His court-room was quiet and orderly. A tap of his pencil or a significant pause was all that was needed to insure proper decorum. In short, at nisi prius he was prompt, punctilious and somewhat strict as to what some might deem the non-essentials, but the essentials were also preserved with impartiality and justice.

However, it was as a member of the Law Court that he accomplished most. The appellate work was agreeable to him. I doubt if the nisi prius terms were. And as a member of the Law Court his record is notable. His first opinion was in *Doyen* v. *Leavitt*, 76 Maine, 247, his last in *Gilbert* v. *Gerrity*, 108 Maine, 258. While Associate Justice he wrote three hundred and twenty-four opinions and four dissents, as Chief Justice, eighty opinions and five dissents, a total of four hundred and fourteen, contained in thirty-three volumes. These stand as the truest estimate of his judicial ability and place him among the great jurists who have adorned this Bench. This is the plaudit for which he cared most. To him vox populi was not vox Dei. In fact he was quite indifferent to the vox populi. His solicitude was for the jus populi and its maintenance was the goal of his judicial life.

Of his family life it is not proper here to speak further than to say that his happiest hours were passed in his home surrounded by family and friends and books, and that the scholarly attainments of wife and children were to him a constant source of congenial pleasure. The conferring of honorary degrees by his alma mater upon his only son, at one time a professor at Yale and member of the United States Tariff Board, and his only daughter, a graduate of Bryn Mawr, and at one time Dean of the Woman's College in Brown University, touched him with pardonable pride, constituting as it did a quite unprecedented event in academic circles. To Bowdoin College Judge EMERY was loyal and devoted. He served for many years upon her governing Boards and his service was not perfunctory and honorary, but thorough and effective. In the best interests of his home town Judge EMERY was vitally concerned. The schools, the public library and the church were all objects of his solicitous care.

I well remember the day at the Portland Law Court when for the last time he laid aside his judicial robe, never to be assumed again. It was a solemn moment, but he accepted it with his usual philosophy, and entered upon his final decade, as Chief Justice Emeritus, with courage and good cheer, and the years still continued rich for him and useful to others. He never reentered practice, but he lectured before the Law School of the University of Maine and of Boston University, and in 1914 was highly honored by an invitation to deliver the course of Storrs Lectures at Yale. He accepted and the printed volume "Concerning Justice" which he dedicated to his

children, (his wife having passed away in 1912) is the worthy result. That volume constitutes his mental and judicial autobiography. Free from official restraint, he could give expression to the thoughts which were the residuum of a long life of study and reflection. The golden text was his definition of justice as "the equilibrium between the full freedom of the individual and the restrictions thereon necessary for the safety of society." Though prepared when the author was seventy-four years of age these lectures bear no mark of waning intellect or slackening powers.

And so the Chief Justice walked down through the sunset hours of an acquiescent old age to the golden gate, fond of the here but unafraid of the hereafter. Never robust, at the last a fatal disease fastened itself upon him and he realized its significance. He recognized the inevitable and had the courage to face it. He talked about it to his friends as he would speak of any other fact in human experience and always with cheerful resignation. On July 27, 1920, he celebrated his eightieth birthday with friends at his summer home at Hancock Point, and entered as he wrote me into "the honorable and select society of octogenarians." That was the last letter that I ever received from him. One month later, after a brief illness, on August 26th, he passed away and a long, honorable and useful life had come to a peaceful close.

If I have made this response too personal and too intimate let my excuse be that our friend was the first Chief Justice under whom I served and his helpful criticism and kindly encouragement during the years that we were together brought us into close personal relations and rendered me his grateful debtor. That intimacy was maintained after he retired and now as the final word is spoken, let it be one of appreciation, respect and honor for a man who will always be remembered in the history of this State as one of its foremost citizens and most eminent jurists.

The resolutions of the Bar are gratefully received and shall be entered upon the records of this court, and as a further mark of respect this court may now be adjourned for the day.

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AGENT.

A railroad company is not bound by an agreement made by a local freight agent, to purchase at face value, goods in the hands of consignees, damaged in transit. *Gauthier* v. *Hines*, 476.

ALIENATION OF AFFECTIONS.

Under the Statutes of Maine an action for alienation of affections cannot be maintained by a married woman against a male defendant.
Howard v. *Howard*, 479.

ANNULMENT OF MARRIAGE.

A woman who marries, when, unknown to her husband, she is pregnant with a child by another man commits a fraud which vitiates the marriage and is ground for its annulment on petition by the husband. It is none the less a reason for annulment if the parties to the marriage have before its consummation had sexual intercourse. *Jackson* v. *Ruby*, 391.

APPEAL.

The proper procedure by a party aggrieved by a decree of a judge of probate exercising equity jurisdiction is by appeal to the Supreme Court of Probate, and not by direct appeal to the Law Court. *Norris* v. *Moody*, 151.

An appeal from a decree of a single Justice in determining the value of the shares of a minority stockholder, cannot be taken to the Law Court, but shall be heard at the next term of the Supreme Judicial Court in the county where proceedings are pending.
Fenderson v. *Franklin Light & Power Co.*, 231.

