MAINE REPORTS

121

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

DECEMBER 2, 1921—OCTOBER 31, 1922

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
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HON. FRED EMERY BEANE,	KENNEBEC COUNTY
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ATTORNEY GENERAL

RANSFORD W. SHAW

REPORTER OF DECISIONS

FREEMAN D. DEARTH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1922

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

ROSE E. HARMON *vs.* CITY OF SOUTH PORTLAND.

Cumberland. Opinion December 5, 1921.

To recover damages against a town for personal injuries caused by an alleged defect in the highway, it must appear that one of the officials named in the statute had twenty-four hours' actual notice of such defect, and that plaintiff, or some person in his behalf, had given the fourteen days' written notice of the injury as required by statute. And if plaintiff had notice of such defect previous to the injury, it must appear that he had, previous to the injury, notified one of the municipal officers of such defect.

The statute places a heavy burden upon the plaintiff in highway cases against a town for damages. First, the plaintiff must prove twenty-four hours' actual notice to one of the officials named in the statute, and also the fourteen days' written notice of the accident. There is yet another notice to be complied with that proves fatal to the plaintiff's case, upon her own testimony. This requirement is: "And if the sufferer had notice of the condition of such way previous to the time of the injury he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way." It will be observed that this notice must be given by the "sufferer," the plaintiff, to one of the municipal officers, not to "a municipal officer, the Street Commissioner or their substitute," as the other twenty-four hour actual notice of the defect may be given.

On exceptions. An action on the case to recover damages for personal injuries sustained by plaintiff by reason of an alleged defect in the highway of defendant city. At the close of plaintiff's case, on

motion of defendant, the presiding Justice ordered a nonsuit, and plaintiff excepted. Exceptions overruled.

Case stated in the opinion.

William A. Connellan, and Harry H. Cannell, for plaintiff.

Hinckley & Hinckley, and Stephen W. Hughes, for defendant.

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

SPEAR, J. On the 28th day of March, 1919, the plaintiff met with an accident on a crosswalk in the City of South Portland by stubbing her toe, in the night time, against the end of a plank that projected above the surface of the crosswalk somewhere from four to eight inches. At the close of the plaintiff's evidence the court granted a motion for a nonsuit, to which the plaintiff filed exceptions, and this is the way the case comes up. The only question involved is, whether there is sufficient evidence, if fully believed by the jury, to sustain a verdict in favor of the plaintiff if so found.

The trouble with the plaintiff case appears to arise from legal impediments. The statute places a heavy burden upon the plaintiff in highway cases against a town for damages. First, the plaintiff must prove twenty-four hours' actual notice to one of the officials named in the statute, and also the fourteen days' notice of the accident. There is yet another notice to be complied with that proves fatal to the plaintiff's case, upon her own testimony. This requirement is: "And if the sufferer had notice of the condition of such way previous to the time of the injury he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way." It will be observed that this notice must be given by the "sufferer," plaintiff, to one of the municipal officers, not to "a municipal officer the street commissioner or their substitute," as the other twenty-four hours' actual notice of the defect may be given.

We find no evidence whatever of such notice. The plaintiff testified that she informed a Mr. Cobb, a workman on the road of the alleged defect in question, and Mr. Cobb says he notified the Street Commissioner. Whether this was sufficient notice of the defect to the Street Commissioner it is not necessary to decide. We refer to the testimony to show that the plaintiff knew of the defect if it was a defect, in the spring of 1918, about a year before the accident.

If we assume that the condition complained of was a defect, the plaintiff had notice of it. It was then incumbent upon her as a condition precedent to any right of action for injury against the city to previously notify "one of the municipal officers" of the defective condition of the way.

There is some evidence that the plaintiff's husband, "about four or five years ago" notified one of the aldermen of the alleged defect. The statute, however, requires that the notice shall be given by the "sufferer" in case the "sufferer" had prior knowledge of the defect. And it is said in *Barnes* v. *Rumford,* 96 Maine at Page 321: "This requirement of the statute imposes upon the traveler a distinct personal duty as a condition precedent to his right to recover for injuries suffered on account of such defects."

It is contended, however, that inasmuch as the plaintiff had given notice of the defect in 1918, she had a right to assume that it had been repaired, and that therefore the "sufferer" notice did not apply. But it will be observed that the conception of this notice is based upon the fact that the defect has not been repaired; and for that very reason, and because the "sufferer" is injured by the identical defect of which he has given notice, he is given a right of action.

If it was not the same defect, then there is no evidence that the municipal officers, the Street Commissioner or their substitute, had had the required twenty-four hours' notice.

We think the nonsuit was properly ordered.

Exceptions overruled.

ANTHONY O. FERNALD *vs.* EDWARD N. FRENCH.

Cumberland. Opinion December 5, 1921.

An operator of a motor vehicle intending to cross the street in front of another car, should so watch and time the movements of the other car as to reasonably insure a safe passage, either in front or rear of such car, even to the extent of stopping and waiting, if necessary. Negligence of driver cannot be imputed to a passenger. Contributory negligence of defendant must be shown. Axiom, "Res Ipsa Loquitur."

This case involves an automobile accident, which took place in plain daylight and in a perfectly open street, at, or near, the junction of the Eastern Promenade and Washington Street in the city of Portland. The negligence of the driver cannot be imputed to the plaintiff, he being a passenger, and the question of plaintiff's contributory negligence is therefore eliminated. The alleged negligence of the defendant is the vital question involved.

The defendant kept his right-hand side of the road all the time, until he turned still further to the right to avoid collision. He had the right of way in passing the mouth of the Promenade, and was charged with the knowledge and expectation that a car might cross his path coming from the Promenade, but not with either knowledge or expectation that a car would cross his path without warning from the other side of the street. There is no evidence that he was violating the law of speed. The evidence of the plaintiff shows that the defendant was in all respects a lawful traveler on this road up to the moment of the accident.

In coming to a reasonable conclusion, not only the testimony but circumstances and conditions must be considered. There is an axiom of law expressed by the phrase "Res Ipsa Loquitur," the thing itself speaks. So in this case the manner of the accident furnishes inherent evidence of what took place when construed in the light of the law applicable thereto. The reckless conduct of the plaintiff is established by his own evidence, and there is no evidence tending to prove the negligence of the defendant except that a collision took place.

On motion. An action to recover damages for personal injuries sustained by plaintiff, a passenger in an automobile driven by his son-in-law, resulting from a collision between such automobile, and that of the defendant, which occurred on Washington Street in the city of Portland, on June 7, 1920, and also to recover damages and expenses resulting from injury to plaintiff's wife, alleging negligence on the part of defendant in driving and controlling his automobile.

A verdict of $2,250 for plaintiff was returned by the jury, and defendant filed a general motion for a new trial. Motion sustained.

Case is stated in the opinion.

Bradley, Linnell & Jones, for plaintiff.

Frank A. Morey, for defendant.

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

SPEAR, J. This case involves an automobile accident. The plaintiff recovered a verdict and the case comes up on the usual motion.

The plaintiff was a passenger in the car driven by James Wright, his son-in-law.

The negligence of the driver cannot be imputed to the plaintiff and the question of his contributory negligence is therefore eliminated.

The vital question to be considered is the alleged negligence of the defendant.

The accident took place in plain daylight and in a perfectly open street. It occurred at or near the junction of the Eastern Promenade and Washington Street in the city of Portland. At this place, Washington Street is forty-four feet wide, with two car tracks running through the center, occupying a width of fourteen feet, thereby leaving fifteen feet in the clear for travel on each side. The Promenade opens into Washington Street upon the easterly side and has a width on the line of the street of about seventy-five feet.

Washington Street is paved, and the Promenade is macadam to the line of Washington. Washington Street runs southerly towards Congress Street and northerly toward Falmouth. The Promenade does not cross Washington Street but leads out of it toward the east.