A bill in equity to construe a will cannot be sustained upon the complaint of any person, executor or otherwise, unless the construction may effect his rights in person or property, or unless it may effect the performance of his duties under the will as executor, trustee or otherwise.

It follows that an appeal by an executor in such procedure cannot be sustained.

An appeal by a guardian ad litem from a decree of the sitting Justice, when made in his own name as principal cannot be sustained, as he is but an agent of the wards, and in a proper appeal the wards should appear as principals and the appeal made in their name by the guardian ad litem.
Webb v. *Dow*, 519.

The findings of a sitting Justice in equity proceedings upon questions of fact necessarily involved are not to be reversed upon appeal unless clearly wrong, and the burden is on the appellant to satisfy the court that such is the fact; otherwise the decree appealed from must be affirmed.

Norton v. *Berry*, 536.

APPOINTMENT OF RECEIVERS.

Where express power is given by statute, to issue an injunction, both temporary and permanent, the court is authorized to appoint at the same time, or at any time during the continuance of the injunction, one or more receivers to wind up the affairs of a corporation.

Savings Bank v. *Railway Co.*, 108.

ASSAULT AND BATTERY.

How far, an officer having made an arrest, may go in his search of the person of the respondent and his removal from the person, the possession of personal effects, is a question of fact for the jury depending upon the law, the facts and circumstances of the particular case, in which, the alleged search and justification are involved. *Paradis* v. *Beaulieu*, 70.

ASSESSORS OF TAXES.

Assessors of taxes may correct an error by them made in making the original assessment, and such correction if of such a nature as to decrease the amount of the tax as assessed originally, is not an abatement within the meaning of the law. Embracing property exempted under the law in the valuation constitutes such error, which may be corrected.

Belfast v. *Hayford Block Co.*, 517.

ATTACHMENT.

An attaching officer may attach an indivisible article of personal property, though of much greater value than the amount he is directed to attach, if debtor has no other property, or no other property is shown to him by debtor, provided he acts in good faith and not with an intent to harass or oppress.

Devereux v. *Silsby*, 362.

AUTOMOBILE.

BAILMENT.

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BOUNDARIES.

The principles of law involved in this case are well settled. What are the boundaries of land conveyed by a deed, is a question of law. Where the boundaries are, is a question of fact.

An existing line of adjoining tract may as well be a monument as any other object. And the identity of a monument found upon the ground with one referred to in the deed, is always a question for the jury.

If an existing line of an adjoining tract is mentioned in a deed as a boundary, it is the true line which is such boundary. *Murray* v. *Munsey*, 148.

A line fixed and agreed to by the original owners of adjoining lots of real estate is necessarily the true line between their successors in title.

Kingsbury v. *Beeler*, 531.

BROKER.

A real estate broker to be entitled to a commission must produce a customer not only willing, but prepared to purchase and pay for the property at the price and on the terms given by the owner to the broker; or if no terms were then made, on terms satisfactory to the owner.

Until a broker produces such a customer the owner may at any time, if acting in good faith, withdraw the property for sale from the broker's hands; and even though he sells the property later to a customer produced by the broker and thereby avails himself of some of the results of the broker's efforts, he is not liable to the broker for a commission on the sale, if the property was withdrawn by him in good faith and before the broker had brought the negotiations to a successful conclusion.

A broker's right to a commission is fixed at the time of his discharge, if done in good faith. If, at the time of his discharge, his efforts have not been successful, he has not earned a commission.

Grant et al. v. *Dalton*, 350.

CHARITABLE BEQUESTS.

Bequests to missionary societies for the diffusion and inculcation of the Christian religion are within the realm of public charities as defined by the court. Bequests "to other moral and useful associations" not defeated, being for charity, by failure to specify in name such associations.

Prime v. *Harmon*, 299.

CONSIDERATION.

Every contract not under seal requires a consideration to support it, that is, some benefit to the promisor or some loss or detriment to the promisee, otherwise a contract is nudum pactum.

Congregation v. *Savings Bank*, 178.

CONSTITUTIONAL DEBT LIMITATION.

Where two or more municipal corporations or political bodies are wholly or partly coincident in territory, they are nevertheless regarded as separate bodies for the purposes of constitutional debt limitation unless the contrary is expressed in the constitution. The constitutional requirement is met, if the municipality or district enjoying special benefits from a public improvement is required to bear the burden of a greater percentage of tax caused by such improvement than the state at large, provided such percentage is not disproportionate to the special benefits that will accrue to it.

Hamilton v. *District*, 15.

CONSTRUCTION OF SPECIAL ACTS.

The right to construct and maintain a bridge with a draw, suited to the purposes of navigation, implies the right on the part of the municipal officers to employ all the necessary and proper means for the execution of that purpose, including plans and specifications for the construction of the proposed bridge.

Merrill v. *Harpswell*, 25.

CONSTRUCTION OF WRITTEN EVIDENCE.

See *Gray* v. *Richards*, 183.

CONTRACT.

An offer by letter, accepted by letter containing the request, "I would be glad if you would send your check for $1,000 to bind the trade," followed by the reply, "I will mail you check for $1,000 in a few days," constitutes a completed contract, although the check was never sent.

University of Maine v. *Pratt*, 7.

As a general rule a person is liable in damages for non-performance of an unqualified contract to do a lawful thing, notwithstanding the performance may have been rendered impossible by inevitable accident subsequent to the

CONTRIBUTORY NEGLIGENCE.

See *Dyer* v. *Power & Light Co.*, 411.

CRIMINAL CONVERSATION.

In civil actions for criminal conversation, marriage between the parties, one of whom is bringing the suit, must be strictly proved.

An unauthenticated and unexemplified document from another State, purporting to contain a marriage record and to be signed by a person purporting to be a city clerk is inadmissible in this State to prove the marriage.

Reed v. *Stevens*, 290.

CRUEL AND ABUSIVE TREATMENT.

1. If the attempt on the part of a husband to have his wife committed to an insane asylum although unsuccessful, is made in good faith and in the sincere belief that she is in such an unsettled mental condition that her own good and that of her family require confinement and treatment in such an institution, such an act lacks the essential element of cruel and abusive treatment as a cause of divorce.
2. If on the other hand the husband without just cause wilfully attempts to have his wife committed to such an institution, such conduct on his part seriously affecting her health, would constitute cruel and abusive treatment within the meaning of the statute. The motive which prompts the proceedings is the controlling factor.
3. Assuming the facts disclosed in the evidence for the libellant in this case to be true, she was entitled to a decree of divorce as a matter of legal right.

Michels v. *Michels*, 395.

DAMAGES BY FIRE.

For injury done to the property of another by fire communicated by a locomotive engine the user of the engine is liable, a statute making it in effect an insurer.

Sanatarium v. *Railway Co.*, 99.

See *Hutchins* v. *Penobscot*, 281.

DEDICATION OF RIGHT OF WAY.

See *Littlefield* v. *Hubbard*, 226.

DEFECTIVE HIGHWAY.

Sufficiency of notice required by R. S., Chap. 24, Sec. 92, relative to a defect in a highway, is a question of law to be passed upon by the presiding Justice, and when instructions by the presiding Justice to the jury on the sufficiency of such notice are not erroneous, exceptions will not lie.

Spencer v. *Inh. of Kingsbury*, 174.

DELIVERY.

In sales of personal property where vendee already has possession, or the property is in the tortious possession of a third person, a delivery, either actual, constructive, or symbolical, is very essential, as against third parties. Actual delivery should be made without laches when it can be reasonably and consistently.

Property, title to which has actually passed from vendor to vendee, may, however, be left by vendee in possession of vendor for a specific purpose. Delivery is a question of fact and no hard and fast rule determining it can be laid down.

Bridgham v. *Hinds*, 444.

DIRECTION OF A VERDICT.

A presiding Justice should direct a verdict when upon the evidence a different verdict could not be sustained. *Pike* v. *Smith*, 512.

DIVORCE LIBEL.

The trustee process in this State is a writ of attachment and a libel for divorce may be inserted therein for service.

The use of it may be limited by the residence of the trustee, but it is no less an appropriate process whenever the court may thereby obtain jurisdiction of all the parties.

A proceeding for divorce is not a real action. It is not necessary to decide in this case whether it is a personal action within the meaning of Sec. 1, Chap. 91, R. S. as the Legislature might authorize its use in other cases at any time which it is held was done under Chap. 122, Public Laws, 1862, now Sec. 3, Chap. 65, R. S.

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See *Jackson* v. *Ruby*, 391.

FRAUDULENT REPRESENTATIONS.

When a fiduciary relation exists between two parties, it is not necessary to prove specific fraudulent representations to obtain relief in a court of equity, where there has been an unfair and unjust transfer of property or property rights from the confiding dependent to the superior confidant. *Stanley* v. *Shaw*, 483.

GUARDIAN AD LITEM.

See *Webb* v. *Dow*, 519.

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See *State* v. *Paige Touring Car*, 496.

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See *State* v. *Paige Touring Car*, 496.

IMPEACHMENT OF ONE'S OWN WITNESS.

One may not by general evidence impeach the competency and credibility of his own witness, but may show by other witnesses, or by direct or re-direct examination, that the facts are otherwise than the witness testified to, for the rule never contemplated that the truth should be shut out and justice perverted. *State* v. *Sanborn*, 170.

INTENT.

See *State* v. *Sanborn*, 170.
See *Gregg* v. *Bailey*, 263.

INTOXICATING LIQUORS.

See *State* v. *Paige Touring Car*, 496.

JUDGMENT.

Parties and privies are estopped by a judgment. The term privity denotes mutual or successive relationship to the same rights of property. As a general rule, a judgment by a court of competent jurisdiction, directly upon the point, is as a plea at bar, or as evidence, conclusive and binding between the same parties and their privies upon all properly alleged matters embraced within the issue in the action, and which were or might have been litigated therein.

It is immaterial whether issue actually was joined by defendant, or tendered him and left unanswered. The rule applies as well to a judgment by default, when the facts stated warrant the relief sought, as to one rendered after contest.

Maddocks v. *Gushee*, 247.

See *Hersey* v. *Weeman*, 256.