For convenience, the car in which the plaintiff was riding will be spoken of as the plaintiff car. The plaintiff car was going southerly toward Congress Street and the defendant car in the opposite direction. The plaintiff car was occupying its right-hand side of the road until it arrived at a point nearly opposite the middle of the mouth of the Promenade. It was the particular duty of the defendant to observe whether a car might be coming from the Promenade into Washington Street. As was said in *Bragdon* v. *Kellogg,* 118 Maine, 42, "A somewhat different situation than would arise if they (the streets) crossed each other, forming four corners, in this, that a car

on Main Street (Washington Street) approaching North Street (the Promenade) is charged with knowledge that a car coming from North Street (the Promenade) must necessarily turn to the right or the left into Main (Washington) Street."

The defendant kept the right-hand side of the road all the time, until he turned still further to the right to avoid collision.

The defendant had the right of way in passing the mouth of the Promenade. He was, moreover, charged with the knowledge and expectation that a car might cross his path coming from the Promenade, but not with either knowledge or expectation that a car would cross his path, by turning into the Promenade, from the other side of the street, without reasonable warning. There is no proof that the defendant was violating the law of speed. The evidence of the plaintiff shows that the defendant was in all respects a lawful traveler on this road up to the moment of the accident.

In describing the accident we refer only to the plaintiff's evidence, as the jury had a right to base their conclusions on the plaintiff's version of how it occurred. But in coming to a reasonable conclusion, not only the testimony but circumstances and conditions must be considered. There is an axiom of law expressed by the phrase "Res Ipsa Loquitur," the thing itself speaks. So, in this case, the manner of the accident furnishes inherent evidence of what took place, when construed in the light of the law applicable to this class of cases.

The plaintiff's version of the accident was that the plaintiff car was moving along on its own side of the street, with the intention of turning to the left across the street, into the Eastern Promenade; that it slowed down and turned to the right of the railroad track for a car to pass; that after the car had passed and it was about opposite the center of the Promenade, the driver threw out his hand before he had crossed the railroad track or made his turn, as testified by Mrs. Wright; that Wright dropped his hand before he saw French coming one hundred feet away; that he did not blow his horn; that, as his forward wheels had just passed the car tracks he saw the defendant, on his own side of the road, about one hundred feet away; that he then kept right on going; that after he thus saw the defendant he didn't look for him again until he, Wright, was within the entrance of the Promenade, and then only when the plaintiff exclaimed with reference to the proximity of a collision.

The following questions and answers tell the whole story of Wright's negligence and disregard of law.

Q. "You didn't see Mr. French, at all did you, except for the distance when he was back here a hundred feet?"

A. "When I started to cross the road there, I looked and I saw him."

Q. "After that you didn't look, did you, until Mr. Fernald called you?"

A. "No sir."

Q. "So that you approached this only place of actually getting across that street from the car track without turning your eyes in the direction of where Mr. French was?"

A. "Yes sir. I was watching the car. I was looking upon the Promenade. I thought Mr. French could see, or whoever it was."

Q. "Or whoever it was?"

A. "Yes sir. He can't run around blind any more than I could."

Q. "I should suppose, if you were crossing the iron and French was coming, you could see him?"

A. "I thought at the time someone was driving the machine."

These questions and answers prove not only an utter disregard of legal duty but a supercilious indifference to the rights of other vehicles upon the road. And the reason he gives for not observing the movement of the French car only adds to the reckless nature of his act.

Q. "French was right in front of you, all in your sight, from the time you started to cross the track?"

A. "I didn't have time to watch Mr. French, there were too many other machines out that day."

The reason he gives for not watching French is the reason that underlies four-fifths at least of all the automobile accidents that occur, namely, he didn't have time, when the casting of an eye would undoubtedly have saved the collision.

If we now note the measurements it will be seen from the evidence of the plaintiff's engineer that the distance from the car track nearest the opening of the Promenade on the line of Washington Street was only fifteen feet, not more than twice the length of the Ford car in which the plaintiff was riding. Wright testifies that his front wheels were on that track, when he then first saw French. He had an unobstructed view of him all the time. There were "many machines," and yet according to his own testimony Wright turned

directly in the path of the defendant car, when he knew it was coming directly along the right-hand side of the street, without ever once looking up to see whether he could safely pass in front of that car or not.

Time and distance are deceptive and illusive under such circumstances. The whole occurence from the time the plaintiff car saw French until the imminence of collision was the work of but seconds. Wright's estimate that the defendant was one hundred feet away was at best a mere guess. And judging from the proven rate of speed of the two cars, an erroneous guess, at that. If French was one hundred feet away and going at the rate of fifteen miles an hour, it was only five and one-half ticks of the clock before he was in the path of the defendant car. And yet the operator drives blindly in front of that approaching car. This reckless conduct on the part of the plaintiff car is established by the plaintiff's own evidence; not by inference from the evidence but by the plain and ordinary meaning of the testimony.

Up to this point there is not one word of evidence tending to prove the negligence of the defendant except the fact that a collision later took place.

He was driving along as any traveler would on his own side of the road, safe from the danger of approaching cars in front, and as far out to the right as the line of the road would permit for the passage of cars from the rear with the duty of particularly observing the Promenade, when in less than fifteen feet away he was confronted with the defendant car headed directly across his course.

Was, then, the defendant guilty of negligence? This question involves the legal relations of the parties as they were, within a period of six seconds, occupying the street. There was no junction of crossing streets. The Promenade is a wide-mouthed avenue that leads from Washington Street to the Eastern Promenade, so called. It is seventy-five feet wide. Ten cars could turn into it abreast. The law of the road requires all vehicles approaching each other in opposite directions to keep to the right of the middle of the traveled part of the way. The defendant was in observance of that law and was well out on the right-hand side. He had the right of way. He was in the place designated by law for him to travel. There is no evidence that he was driving at an excessive rate of speed. The evidence, in fact, shows that he was driving at a legal rate. The undisputed evidence shows that there was a car just ahead of him. When he

approached at about the middle of the Promenade he was suddenly confronted with the plaintiff's car, at nearly or quite at a right angle, crossing his track directly in front of him. There was nothing so far as the evidence shows to reasonably put the defendant on guard against the sudden appearance of the defendant car or to warn him of its sudden turn across the street. Mrs. Wright testified that Wright put his hand out before she saw the defendant car.

As bearing upon the sufficiency of warning, it must be kept in mind that the distance between the front of the plaintiff car, when it was turned across the railroad track, and the line of Washington Street was less than fifteen feet; and if the defendant car was close to the line of Washington Street, the plaintiff car was less than fifteen feet, by the width of the defendant car, or actually less than ten feet from the direct line of French's path, when the defendant blindly headed across the car tracks, without once casting an eye to observe the position of the oncoming car.

This short distance placed him so quickly in the path of French, that even, if upon cool afterthought, it appeared that he might have stopped his car, yet in the emergency which confronted him he might have reasonably concluded that he could not do so, and that his only course was to turn up the Promenade.

It was the duty, however, of the plaintiff car, under these conditions to give the defendant, who had the right of way, such notice as to amply inform him of its intention to cross in front of him. And unless and until the defendant car had such notice it could not be charged with negligence in pursuing its course.

In fact it should be declared as a rule of law, governing the movement of motor vehicles under the conditions and circumstances of the present case, that a car intending to cross the street in front of another car, should so watch and time the movements of the other car as to reasonably insure itself of a safe passage, either in front or rear of such car even to the extent of stopping and waiting, if necessary. This is no new rule but simply the application of a well established principle to new conditions. In *Savoy* v. *McLeod*, 111 Maine, 234 it is said:

"The court should establish as a law the rule which prevents injury or loss of life rather than that which even invites or permits it. This rule is based upon reason and public policy."

We have gone somewhat in detail in describing the reckless operation of the plaintiff car, not on the ground of contributory negligence, but to show that the defendant was not required to anticipate such carelessness, and was therefore excused from the charge of negligence when he himself was driving his car as a man of ordinary care and prudence would have done in the like circumstances.

Therefore, as was said in the beginning, the thing itself speaks, and we are unable to find any adequate evidence of direct negligence on the part of the defendant up to the time the plaintiff car appeared in front of him in the streets.

Was he guilty of subsequent negligence? Accepting the plaintiff's version of where the collision occurred, it is evident that the defendant, when he saw the imminence of a collision, turned his car to the right into the Promenade, but Wright, the driver of the plaintiff's car said:

"I know he chased me up there. I should say I got there before Mr. French. I got up there when he hit me, before he did. He chased me up there."