JURISDICTION.

A state may neither broaden nor narrow the limits of maritime law and admiralty jurisdiction, that being of the law of the United States.

But the State of Maine in enacting the Workmen's Compensation Act has not presumed to encroach or trench upon a power which the people of the United States conferred upon the nation. The statute is optional or elective and not mandatory as to those within its purview.

Acceptance of the provisions of the law creates a contractual relationship between employer and employee in which they mutually substitute for rights and liabilities that the law would imply from the contract of hiring, other rights and liabilities, made effective by the superadded state-sanctioned contract, in respect to the form of compensating industrial injuries.

A contract so founded is entitled to be respected as a contract universally.

Berry v. *Insurance Co.*, 457.

JURY.

In an action of assumpsit to recover for potato fertilizer sold and delivered, the jury returned a verdict for the defendants.

One of the jurors when examined by counsel for the plaintiff on the voir dire stated that he had no claim and no interest in any claim against any fertilizer com-

pany, when, in fact, he and his partner had at that time a claim against such a company which claim was allowed within one month after this trial to the amount of $1,344.75.

Held:

1. That the plaintiff was entitled to full, fair and frank answers, so that he might challenge the juror if it appeared that he was not indifferent.
2. That the plaintiff had the right to rely upon the juror's statements and waived nothing by accepting him after his denial of interest.
3. That the statement being untrue and the plaintiff being misled thereby, the court will grant relief against a false denial of proven interest or bias.

Agricultural Corp. v. *Willette*, 423.

LEASE.

See *Murray* v. *Ryder*, 471.

LIFE ESTATE.

See *Alford, Trustee* v. *Richardson*, 316.

MARRIAGE.

Marriage between the parties, one of whom is bringing the suit, must be strictly proved in civil actions for criminal conversation. *Reed* v. *Stevens*, 290.

MARRIAGE CONTRACT.

A rescission by agreement of a contract to marry is a matter of mutual intention on the part of both parties to the contract, and implies an existing and unbroken contract. *Nightingale* v. *Leith*, 501.

MEASURE OF DAMAGES.

The measure of damages is the difference between the contract price and the market value at place of delivery at time of breach.

Cohen v. *Morneault*, 358.

MORTGAGEE.

MOTOR VEHICLES.

MUNICIPAL ORDINANCES.

NEGLIGENCE.

Negligence of a selectman, as a forest fire warden under R. S., Chap. 8, Sec. 29, in not ascertaining the facts concerning the existence of a ravaging or threatening forest fire, may impose liability upon his town.

Hutchins v. *Penobscot*, 281.

Unless a case where negligence is presumed from the nature of the accident, there must be some competent evidence of the defendant's lack of care and that it contributed as a proximate cause of the injury, unless the case comes within the rule of res ipsa loquitur. But this rule does not go so far as to supply the necessity of proof as to how an injury occurred. Where it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict.

Mahan v. *Hines*, 371.

An owner of an automobile who allows an inexperienced and unlicensed person to drive his automobile, in the owner's presence and under his control, at an unreasonable and dangerous rate of speed with little regard for rights of pedestrians who conduct themselves as ordinarily prudent persons under like circumstances, is liable in damages if an accident occurs due to negligence of such driver as if it had been his own negligence that caused it.

Kelley v. *Thibodeau*, 402.

Upon a motion by the defendant for a new trial on the usual grounds and also upon newly discovered evidence,

Held:

That as to the manner in which the accident occurred, the jury must have found in favor of the plaintiff's contention and in this respect the jury's finding is not so manifestly wrong as to warrant the verdict being disturbed by this court;

That the defendant company owed a duty to travelers lawfully upon the highway to keep a lookout and exercise all reasonable care to avoid injuring them;

That in view of these conclusions, the defendant's servant operating the electric car must either have seen the plaintiff in his position of peril and misjudged his distance from the track, or in the exercise of due care should have discovered him in time to have avoided the accident;

That in applying the rule of the "last clear chance," it is not necessary for the defendant to have actual knowledge of the plaintiff's peril, if he owed the plaintiff a duty of keeping a lookout to avoid injuring him, and in the performance of that duty should have discovered the plaintiff's peril in time to have avoided the accident;

That while the plaintiff was clearly guilty of contributory negligence in stopping his truck so near the tracks of the defendant and a duty also rested upon him to keep a lookout for the car he knew was behind him, the jury may have found, if the motorman could have stopped the electric car, as he testified he did within a distance of one foot, or even a greater distance, after discovering

ORAL MODIFICATION OF CONTRACT.

A parol agreement may contradict or vary the terms of a written contract, and in either case, such oral agreement cannot be made the basis of a valid judgment, unless such changes, variations, modifications, or rescission, are by contract for a consideration which must be clearly proved. A written contract may be reformed if it is clearly shown that something was omitted in the written contract by mistake, but such reformation is an equitable, not a legal remedy, and an equitable answer to a legal defense as authorized by R. S., Chap. 87, Sec. 18, must be set up.

Johnson v. *Burnham*, 491.

PAROL AGREEMENTS.

See *Johnson* v. *Burnham*, 491.

PARTIES TO SUITS.