Q. "So he chased you right up into the Eastern Promenade?"

A. "Yes sir."

Q. "No doubt about that?"

A. "Not a bit."

If this language is given its ordinary meaning it is foolishly absurd. That the defendant should chase him into the Promenade or anywhere else, for the purpose of running into him, is preposterous. On the other hand, it is apparent from the evidence that, when the emergency of the plaintiff car, directly across his path, confronted French, he immediately turned into the Promenade with the hope of avoiding the collision that appeared inevitable if he kept on, but, as both proceeded up the Promenade, could not turn his car sharply enough to the right to avoid the accident.

It is well settled law that in an emergency a person is not held to that same degree of care as he would be required to observe under normal conditions. *Bragdon* v. *Kellogg*, 118 Maine, 42. An emergency requires quick judgment and instant action, or the inevitable has taken place. We are of the opinion that French was within the rules of due care under the circumstances. He was therefore guilty of neither original nor subsequent negligence. A new trial should be granted.

Motion sustained.

HARRY E. CRANDALL

vs.

WALKER D. HINES, Director General of Railroads.

Aroostook. Opinion December 10, 1921.

In an action to recover damages to property resulting from a collision at a grade crossing of a railroad, alleging negligence, it is unnecessary to consider the alleged negligence of defendant, if it appears from the direct examination of the plaintiff that he was manifestly guilty of contributory negligence.

In the instant case it is unnecessary to state the case further than appears in a page and an half of the testimony of Lloyd Justus Crandall, a minor son of the plaintiff, who was driving the team.

It is not necessary to discuss the alleged negligence of the defendant. For, upon the assumption that it was negligent, the testimony of the minor son, Lloyd, on direct examination proves that he was manifestly guilty of contributory negligence.

On motion for new trial and exceptions by defendant. An action to recover damages for the loss of a horse and injury to a farm wagon resulting from a collision with a train of defendant at a grade crossing, alleging negligence of defendant. Plea, the general issue. At the conclusion of the evidence counsel for defendant moved that the presiding Justice direct the jury to return a verdict for the defendant, which was denied, and defendant excepted. A verdict for $375.00 in favor of plaintiff was returned by the jury, and defendant filed a general motion for new trial. Motion sustained. New trial granted.

Case is sufficiently stated in the opinion.

Charles P. Barnes, for plaintiff.

Cook, Hutchinson & Pierce, Frank P. Ayer, Henry J. Hart, and James C. Madigan, for defendant.

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

SPEAR, J. This is an action to recover damages for injury to property through the alleged negligence of the operatives of the Bangor and Aroostook Railroad.

On the twenty-seventh day of November, 1919, about ten minutes past six o'clock, the plaintiff's son, a minor, a little over fifteen years of age, was driving his father's team when the accident, by collision, at a grade crossing, occurred by which the wagon was demolished and one of the horses rendered entirely worthless.

It is unnecessary to state the case further than appears in a page and a half of the testimony of Lloyd Justus Crandall, the son who was driving the team.

Namely:

"Q. On the afternoon of the day the horse was killed what time did you leave home?

A. Five o'clock.

Q. Where did you go?

A. To Paul Nadeau's.

Q. How far is Paul Nadeau's from your father's house?

A. About a mile.

Q. Is he a farmer?

A. Yes.

Q. What did you get for a load over there?

A. I got five bags of oats.

Q. Is that all you had on the wagon?

A. Yes.

Q. As you came back after you passed George Crandall's house you turned in on this Grant Road, did you not?

A. Yes, sir.

Q. That is before you reached the railroad?

A. Yes.

Q. And as your horse was traveling along approaching the railroad, one hundred or more feet back from the railroad, were you sitting on the wagon driving?

A. No.

Q. What were you doing?

A. Walking.

Q. Where?
A. Behind the team.
Q. Now you may state what you did?
A. I stopped the team, looked and listened and then got on after the noise had died away so that the horse got quieted down.
Q. Do you know how far away from the track the horses were at the point where you stopped?
A. About sixty feet.
Q. When you got ready to start that day where were you on the wagon?
A. I was sitting down on a bag of oats.
Q. Where were the reins?
A. In my right hand.
Q. Did you hear any whistle?
A. No.
Q. Did you hear any bells?
A. No.
Q. How rapidly did you drive the horses towards the crossing?
A. Two miles and a half an hour probably.
Q. That is, were you walking?
A. Yes.
Q. What was the first thing you knew of that railroad train?
A. I see it about fifty feet away when I was on the track.
Q. How far on the track was the team when the engine collided with it?
A. The wagon was just started on; the horses was part of the way over.
Q. Were you thrown off the wagon?
A. Yes."

It is not necessary to discuss the alleged negligence of the defendant. For upon the assumption that it was negligent, the testimony of Lloyd, as given above, on direct examination proves that he was manifestly guilty of contributory negligence.

His case falls so clearly within the facts and the law announced in *McCarthy, pro ami* v. *Bangor and Aroostook R. R. Co.*, 112 Maine, 1, that further discussion would seem unnecessary.

In that case the plaintiff was a boy of fourteen years of sufficient intelligence to appreciate the danger of being run over at the crossing. This is true of the boy in the present case. In that case the boy

said he stopped his team twice to look and listen, the last time about fifty feet from the track. He said he could not see the approaching train on account of bushes on the right and a bank left by grading. This is what is claimed in the present case.

In that case the court say, assuming the crossing to be blind and dangerous as the plaintiff describes it, there was all the more need of watchfulness on the plaintiff's part. At an ordinary crossing, a burden is put upon the traveler to be observant, to look and listen, and to stop, if need be. Much more at a blind crossing. The same duty rested upon the driver of the team in the present case.

In that case the court further say, "Now if the plaintiff had stopped last at a distance of twenty or even fifty feet, from the track and actually listened, it is in the opinion of the court, incredible that he should not have heard the noise and roar of the onrushing train."

The driver in the present case says he did stop and look and listen "about sixty feet" from the track; that he then got upon his load and went ahead at the gait of two and one-half miles per hour, in the meantime looking for the train in both directions, and admits that he could see a train one hundred and fifty feet from the crossing, at a point even sixty-five feet away, as appears from the following question and answer:

"Q. Assuming this sixty-five feet, that point is from the crossing this way, do you mean you could only see one hundred feet from the crossing east from that point?

A. You could see a matter of one hundred and fifty feet."

In the language of the McCarthy case, "We think the case shows beyond question that if the plaintiff had looked just before the horse went onto the crossing, he would have seen the train where it was."

In answer to the argument of obstructions to the view the court in that case goes so far as to say: "In any event as we have already said there was a point where if he had looked he could have seen the train and stopped his team, before he entered upon the track."

That the driver could have done this in the present case is manifestly clear from his own testimony. But in the present case as in the McCarthy case, the plaintiff contends that if the usual signals are not given, a traveler is not held to that degree of diligence that he would, had the company discharged its duty. But the court held that such want of signals does not discharge the traveler of all care not to listen, or having listened and heard, when the plaintiff says

a train could not be seen until the traveler was on the track, is clearly a want of requisite care, even if it be true that no crossing signals were given.

All the above principles of law are fully reviewed in the McCarthy case, and it is therefore unnecessary to further allude to them.

We are of the opinion, under the above rules of law of which we fully approve, that it is incredible that the driver of the plaintiff's team, could not both hear and see the approaching train with which the team collided, even upon an interpretation of his testimony most favorable to plaintiff's contention.

The driver of the team was clearly guilty of contributory negligence.

Motion sustained.
New trial granted.

KATE P. CLIFFORD, AND CORA B. SCRUTON et al.

vs.

ANDROSCOGGIN & KENNEBEC RAILROAD COMPANY.

Androscoggin. Opinion December 10, 1921.

The forming of a new corporation of bondholders under R. S., Chapters 51 and 57, which absorbs the old corporation, constitutes a forfeiture of a lease held by the old corporation with a provision for determination, that should the leased estate be taken from lessee "by proceedings in bankruptcy or insolvency or otherwise," lessor may enter and forcibly remove lessee if necessary.