It is the general rule that, when suit is brought for the special use of any one, the interest of that person must be established to maintain the action, because it is involved in the breach assigned. *Mile* v. *Coombs*, 453.

PERPETUITIES.

See *Merrill, Ex'r* v. *Winchester et als.*, 203.

PRESUMPTION.

See *Gregg* v. *Bailey*, 263.

PROBATION.

See *Welch* v. *State*, 294.

PROCEDURE.

See *Norris* v. *Moody*, 151.
See *Hersey* v. *Weeman*, 256.

PROXIMATE CAUSE.

REBUTTAL.

The presumption that a fee or an absolute estate was intended, may be rebutted by a limitation or remainder over at the death of the first taker.
Gregg v. *Bailey*, 263.

RECEIVERS.

Where express power is given by statute, to issue an injunction, both temporary and permanent, the court is authorized to appoint at the same time, or at any time during the continuance of the injunction, one or more receivers to wind up the affairs of a corporation. *Savings Bank* v. *Railway Co.*, 108.

REFORMATION OF A CONTRACT.

Reformation of a written contract on the ground of mistake, is an equitable, not a legal remedy. *Johnson* v. *Burnham*, 491.

REFEREES.

REMAINDER.

REMOVAL OF CASES.

Facts properly set forth in a petition for removal are assumed by State Courts to be true. Issues of fact arising out of such petitions are triable in the Federal Courts.

But State Courts inquire and in the first instance determine whether upon the facts as shown by the petition and other pleadings a case has been made out requiring removal as prayed for.

The term "proper district" as used in Section 28 of the United States Judicial Code means the district within the territorial limits of which the action is pending in the State Court.

A case cannot by reason of diversity of citizenship of the parties be removed to a District Court in a district other than that in the territorial limits of which the suit is pending in the State Court.

The petition sets forth the citizenship and residence of the plaintiff to be in New York and of the defendant in Pennsylvania. On the ground of diversity of citizenship alone it prays for the removal of the cause from the Supreme Judicial Court for Kennebec County, Maine, to the United States District Court for the Western District of Pennsylvania.

Held:

Not maintainable. *Doherty* v. *McDowell*, 384.

REPLEVIN.

The taking of property on a replevin writ without taking a bond as required by statute is unauthorized, but if plaintiff in replevin action is entitled to possession of the property under a mortgage, he is liable for nominal damages only, but if not entitled to such possession under a mortgage, he is liable for such actual damages as would be recoverable on a statutory bond had one been taken. Where the delivery of a commodity named constitutes the consideration for a mortgage note, and such commodity is not delivered as required by conditions of the contract, such note is unenforceable and the mortgage securing same is likewise effected. If such note is payable either in a commodity or cash, and promisor offers to pay before maturity in cash for such part of the commodity constituting the consideration for the note as has been delivered, which is refused by payee, then all rights of possession of the mortgaged chattels under the mortgage are lost. If the property taken is not returned, the value of the property taken constitutes the damage recoverable, less amount due for such part of the consideration for the note as was delivered after deducting damages for failure for complete delivery. *Williams* v. *Dunn*, 506.

RESCISSION OF CONTRACT.

See *Dutch* v. *Gamage*, 305.

See *Johnson* v. *Burnham*, 491.

See *Nightingale* v. *Leith*, 501.

RES IPSA LOQUITUR.

See *Mahan* v. *Hines*, 371.

REVIEW.

REVOCATORY DOCUMENT.

RIGHTS OF MARRIED WOMEN.

RIGHT OF WAY.

SALARY.

SALE OF PERSONAL PROPERTY.

SCALER OF LOGS.

SENTENCE.

Sentence may be pronounced at once, or deferred by placing the case on the special docket, and the length of time during which the case may remain upon the special docket before being brought forward for imposition of sentence is within the discretion of the court. *Welch* v. *State*, 294.

SERVICE OF LIBEL FOR DIVORCE.

See *Smith* v. *Smith*, 379.

SERVICE OF WRIT.

Valid service of a writ upon the resident agent of a foreign administrator may be made by leaving a summons at his "dwelling house or last and usual place of abode." An attorney's office is not his last and usual place of abode within the meaning of the statute. *Camden Auto Co.* v. *Mansfield, Adm'r*, 187.

A writ of error maintainable to reverse a judgment when judgment debtor has been defaulted without service upon him, or appearance by or for him. But if defendant has been duly served with process and had opportunity to protect his rights by appeal or by exceptions, and has failed or neglected to do so, he cannot afterwards raise the same questions upon a writ of error. R. S., Chap. 82, Sec. 97, is a declaration of the forum, and not a declaration giving choice of procedure. *Hersey* v. *Weeman*, 256.

SHOPKEEPER'S BOOKS.