In the instant case the lessee went into receivership, and the bondholders of the lessee, the Lewiston, Augusta & Waterville Street Railway, after the court had granted leave to the Old Colony Trust Company, trustee for the bondholders under a mortgage, to file a bill for foreclosure, formed a new corporation of bondholders in accordance with the provisions of R. S., Chapters 51 and 57. A decree of foreclosure and sale of the property of lessee was entered. The new corporation, the defendant, went into possession of the premises demised under the lease. Plaintiffs claim a forfeiture of the lease resulting from an alleged breach of that provision in the lease which is as follows, viz.:

" . . . . or in case the estate hereby created shall be taken from lessee or those claiming under it by process of law, or by proceedings in bankruptcy and insolvency, or otherwise, lessors or their heirs or assigns may, while the fault or neglect continues, or at any time after such taking by process of law and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand, enter upon the premises and thereby determine the estate hereby created and may thereupon expel and remove, forcibly if necessary, the lessee and those claiming under it." Defendant claimed that there had not been any forfeiture, and that if a forfeiture might have been claimed it had been waived.

On report. A writ of entry to recover possession of certain real estate owned by the plaintiffs, which was in the possession of defendant. At the conclusion of the evidence, and by agreement of the parties, the case was reported to the Law Court for final determination, upon so much of the agreed statement of facts and evidence as was material and legally admissible. Judgment for plaintiffs.

The case is fully stated in the opinion.

Clifford & Clifford, Benjamin L. Berman, and Tascus Atwood, for plaintiffs.

William H. Newall, for defendant.

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

SPEAR, J. On October 28, 1908 the plaintiff leased to the Lewiston, Augusta & Waterville Railway for a term of twenty years, at an annual rental of $2,800, a brick block in Lewiston located at the corner of Main and Lisbon Streets.

December 16, 1918 the L. A. & W. St. Ry. by legal process was placed in the hands of receivers, who qualified and acted until discharged by the court.

On June 19, 1919 leave was granted by the court to the Old Colony Trust Company, trustee under the mortgage for the bondholders of the railroad, to file a bill for foreclosure.

On July 31, 1919 a decree of foreclosure and sale of the property of the railroad was entered.

Under the bill and foreclosure all the necessary steps were taken for the purpose of forming a corporation of bondholders in accordance with the provisions of R. S., Chapters 51 and 57, the completion of which was effectuated on September 30, 1919 in the organization

of the Androscoggin & Kennebec Railroad Co. Thus the old corporation was absorbed by the old bondholders and reappeared in a new organization under the name of the Androscoggin & Kennebec Railroad Co. Immediately upon the appointment of new receivers the plaintiff claimed a forfeiture of the lease and thereupon the receivers notified the plaintiffs of their intention to exercise their option to assume the lease and continue in possession.

There is no dispute between the parties as to the particular provision in the lease the interpretation and legal effect of which is determinative of their respective rights. It reads as follows:

"Provided always, and these presents are upon this condition, that in case of a breach of any of the covenants to be observed on the part of the Lessee or of those claiming under it, or in case the estate hereby created shall be taken from the Lessee or those claiming under it by process of law or by proceedings in bankruptcy and insolvency, or otherwise, the Lessors or their heirs or assigns may while the default or neglect continues, or at any time after such taking by process of law and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand, enter upon the premises and thereby determine the estate hereby created and may thereupon expel and remove forcibly if necessary, the Lessee and those claiming under it."

The defendant claims (1) that there has been no forfeiture under the above provision, and (2) that if a forfeiture might have been claimed it was waived. Treating the last claim first, we are unable to find any adequate evidence of waiver. The plaintiffs gave notice of a claim of forfeiture as soon as the receivers were appointed and followed that claim by a suit against the new company upon which they were nonsuited for want of entry, and in twelve days after the announcement of the nonsuit made entry upon the demanded premises for the purpose of bringing the present suit. These acts do not show a voluntary relinquishment of a known right.

Reverting now to the first defense it is claimed that the transformation of the old corporation into the new one did not work a forfeiture, as, in law there was (a) no real change in the status of the property, and (b) no violation of the terms of the lease, if there was. In regard to ownership the defendant says:

"It seems to us that the purpose of these statutes is to provide a means whereby the title to the property should vest in the share-

holders after the organization of the bondholders into a corporation, without a change in the ownership of the property, if the same, as in this case, is desirable. In other words, it was the same property; the owners were the same, and the only feasible way was to reorganize under the statutes. Before foreclosure this ownership was represented by bonds, and after foreclosure and organization, by shares of stock equal in amount to the bonds, at par."

We cannot concede that contention. It completely ignores the rights of the stockholders in the old company. These stockholders were the equitable owners subject to the mortgage to secure the interest on, and payment of, the bonds. That is, in case of final dissolution the assets if any are distributed to the stockholders. R. S., Chap. 51, Secs. 58 and 104. In the above reorganization, the old stockholders were completely eliminated. Under the language of R. S., Chap. 57, Sec. 58. "The foreclosure of the mortgage shall inure to the benefit of all holders of the bonds, coupons and other claims secure thereby." That provision sounded the death knell of the old stockholder and transferred all his property rights in the old to the stockholders of the new corporation. By reason of this change the entire management of the corporation as well as its property became vested in a new set of stockholders who could elect the officers and control the policy of the business. In fact, there was nothing of the old corporation left except its franchises and physical property, the equitable title of which vested in the new stockholders immediately upon the consummation of the new corporation. There was consequently an assignment of the lease to the new corporation by operation of law.

But the defendant, though admitting a change of property rights, yet contends that the language of the lease does not remove the case from the general rule that such an assignment passes the estate free from the covenant of forfeiture. Without any special provision against forfeiture or for re-entry it is undoubtedly well settled that an assignment, in invitum, of a lease does not come within a general provision of forfeiture. In such case it is only the voluntary act of the lessee that forfeits the lease, *Bemis et al.* v. *Wilder,* 100 Mass., 446.

But that is not the present case. By reference to the forfeiture clause in the present lease it will be observed that the lessors, for what reason it is immaterial to inquire, nevertheless did provide against the very contingency that happened in the insolvency,

receivership, obliteration of the old, and formation of the new corporation, by reserving upon the happening of such contingency the right of re-entry in language so clear and free from ambiguity that, in our opinion, its purpose, intent and legal effect cannot be overlooked. The provision of the lease pertinent to the point under inquiry reads as follows: "provided always, and these presents are upon this condition that in case that the estate hereby created shall be taken from the lessees or those claiming under it, by a process of law or by proceeding in bankruptcy and insolvency, or otherwise, the lessors or their heirs or assigns may without any notice or demand, enter upon the premises and thereby determine the estate and expel and remove forceably if necessary the lessee and those claiming under him."

We can hardly conceive of language more comprehensive to accomplish the prevention of the assignment of this lease by any available form of in invitum process. It provides against such action by process of law, bankruptcy and insolvency, or otherwise. These conditions are expressed in the specific terms of a written contract by the unambiguous language of which the lessee, without qualification, agreed that the occurrence of any of the contingencies named should constitute specific acts of forfeiture. We are unable to assign any valid reason why the defendant should not be bound by the terms of its own deliberate stipulations, in this as well as in any other form of contract. And it is so held in R. C. L., Page 1116, Section 634, in the following language: "Both courts of law and equity have always strictly construed provisions for forfeiture in ordinary leases, but when the parties have made express stipulations, which will admit of but one interpretation, not to give effect to them would be making a new contract for the parties, instead of construing that which they have made themselves." It is further said in Section 645 that it is competent for the parties to a lease to insert restrictive provisions and that "This is held to include the right to declare a forfeiture for an involuntary as well as a voluntary assignment." Under the last section several cases are sighted in support of the doctrine therein declared.

Among the cases sighted is the Penn. case *West Shore Railroad Co. et al.* v. *Wenner et al.*, reported in 1 Ann. Cas., 790, in which it is said in the note as follows: "The particular question appears to be one which has seldom arisen. To hold otherwise than as is held in the

reported case and the cases cited would be setting up a technicality in manifest disregard of the intention of the parties to the lease. It is a well-known rule that in construing covenants the intention of the parties will control."

We have no doubt, upon a legal interpretation of the clearly expressed provision in question that the insolvency and reorganization the lessee worked a forfeiture and authorized the plaintiffs to re-enter for the purpose of taking possession of the leased premises.

We now come to the question of Damages. The report of the evidence shows that on the 19th day of March, 1921 an entry upon the demanded premises was legally made for breach of the covenants of the lease, possession demanded and refused, and that the premises have been continually in possession of the defendant since March 19, 1921. The defendant is therefore liable for the reasonable rental value of the premises from that day to the present time.

We feel inclined to accept the testimony of the defendant's witness and fix the amount of rental at the rate of $6,000 per year.

Exceptions overruled.

THOMAS GAGNON'S CASE.

Franklin. Opinion December 14, 1921.

In an appeal to the Law Court from a decree confirming the decision of the Industrial Accident Commission, the record should contain a sufficient amount of the evidence to make it possible to obtain therefrom the facts necessary to a proper decision of the issue involved.

In an appeal to the Law Court from the decree of the sitting Justice confirming the decision of the Chairman of the Industrial Accident Commission, it is

Held:

That where the record does not contain the evidence, if any, taken out before the Industrial Accident Commission, but merely an agreed statement of facts, so meagre that it is impossible to obtain therefrom the facts necessary to a proper decision of the issue involved the entry should be,

Appeal dismissed for want of sufficient record.

On appeal. The applicant sustained by accident personal injuries while in the employment of defendant, the American Realty Com-

pany, as a teamster. Defendant contends that applicant is not entitled to compensation for the reason that the kind of work in which he was engaged at the time of the accident is not embraced in its written acceptance, and that it is entitled to the benefits of common law defenses. The Chairman of the Industrial Accident Commission found in favor of the applicant, and defendant appealed from a decree of a sitting Justice confirming such finding. Appeal dismissed for want of sufficient record.

Case is stated in the opinion.

James H. Carroll, for applicant.

Weeks & Weeks, for defendant.

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

CORNISH, C. J. Appeal from the decree of a sitting Justice under R. S., Chap. 50, Sec. 34, now found in Public Laws, 1919, Chap. 238, Sec. 34.

The question at issue is whether the employer's written acceptance covered the class of work in the performance of which the claimant was injured. The record before the Law Court includes the written documents and an agreed statement of facts, but not the evidence taken before the Industrial Accident Commission. The agreed statement is so meagre that it is impossible to obtain therefrom the facts necessary to a proper decision of the issue involved.

The statute requirement is that "upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure," Section 34. Appeals in equity carry with them all the evidence, *Caverley* v. *Small,* 119 Maine, 291, and it is the common practice to have the report of the evidence before the Law Court in this class of cases as in equity appeals. An agreed statement might perhaps be so full and complete as to cover every necessary point, but that is not the case here. Counsel in their briefs argue important facts which may have been in evidence but they are not contained in the record before us.

We are of the opinion, therefore, that the proper entry under the circumstances is,

Appeal dismissed for want of sufficient record.

RAYMOND T. BOWLEY *vs.* JOHN FULLER.

Knox. Opinion December 14, 1921.

Silence cannot be construed as consent, even by estoppel, unless it is one's duty to speak, and the question of acceptance inferable from conduct is one of fact for the jury.

An offer either oral or in writing, cannot be turned into an agreement simply because the person to whom it is made or sent makes no reply. Acceptance of an offer may be inferred from silence, where previous dealings or other circumstances are such as to impose a duty to speak, but the question of acceptance inferable from conduct is one of fact for the jury.

On exceptions. An action of assumpsit on account annexed to recover the sum of one hundred and eighteen dollars for storage of hay in a barn in the possession of the plaintiff, from November 1, 1919 to April 26, 1920. A verdict for plaintiff for $80.83 was returned by the jury. Exceptions were taken by defendant to that part of the charge of the presiding Justice wherein he instructed the jury, that as a matter of law, if the plaintiff was entitled to recover at all, he was entitled to recover the per diem storage claimed by plaintiff, dating from a reasonable time after notice was given to remove the hay.

Exceptions sustained.

The case is fully stated in the opinion.

Edward C. Payson, for plaintiff.

Elisha W. Pike, for defendant.

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

CORNISH, C. J. Assumpsit on an account annexed for the storage of hay, from November 1, 1919, to April 26, 1920. It appears from the bill of exceptions and the charge of the presiding Justice which is made a part thereof that the plaintiff became lessee of certain premises on October 24, 1919. The defendant had been and at that time was in occupation of the premises, but he moved away four days later, on October 28, 1919, leaving, however, two bins of hay stored in the

barn. This was left because the defendant gave the plaintiff an option to purchase this hay at a certain price, the option to continue for two months. The plaintiff did not see fit to purchase, however, and the option expired leaving the defendant still the owner of the hay, which remained in the barn until April 26, 1920.

The plaintiff claims that no agreement was made at the beginning as to the exact price of storage, while the defendant contends that in consideration of the option of purchase the plaintiff agreed that the defendant could have the storage without compensation until the next July. This was the first issue of fact to be decided by the jury and this controversy they must have determined in favor of the plaintiff; otherwise the defendant would have secured a verdict in his favor.

The jury were instructed that if they accepted the plaintiff's version on this issue he was entitled to a fair compensation under an implied contract and to this ruling no exception was taken. This covered the period from the expiration of the option until about March 15, 1920. On March 11, 1920, the plaintiff notified the defendant by letter that if he did not remove the hay by March 15th he should charge the defendant one dollar per day for the storage after that date. To this the defendant made no reply, and he took no steps to remove the hay. The court instructed the jury that after the receipt of that letter the defendant was entitled to a reasonable time in which to remove the hay, but if the hay was not removed within that reasonable time, the duration of which was left to the jury to determine, the plaintiff was entitled to recover one dollar per day as demanded. To this instruction the defendant excepted.

On March 30, 1920, the plaintiff again wrote the defendant stating that if he did not remove his hay on or before April first, the rate of storage would be increased to two dollars per day after that date. The defendant made no answer and removed no hay. The court gave the same instruction with reference to the two dollar as with reference to the one dollar demand, and exception to this ruling was also taken. Upon these two exceptions, which involve but one and the same legal question, the case is before the Law Court.

The plaintiff's contention is that while the price of storage prior to March 15, 1920, should be fixed by the jury at a reasonable rate under an implied contract, that defendant's silence gave assent to the plaintiff's proposed increase to one dollar and again to two dollars

per day, and that the defendant was bound thereby as under a perfected express contract. The defendant answers that no express contract at any figure was made, because there was no acceptance on his part, and that the most that the plaintiff can recover is a reasonable compensation under an implied contract during the entire period for which he was liable.

In our opinion it cannot be said as a matter of law that an express contract was completed. Plaintiff's letters constituted nothing more than an offer communicated to the defendant. In order to perfect the contract and bind the defendant there must have been an acceptance by him. But he neither accepted nor rejected the offer. He did nothing which could be construed into an acceptance. He simply remained silent. He was under no obligation to speak or to act and under those circumstances silence and inaction cannot be converted into acceptance.

The amount of storage to be paid rested entirely in contract. When the letters were written there was a subsisting implied contract which obligated the defendant to pay a reasonable sum. There was no existing obligation on the defendant to pay the increased demand and it could not be inferred as a matter of law from merely allowing the hay to remain in the barn because the continuing liability for rent could be referred to that subsisting contract, and in the absence of any new contract, would be referred to it. *Raysor* v. *Berkeley Co. Ry. & L. Co.*, 26 S. C., 610, 2 S. E., 119. A mere failure to reject cannot be converted into an acceptance unless the offeree has agreed in advance that such silence should be so construed or there was some legal duty resting upon him to that effect. There was no such preliminary agreement here and no such duty. Even if the plaintiff had attempted in his offer to make silence on defendant's part a constructive acceptance the law would not permit it. The governing principles are summarized as follows: "Acceptance of an offer may often be inferred from silence as when goods sent to another without request are used or dealt with as his own. Silence alone does not give consent, even by estoppel, for there must not only be the right but the duty to speak before the failure so to do can estop a person from afterward setting up the truth. It is otherwise of course if the relation of the parties, their previous dealings or other circumstances are such as to impose a duty to speak. An offer made to another either orally or in writing, cannot be turned into an agreement because

the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent for the offerer cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance." 13 C. J., Page 276, Sec. 74.