Assumpsit on account annexed supported by affidavit, R. S., Chap. 87, Sec. 127, entitles plaintiff to judgment, unless rebutted. Delivery or performance to be shown by best evidence obtainable. Shopkeeper's books of account must be identified by person making entries, if living, not insane, and within jurisdiction of court. Books and suppletory oath not admissible until defendant's liability established, if delivery was to, or services rendered for, third parties. If person making entries is the only person with knowledge of delivery, or performance, and is dead, insane, out of jurisdiction, or unable to testify, proof of handwriting, that books kept in regular course of business, such entries made in line of his duty of practice, and that they were made at or near time of delivery, or performance, may be sufficient proof of delivery or performance. In actions between living parties, any person having personal knowledge is a competent witness as to delivery or performance. The testimony of any party, in an action between a living party and the representative of a deceased person who made the entries, except in case of bulky articles, and services

STATUTE.

STATUTE OF LIMITATIONS.

STOCKHOLDERS.

TAXES.

TRESPASS.

TRUSTS.

UNCONSCIONABLE CONTRACT.

UNDUE INFLUENCE.

VERDICT.

VIS MAJOR.

See *Cullicut* v. *Burrill*, 419.

VOIR DIRE.

See *Agricultural Corp.* v. *Willette*, 423.

WAGES.

Where there is a contract for hiring for a fixed period and the servant or agent is discharged either rightfully or wrongfully before the end of the term he cannot recover, as such, wages or salary accruing after his discharge. Wages and salary are commonly predicated upon the relation of master and servant, or principal and agent, and such relation cannot exist against the will of either party.

An employee wrongfully discharged may in an action for the purpose recover as damages the difference between the amount which would after his discharge accrue to him under the contract if continued in force, and the amount which during the remainder of the term he earned, or by reasonable diligence might have earned. *Harrington* v. *Separator Co.*, 388.

WAIVER.

The appointment of Commissioners under R. S., Chap. 68, Sec. 55, upon application of administrator to whom a claim in writing against the estate has been presented, and a hearing had before such Commissioners, operate as a waiver of any defect or insufficiency in the claim as presented.

National Bank v. *Cox*, 488.

See *Agricultural Corp.* v. *Willette*, 423.

WARRANT.

Provisions of R. S., Chap. 135, Sec. 9, requiring a person arrested to be brought before a magistrate for examination, and the warrant with the return thereon delivered to the magistrate, are mandatory. *Hefler* v. *Hunt*, 10.

WILLS.

The principles enunciated in, *Union Safe Deposit and Trust Company* v. *Frank W. Dudley et als.*, 104 Maine, 97, affirmed as rules of interpretation in the distribution of estates. *Trust Company* v. *Bennett*, 46.

Bill in equity praying for interpretation of a paragraph in the will of M. Angie Brown which reads thus:

"All the rest, residuum and remainder of my estate I give to Caroline S. Fogg of Augusta, Maine, to be disposed of as she directs from time to time and as she thinks will be in accordance with my wishes."

Mrs. Fogg is the executrix of the will.

Held:

That the executrix holds the residuum in trust for the heirs at law of the testatrix, and that the same be divided among them after paying debts of administration. *Buzzell* v. *Fogg*, 158.

Bequests in a will in the following language, "to each of her children, grand children, and great-grandchildren now living or hereafter born (17 now living) I give and bequeath . . . . each" embrace and include all children, grandchildren and great-grandchildren who might be in esse at the time of the decease of testator, that is, those born or who might be born within nine months thereafter. The enumeration of certain articles such as personal apparel, jewelry, etc., restricts the general words to articles of the same class as those enumerated and does not include money. There is no rule of law which prevents a person from acting as trustee for himself and others. By "articles of personal property" is meant goods and chattels; not money nor securities.

Merrill, Ex'r v. *Winchester et als.*, 203.

There is no fixed rule of construction that a gift or devise in general terms without words of inheritance or a general power of disposal, but with a remainder over at the death of the first taker, conveys an absolute estate. In all such cases it becomes a question of interpretation to determine the intent of the testator from the entire will which must and should control. The presumption that a fee or an absolute estate was intended, may be rebutted by a limitation or remainder over at the death of the first taker. *Gregg* v. *Bailey*, 263.

Bequests to missionary societies for the diffusion and inculcation of the Christian religion are within the realm of public charities as defined by the court. Bequests "to other moral and useful associations" not defeated, being for charity, by failure to specify in name such associations.

Prime, Ex'r v. *Harmon, Adm'r*, 299.

A bequest to A in trust of certain personal property, to pay the net income thereof to B during his natural life, and at his death to his wife if she survives, for their support and maintenance, with discretionary power to sell a part of said personal property and apply the proceeds for said purposes if necessary, invests the trustee with the right to use his own discretion and judgment in determining whether or not the conditions specified in the will exist or not in fact, and

as to how much relief may properly be given. So long as he acts within his power, honestly and in good faith, not arbitrarily or capriciously, his determination is conclusive and his judgment will not be reviewed.

Alford, Trustee v. *Richardson et als.*, 216.

Bill in equity asking for the construction of the will of Peter S. J. Talbot, and for instructions to the executor and trustee.