Another author states the rule thus: "A party cannot by his wording of his offer turn the absence of communication of acceptance into an acceptance and compel the recipient of his offer to refuse at the peril of being held to have accepted it." Clark on Contracts, Sections 31-32.

Page on Contracts, Section 42, says: "Failure or omission to reject an offer is not the equivalent of an acceptance, . . . Even if the party making the offer prescribes that a failure to answer should be regarded as an acceptance such failure does not amount to an acceptance. The party to whom the offer is made may, however, have agreed that his silence shall be equivalent to an acceptance and this agreement may be understood from the conduct of the parties."

This doctrine has been recognized and applied in a wide range of cases. Illustration may be found in *Felthouse* v. *Brindley*, 11 C. B. N. S., 869; In re Empire Assoc. Corp. L. R. 6 Ch., 266; *Prescott* v. *Jones*, 69 N. H., 305; *More* v. *Ins. Co.*, 130 N. Y., 537, 547; *Raysor* v. *Berkeley Co. Ry. & L. Co.*, 26 S. C., 610; *Royal Ins. Co.* v. *Beatty*, 119 Pa. 6; *Cincinnati Equipment Co.* v. *Coal Co.*, 158 Ky., 247.

Of course the conduct of the offeree may be of such a character that although he remains silent his acts import acceptance or assent and therefore in the eye of the law may be regarded as such, as in *Beverly* v. *Lincoln G. L. Co.* 6 A. & E., 829; *Orme* v. *Cooper*, 1 Ind., App. 449; *Hobbs* v. *Massasoit Whip Co.*, 158 Mass., 194; *Bohn Mfg. Co.* v. *Sawyer*, 169 Mass., 477. In this class of cases the question of acceptance inferable from conduct would be one of fact for the jury.

In the case at bar the court ruled that the mere silence of the defendant and his failure to remove the hay after a reasonable time unaccompanied by any acts whatever constituted an acceptance and forced on him a liability for the increased demands as a matter of law.

The learned counsel for plaintiff cites many cases based upon the rights of landlord and tenant, but these are clearly distinguishable because the relation of landlord and tenant did not exist in this case. It is not a question of a tenant holding over after the expiration of his term and after having received notice from his landlord of increase of rent in such event. In such cases the assent and therefore the

liability of the lessee may be implied from the mere continuance in possession. *Hunt* v. *Bailey,* 39 Mo., 257; *Higgins* v. *Halligan,* 46 Ill., 173; *Griffin* v. *Knisely,* 75 Ill., 411; *Reithman* v. *Brandenburg,* 7 Colo., 480; *Despard* v. *Walbridge,* 15 N. Y., 374; *Stees* v. *Bergmeier,* 91 Minn., 513, authorities relied upon by the plaintiff.

In the case at bar, however, there was no tenancy, not even a tenancy at will, because tenancy implies an estate in the real property for the time being, an ownership pro hac vice. Nothing of the sort existed here. The defendant had no estate in the premises. There was no contract for the hiring and letting of real estate. The defendant was a mere licensee, with permission to occupy with his hay two bins in a barn, the possession of which still remained in the plaintiff. The exceptions precisely so state: "This is an action of assumpsit on an account annexed brought to recover the sum of one hundred and eighteen dollars for storage of hay in a barn in possession of the plaintiff," are the significant words in the bill of exceptions. The action is for storage, not for use and occupation, and it is properly so brought. The defendant was storing his hay in two bins under the same conditions as if he were storing carriages or farming implements on the floor of the barn. The facts of the case bring it in line with similar cases in which it is held that no tenancy exists. Thus, in case of a lodger occupying rooms in a boarding-house with his family; *White* v. *Maynard,* 111 Mass., 250; *Peaks* v. *Cobb,* 197 Mass., 554; or a party occupying with horses, stalls in a stable, *Congregation Beth Israel* v. *O'Connell,* 187 Mass., 236; or a music dealer using certain designated space in a department store, *R. H. White Co.* v. *Remick,* 198 Mass., 41; or an advertiser occupying certain space on a roof, *Jones* v. *Donnelly,* 221 Mass., 213. In this class of cases the occupant is held to be a licensee and not a tenant. Such were the rights of the defendant here, and the rules applicable to landlord and tenant are therefore not pertinent in this case. The plaintiff's rights rest in contract. His rights under an implied contract for reasonable compensation are established, but his claims under his specific demands are not proven as a matter of law. The question of acceptance under all the circumstances should at least have been left to the jury.

Exceptions sustained.

ARTHUR F. HOPKINS *vs.* JOHN D. MCCARTHY.

Androscoggin. Opinion December 15, 1921.

Where an intending purchaser has actual notice of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to make the inquiry. Notice of a lease will be notice of its contents.

A stipulation for the renewal of a lease operates to give it effect as an original present demise for the full term for which it might be made inclusive, contingent upon an election to exercise the privilege of extension. If the term possible be for more than seven years the lease requires record. But notice of a lease will be notice of its contents. Which is but another way of saying that notice may become the equivalent of knowledge, and that he who is put upon inquiry must exercise good faith, proper diligence, and reasonable care in following up the inquiry. It is not so much a question that this plaintiff had the means of knowledge as that he did not obtain the knowledge. He was rightly held to have had actual knowledge of the lease according to its true legal effect, and to be bound by the renewal or extension clause that it contains.

On exceptions. This is an action of forcible entry and detainer. It was brought in the Lewiston Municipal Court and went to the Superior Court on appeal by plaintiff. It was tried in the Superior Court without a jury and a decision favorable to the defendant resulted, from which decision plaintiff took exceptions. Exceptions overruled.

Case is stated in the opinion.

Frank A. Morey, for plaintiff.

William H. Newall, for defendant.

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

DUNN, J. Except against the lessor and his heirs and devisees, and also in opposition to any other person actually having notice, every lease of real estate for more than seven years is imperfect, without record. R. S., Chap. 78, Sec. 14.

The owner of a Lewiston business block rented it in distinct parts to different tenants. One McCarthy occupied an upper floor; his lease being for two years, with option for its renewal for a ten-year or fractional term. There is no registry record of that lease of consequence here. A partnership, comprising this plaintiff as a member, was tenant in possession of another portion of the building. Before McCarthy's two-year period was out, and while the partnership was still continuing in tenancy, the lessor died. Thereafterwards, an administrator of the lessor's estate, especially authorized to make a sale, entered into a written agreement with the partnership, contemplating the sale and purchase of the entire block, subject only to an outstanding lease to Mr. McCarthy, the exception not being otherwise more specific than additionally to name the part of the building that his lease covered.

For some reason, not disclosed in the record, the partnership did not buy the building. Three days after that of the aforesaid agreement's date the residuary devisees under the lessor's will conveyed the block to the plaintiff. Three days later yet the administrator deeded to the plaintiff the same property. Neither deed mentions Mr. McCarthy's lease. Neither speaks of the agreement with the partnership. During the negotiations which led to the making of that agreement, the plaintiff, as the active member of the partnership in the particular business affair, saw but did not read the leasehold contract. He did read a filing on its back indicative of a two-year term. And the administrator, in exhibiting the document to the plaintiff, spoke of it as one for two years. The integrity of the administrator's belief in the accuracy of his utterance is generously conceded. He then had never known about the renewal covenant or extension clause, or, if he ever had known, that fact escaped the attention of a memory revived solely by a reading of the index on the instrument.

Beyond himself reading the filing on the lease, and being told that it was for two years, the plaintiff, in advance of purchasing the property, engaged an attorney at law to search its record title at the registry of deeds. The attorney reported the discovery of no encumbrance. Thereupon the plaintiff purchased. When the plaintiff had bought, Mr. McCarthy, who is now defending here, began to attorn to him as his landlord. Some six months later, and about three weeks before the specified two years were expiring, the defend-

ant, exercising and limiting his right of election, gave the plaintiff notice of his desire to avail himself of the renewal privilege arising from the original demise. *Perry* v. *Rockland Lime Company,* 94 Maine, 325; *Willoughby* v. *Atkinson Company,* 93 Maine, 185. Insisting the lease to be without binding force upon him for lack of record, the plaintiff thence declined to receive instalments of the reserved rental, as they successively matured. When the two years were up, he brought this action of forcible entry and detainer, seeking judgment for possession of the leased premises.

A contract for the renewal or extension of a lease is incipiently executory. Nevertheless, the stipulation for a renewal operates to give the lease effect as an original present demise for the full term for which it might be made inclusive; contingent, however, upon an election to exercise the privilege of extension. *Holley* v. *Young,* 66 Maine, 520; *Harris* v. *Howes,* 75 Maine, 436; *Willoughby* v. *Atkinson Company,* supra; *Perry* v. *Rockland Lime Company,* supra; *Briggs* v. *Chase,* 105 Maine, 317; *Hooper's Sons* v. *Sterling-Cox Company,* 118 Maine, 404; *Leominster Company* v. *Hillery,* 197 Mass., 267. So operating, if the term possible for it to embrace be for more than seven years, it brings the lease within the meaning of the statute requiring record. *Leominster Company* v. *Hillery,* supra. In the absence of limitation, the agreement to renew the lease runs with the reversion and, within the restrictions of the statute, it is binding on and enforceable against a purchaser thereof. *Perry* v. *Lime Company,* supra; *Leominster Company* v. *Hillery,* supra. Precluding limitation is not contained in McCarthy's lease. Obviously, then, decision must turn on determination of the question of whether the plaintiff, at the time of purchasing the property, had actual notice of the existence of that lease.

Actual notice and actual knowledge are not necessarily synonomous expressions. Actual notice is that which gives actual knowledge, or the means to such knowledge. It is a warning brought directly home to one whom it concerns to know. Actual notice may be either express or implied. It is express when established by direct proof. It is implied when inferable as a fact by proof of circumstances. "Express actual notice" is its own definition. Implied actual notice is that which one who is put on a trail is in duty bound to seek to know, even though the track or scent lead to knowledge of unpleasant and unwelcome facts. *Knapp* v. *Bailey,* 79 Maine, 195; *Bradley* v. *Merrill,* 88 Maine, 319.

In the present case events came about in close propinquity. Plaintiff's partnership and the defendant, as we already have seen, were tenants of different parts of the same building. In behalf of his partnership, plaintiff arranged for the purchase of the building. He then actually saw the defendant's leasehold document. Seemingly in substitution for the partnership, but whether so or not, with the same mental faculties and the same notice that were his while acting for the partnership, he within the week following took to himself individually two deeds to the property, both silent on the subject of an existing tenancy. Although his earlier information had told him that McCarthy's lease was yet unexpired by limitation of the two-year term, and although McCarthy, as the plaintiff in his daily walk must well have known, was still in occupancy of the upper floor, yet the plaintiff explored only the avenue of the registry of deeds. Other ways potential of intelligence he did not deign to enter upon. Certain facts it was given him to know. And knowing them his knowledge ought to have impressed him. For, to one who knows a fact and thereby is impressed, a fact is more than a fact; it is a living, sentient thing; a source of thought.

Inquiry was not necessary because the plaintiff saw the defendant in possession. Possession alone is not implied notice. *Hanly* v. *Morse*, 32 Maine, 287. But inquiry became highly important when he had found out that the man was in possession under a contract of lease. Then a prudent man would have inquired, and inquiring would have learned. Then, to excerpt from *Birdsall* v. *Russell*, 29 N. Y., 220, there was "such a connection between the fact discovered and the further facts to be discovered as to furnish a clue—a reasonable and natural clue—to the latter." Notice of a lease will be notice of its contents. Story's Eq. Jur., Section 400. Which is but another way of saying that notice may become the equivalent of knowledge, and that he who is put upon inquiry must exercise good faith, proper diligence, and reasonable care in following up the inquiry. The underlying and ruling principle is that of common prudence, or, better still, that of common honesty. "Whatever puts a party upon inquiry, amounts in judgment of law to notice, provided the inquiry becomes a duty and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding," is a commendable syllabus condensed into small space. *Lodge* v. *Simonton*, 2 Penrose & Watts, 439; 23 Am. Dec. 36. Mr. Justice Story

says: "Whenever inquiry is a duty, the party bound to make it is affected with knowledge of all that which he would have discovered had he performed the duty." *Cordova* v. *Hood,* 17 Wall., 1; 21 Law Ed., 587. Ruling Case Law puts the essential principle in words of undoubted denotation, words that are precise, specific, concrete, and strong: "Where a person is charged with notice, or actually knows, of an instrument he is also charged with notice of all facts appearing on the face of the instrument to the knowledge of which anything there appearing would conduct him." 20 R. C. L., 353. Duty unperformed begets consequences to be suffered. Where an intending purchaser has actual notice of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to make the inquiry. The corollary is that the purchaser may show by proof, where his actual notice of the preliminary fact has been established by legitimate evidence, that he failed to discover the prior right, the exercise of appropriate diligence on his part notwithstanding.

It is not so much a question that this plaintiff had the means of knowledge as that he did not obtain the knowledge. The idea of reading the lease, or of having it read aloud in his hearing, does not seem to have occurred to him. He dared know that which he would know,—what the filing on the back of the lease pointed out,—and beyond this he was indifferent and was blind. Surely, had the lease been of registry record, the plaintiff would not base his case upon a statement that in his reading of the record he totally ignored the covenants there spread before him. His present position is not worthy more esteem. His indifference was blameworthy and his blindness wilful. That indifference and blindness fused into negligence of a degree fatal to his claim of having purchased in innocence of knowledge, for value. He had actual notice of the lease according to its true legal effect, within the meaning of the statute.

Exceptions overruled.

CALIXTE JUTRAS *vs.* EMILE BOISVERT et al.

Androscoggin. Opinion December 17, 1921.

When a real estate broker has complied with the conditions of the contract with the owner, by producing to the owner a customer who is ready, willing and able to buy at a specified price, upon terms satisfactory to the owner, and the customer is accepted by the owner as such, he is entitled to his commission, whether the customer changes his mind and refuses to buy or not.

In the instant case the plaintiff listed his property with the defendants, authorizing them to advertise it for sale and "to find a purchaser at the price of three thousand seven hundred dollars." The purchase price was presumed to be in cash in absence of other terms. Subsequently, the owner changed the terms first prescribed as to cash, to terms agreed upon between the owner and the customer, part in cash and part by assuming an outstanding mortgage.

Such change or modification being made by the owner would not effect the rights of the brokers to their commission. The seller accepted the customer as his purchaser.

Later there was a further modification of terms, agreed to by the seller and the customer, terms which it was admitted the purchaser was able to comply with. The deal was not, however, consummated for the reason that the purchaser changed his mind and refused to complete the transaction. There was no valid contract of purchase signed by the buyer. These conditions did not concern the brokers. The owner alone was concerned.

The right to compensation had become fixed before the changes and modifications were made by agreement between the seller and the purchaser.

This is an action in assumpsit for money had and received. The plaintiff owned a house in Lewiston and listed it with defendants, real estate brokers, at a stated purchase price and also stated commission. Defendants procured a customer who paid to defendants sixty dollars "to bind the bargain." Subsequently, the purchaser changed his mind, after two changes and modifications had been made in the terms of the purchase price agreed to by both the owner and the purchaser, and forfeited the sixty dollars paid down, and refused to consummate the deal.

The case was tried in the Lewiston Municipal Court, and plaintiff excepted to the finding in favor of defendants, and the case was

certified to the Chief Justice under Private and Special Laws of 1871, Chap. 636, Sec. 10. Exceptions overruled.

Case is fully stated in the opinion.

Louis J. Brann, for plaintiff.