Held:

1. That under clause two, the legal title vested in the trustee, and the equitable title in the twelve beneficiaries named, as they were all living at the death of the testator.
2. Their interest was not in common but joint, and upon the death of one or more his or their interest would pass not to his or their heirs, executors, administrators or assigns, but to the survivors.
3. The trust created is valid. Its provisions do not offend the rule against perpetuities, because all interests under the will vest within the prescribed time.
4. In case of serious disagreement between the trustee and his cotenants who own an undivided half of the wild land, the remedy of the trustee would be to apply to the court in equity, setting forth all necessary facts and bringing in all necessary parties.
5. Proceeds from the sale of the real estate and income from the sale of stumpage should be distributed annually among those entitled thereto. If a beneficiary is not living at the time of annual distribution his or her share passes to the then survivors.
6. The beneficiaries have an assignable interest in income accruing and distributed in their lifetime, but not in income accruing and distributed after their decease.
7. The trust may be terminated by the sale of all the property during the lifetime of one or more of the beneficiaries. If no sale is effected during that time the trust will continue until the death of the last survivor.
8. The death of the testator fixed the time of vesting of the residuary interests, and as all the devisees and legatees were living at that time, if any have since died their interest passed to their devisees, legal representatives or assigns.
9. The surviving residuary beneficiaries or other persons now entitled to participate as representing a deceased beneficiary have a present assignable interest in the residuum.

Cary v. *Talbot*, 427.

A will may be contested in whole or in part, and it may be void in part and otherwise valid.

In proceedings for the probate of a will, a writing purporting to be a later will, but then already totally disallowed, cannot properly be offered in evidence as a revocatory document. It matters not that a beneficiary under the earlier instrument, in seeking for himself a greater bequest than it contains, procured the making of the later one by the exerting of an undue and improper influence.

O'Brion Appellant, 434.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

An employee after finishing her work and in leaving the building to return to her home, there being two exits from the floor where she worked to the street, and a stairway leading to the basement from which there was an exit by a back way to her home, takes a freight elevator not used by the employees for the purpose of exit with knowledge of employer, to reach which, it was necessary to go through a door into another room and pass through an alley-way, the elevator being in an extension built onto the main building, and is injured, such injury is not the result of an accident "arising out of and in the course of his employment." The accident must be due to a risk to which the employee is exposed "while employed and because employed by the employer," and must occur while employee is doing the duty which he is employed to perform, all of which the burden is on the petitioner to show. *Dulac* v. *Insurance Co.*, 31.

"Dependency" is predicated upon the question of whether the claimants are wholly or partly dependent on the earnings of the employee for support "at the time of the injury." Claimant may be wholly or partially dependent upon the earnings of the employee for support at the time of the injury. It must be shown not what part of the earnings were paid to the claimant, but what part was actually used by the claimant for actual and lawful support. *MacDonald* v. *Liability Corp.*, 52.

An employee, who also was a member of a fire department, while on duty for his employer, in leaving the mill where he was at work in answer to a fire alarm, jumped over a flight of five or six steps receiving an injury to his ankle on striking the ground, but such injury was not the result of an accident arising "out of" and "in course of" his employment for his employer in the mill. When leaping over the steps, which was the proximate cause of the accident, he was in the employment of the fire department, and not in the employment of the mill owner. The risk was due to the call of the fire department, and did not arise because the employee was "doing the duty which he was employed to perform." *White* v. *Insurance Co.*, 62.

The accident to the petitioner occurred April 23rd, 1918. Soon after this an agreement as to compensation was made and filed with the Industrial Accident Commission but not approved.

Compensation was paid until Jan. 19, 1920 and then suspended. The pending petition was filed more than two years after the accident occurred. The commissioner's decree was in favor of the petitioner awarding compensation according to the rule established by Chapter 238 of the Laws of 1919.

Held That:—

(1) The claim is not barred by limitation.

(2) The petition does not conform to the statute, but the petitioner not having been prejudiced or misled by any failure or omission in the petition, the decree is not to be reversed for this reason.

(3) Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute would be to impair the obligation of contracts, and thus to contravene both the State and Federal Constitutions.

The accident to the petitioner occurred before the passage of the Workmen's Compensation Act of 1919. The commissioner having applied the statute of 1919 in determining compensation, his decree would be modified by the court to confrom to the law in force at the time of the accident, were it not that for a further reason the decree must be reversed.

(4) The Industrial Accident Commission while primarily an administrative body exercises certain judicial functions. Its findings must be based on evidence. The statute so commands, but this would be true if there were no such statutory mandate. *Mathias Gauthier's Case*, 73.

An industrial accident occurred in 1918. The commissioner applied the Act of 1919 to the case and made an award for which under the law prevailing at the date of the accident there was no authority. Gauthier's Case is decisive of this. Ruling reversed. *Major Shink's Case*, 80.

The commissioner found as a fact that the death of the petitioner's husband from tuberculosis, was due to an industrial accident which he suffered twenty months before. This finding being supported by some evidence is not subject to review by this court.

The amount of the commissioner's award is, however, based upon the statute of 1919. This is error. For reasons set forth in Gauthier's case the amount of compensation is determined by the statute in force at the date of the accident.

To determine the correct award, no disputed question of fact is to be passed upon.

The decree must be modified to conform to the statute in force in 1918 when the accident occurred. *Gray* v. *Insurance Co.*, 81.

The last paragraph of Section 16 of the Workmen's Compensation Act of 1919 (Chapter 238) was intended to enlarge the scope of the law and to provide

compensation for permanent impairment of the usefulness of a member, or of any physical function thereof, named in the schedule, where previously compensation for loss of the member to the extent specified could alone be had.

Under the last paragraph of Section 16 of the Workmen's Compensation Act of 1919 (Chapter 238) compensation is not confined to cases of actual loss or severance of the member or some part thereof; but includes all cases of injury to the members specified in that section, not before provided for, where the usefulness of the member or any physical function thereof is permanently impaired.

The fact that there was no loss of wages in the instant case does not afford an answer to the application for compensation. By the injury to his hand, resulting in the permanent impairment of its usefulness, the applicant has sustained a distinct loss of earning power in the near or not remote future.

Clark's Case, 133.

An injured employee injured while engaged in a kind of work or business not specified in the written acceptance filed by the employer with the Industrial Accident Commission, cannot recover. *Fournier's Case*, 191.

Where a workman took hold of a rope used for hoisting bales of cotton from the basement of a building up through doors in the floors above and received injuries while being hauled up through such trap doors, which he knew was against the orders of his employer as the evidence clearly shows in this case,

Held:

That by so violating the orders of his employer he placed himself outside the course of his employment, there being a stairway provided for use of the workmen in going from the basement to the upper floors.

The words in "the course of the employment" relate to the time, place and circumstances under which the accident takes place. An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or doing something incidental thereto.

The claimant in this case was not in a place where he reasonably might be in the performance of his duties when the accident occurred. He had taken a forbidden way, which the evidence shows he took for his own convenience and not that of his employer. *Fournier's Case*, 236.

In determining whether injuries resulting in death arose out of and in the course of the employment, statements, not of deceased's mental or physical condi-

tion, but of what occurred from which his physical condition resulted are inadmissable, unless occurring at the time of the injury.

The mere receipt of hearsay or inadmissible evidence by the Industrial Accident Commissioner, however, is not alone sufficient to require a reversal of his findings, if there is sufficient competent evidence in the case upon which his findings may rest, unless it appears that his findings were in some part at least, based on such incompetent testimony.

Findings of fact by the commissioner from circumstantial evidence alone are not unwarranted as a matter of law if they are supported by rational or natural inferences from facts proved or admitted even though not only possible or even reasonable inference to be drawn therefrom; provided the inferences upon which the commissioner's findings are based are more consistent with the proven or admitted facts than any other inferences which may be rationally drawn therefrom.

There was sufficient competent testimony presented before the commissioner in this case upon which his findings may rest, and it does not appear that his findings were in any part based on the inadmissible testimony.

Larrabee's Case, 242.

The word "status," as that term is used in the Workmen's Compensation Act, in inhibition of change of a compensation carrying decree, prior to application for a review thereof, has reference to the relation in which an injured person stands toward him who was his employer at the time of the accident. It means that if the question of such person's right to receive compensation be an adjudicated one, that question may not be reviewed previously to the date of application looking to that end. But there is easily seen distinction between a judicially determined right to receive compensation while disability resulting from accident continues and the receiving of money, primarily from an erstwhile employer, but ultimately from society for supposed disability, when in reality not any exists. *Fennessey's Case*, 251.

Compensation not permissible to widow claiming for death of husband, who produced an epigastric or ventral hernia by heavy lifting, having at the same time and prior thereto an inguinal hernia, who died from an operation for both hernias at the same time. Respondents responsible for the epigastric hernia, but not for the inguinal hernia. Decedent might have lived if not operated upon for inguinal hernia. Evidence does not show that death resulted from operation on epigastric hernia alone, the direct result of the injury, which is imperative to recover, and not be left to uncertainty and conjecture.

Dulac v. *Insurance Co.*, 324.

Claim under the Workmen's Compensation Act. The accident occurred in the County of Kennebec. The evidence was taken out before the Industrial Accident Commission in the County of Androscoggin as a matter of conve-

nience. Copies of the decision with all other papers in connection therewith were filed by the defendant with the Clerk of Courts for Androscoggin County. From a decree of a Justice of the Supreme Judicial Court confirming the finding of the commission an appeal was taken by the defendant to the Law Court.

Held:

1. That under R. S., Chap. 50, Sec. 34, Kennebec County, "the County in which the injury occurred" alone had jurisdiction of the cause, and the papers should have been filed in that county instead of in Androscoggin County.
2. That the appeal was not properly perfected and the Law Court is therefore without jurisdiction. *Mary Margretta Maguire's Case*, 398.

WRIT OF ERROR.

See *Hersey* v. *Weeman*, 256.

A writ of error is based upon the record facts alone, and facts dehors the record, even if true, are immaterial, and can form no basis for a writ of error. *Welch* v. *State*, 295.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Substitute "indicted" in place of "indicated" in third line in introductory statement on page 310.

Substitute "Worster" for "Worcester" as surname of attorney for plaintiff on page 317.

Substitute "Chap. 10" for "Chap. 6" in seventh line on page 475.

Substitute "younger" for "older" in the eleventh line from the bottom of page 435.

Substitute "Paige Touring Car" for "Packard Touring Car" in heading on page 496.