H. E. Holmes, for defendants.

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

CORNISH, C. J. This case was certified to the Chief Justice from the Municipal Court of Lewiston under Private and Special Laws, 1871, Chap. 636, Sec. 10, and is before us on plaintiff's exceptions to a judgment for the defendants rendered by the Judge of that court on the following agreed statement of facts:

"This is an action in assumpsit for money had and received. The defendants are real estate brokers in Lewiston. The plaintiff owned a house and land on Rosedale Street, Lewiston. In June 1920 plaintiff listed this property with defendants authorizing them to advertise it for sale and to find a purchaser at the price of three thousand seven hundred dollars. Defendants advertised it for sale in a Lewiston newspaper and took several people to see it. In the month of May 1921 they interested one George Sutton in the property. The defendants told the plaintiff that they had interested Sutton and the plaintiff told defendants that he would sell the property for three thousand eight hundred dollars, defendants to have a commission of one hundred dollars. May 26, 1921 the defendants brought Sutton to see the plaintiff. Sutton, plaintiff and defendants had a conversation together in which Sutton agreed to buy the property at the price of three thousand eight hundred dollars, to pay seventeen hundred dollars in cash, and assume a mortgage which was on the property. Then in the presence of plaintiff, Sutton gave defendants sixty dollars, the understanding among them being that it was 'to bind the bargain,' and defendants wrote and handed to Sutton a receipt in the following words:

'May 26, 1921.

Received of Jorge Suttun sixty dollars on property. $60.

BOISVERT & BEAUCAGE'

"There was no other written agreement made. The next day Sutton entered upon plaintiff's land, with plaintiff's permission, and planted some potatoes and other vegetables. Sutton owned a house and land on Sabattus Street, Lewiston, which he was bargaining to sell at the time. He expected to make the payment of seventeen hundred dollars with the money that he would receive from the sale of his Sabattus Street property. A few days after May 26th he had a telephone conversation with the plaintiff in which he told plaintiff that he could not pay seventeen hundred dollars cash down, but could pay one thousand dollars. Plaintiff agreed to take one thousand dollars. On June 2nd there was a telephone conversation, partly between Sutton and plaintiff and partly between Sutton and defendant, Beaucage, the plaintiff and defendant, Beaucage, being together at the time at plaintiff's house, in the course of which Sutton told plaintiff that he did not want to buy plaintiff's property, giving as a reason that he did not like to pay interest on so much money; but he told defendant, Beaucage, during the same conversation that his children did not like plaintiff's house, that his daughter 'cried all night,' and that he must refuse to buy the place in order to 'keep peace in his family,' and that he would forfeit the sixty dollars that he had paid. Sutton then bought a place on Homefield Street, Lewiston.

"It is agreed that Sutton had one thousand dollars in cash which he could have paid to plaintiff; and it is agreed that his real reason for not completing the transaction was that his children did not like the place and he did not want to displease them. It is agreed that the plaintiff in no way prevented the sale but was willing to complete the trade.

"Afterwards plaintiff demanded of defendants the sixty dollars, which defendants refused to give him, claiming it as a part of their commission of one hundred dollars, claiming that they had fully performed their work as real estate brokers when they brought Sutton to the plaintiff. The plaintiff, however, claims that the sixty dollars belongs to him and that defendants have not earned their commission because the sale was not consummated."

The precise question of law raised under these facts is whether a broker employed to find a purchaser for real estate is entitled to his commissions provided he produces to the owner a customer who is ready, willing and able to buy at the specified price, upon terms

satisfactory to the owner, and the customer is accepted by the owner as such, even though he subsequently changes his mind for personal or family reasons and refuses to purchase, while the owner remains ready and willing to sell. The answer to this question depends upon the precise contract made between the owner and the broker and what the broker is bound to do in order to be held to have complied with it.

In the case at bar the plaintiff listed his property with the defendants, authorizing them to advertise it for sale and "to find a purchaser at the price of three thousand seven hundred dollars." These are the express words of the agreement and "to find a purchaser at the price of three thousand, seven hundred dollars" means that the defendants were to procure a party who was ready and willing and able to purchase at that price. Further this was presumed to mean a cash sale in the absence of other terms. *Grant* v. *Dalton,* 120 Maine, 350. The price was subsequently changed to three thousand, eight hundred dollars. The brokers had no power in the first instance, without authority from the owner, to change the terms first prescribed as to cash, to the terms agreed upon between the owner and the customer, part in cash and part by the assumption of an outstanding mortgage. The owner, however, had that power because he was dealing with his own property and he could vary the terms as he saw fit, and such modification would not deprive the brokers of their commission. The rule recognizing this element is stated in a very recent case as follows: "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." *Grant* v. *Dalton,* supra, and see *Hanscom* v. *Blanchard,* 117 Maine, 501, 503.

The brokers in the case at bar brought one Sutton to the plaintiff, who was ready, willing and able to take the property on terms satisfactory to the plaintiff, that is, for seventeen hundred dollars in cash and the assumption of the outstanding mortgage. This modification of the original cash terms being agreed upon between the seller and purchaser, the seller accepted the customer as his purchaser. When that was done the brokers had fulfilled all the requirements of their contract and were entitled to their commission. Later there was a further modification, to the effect that the customer should pay one thousand dollars in cash instead of seventeen hundred. This was

agreed to by the seller and it is admitted that Sutton had the one thousand dollars in cash with which he could have met the payment.

The deal was not consummated by the execution, delivery and acceptance of a conveyance and the payment of the consideration, nor was any valid contract of purchase signed by the buyer, but neither of these acts concerned the brokers. No duty was imposed upon them in relation thereto by their contract. These were matters entirely for the owner to consider and determine, and if he saw fit to take the purchaser's word and to demand no valid written agreement the responsibility rested entirely upon him.

Under the agreement in this case the brokers were not obliged to effect a sale, as in *Ward* v. *Cobb*, 148 Mass., 518, which means in this connection either an actual conveyance or a valid written contract to buy, *Rice* v. *Mayo*, 107 Mass., 550, *Veazie* v. *Parker*, 72 Maine, 443, but they were only bound to find a purchaser as already defined. When they had found such a purchaser and had brought him to the owner and those two had agreed upon modified terms which were satisfactory to the seller, the seller had accepted that party as the purchaser whom he had authorized the brokers to find, and he cannot repudiate his agreement to pay commissions simply because no written agreement was signed binding the purchaser. The agreement contained no special stipulation that the brokers' commission was conditional upon the making of an enforceable agreement between seller and customer, *Harrington Co.* v. *Waban Rose Conservatories*, 222 Mass., 372. "It is no part of the brokers contract to see to the making of the contract between his principal and the customer found by him." *O'Connell* v. *Casey*, 206 Mass., 520-529; *Taylor* v. *Schofield*, 191 Mass., 1; *Willard* v. *Wright*, 203 Mass., 406; *Brilliant* v. *Samelas*, 221 Mass., 302; *Leland* v. *Barber*, 228 Mass., 144.

As was said by the court in an oft-cited case: "When the broker has produced a customer his duty is at an end; so far as his rights or his duties are concerned it is immaterial whether a contract is or is not made, or if made, whether it is or is not performed. The broker's right to a commission is no more dependent upon or affected by the fact that a contract is or is not drawn up and executed, than it is by the fact that the contract, if drawn up, is or is not carried into effect. Making or not making a contract with the customer produced, enforcing or not enforcing a contract, if made, are matters for the broker's principal to do or not to do as his ability and inclination

determine. They are matters with which the broker is not concerned, and on which his right to a commission is not dependent." *Fitzpatrick* v. *Gilson*, 176 Mass., 477, and see *Goodnough* v. *Kinney*, 205 Mass., 203, to same effect.

The case at bar falls within these well settled principles of law. For family reasons the customer declined to carry out the oral contract which he had made with the seller, (the enforceability of which we do not decide) but that was a matter between the seller and the buyer, not between the seller and the brokers. Their right to compensation had already become fixed. The customer had paid to the defendant brokers sixty dollars to bind the bargain, with the knowledge and consent of the plaintiff. The plaintiff seeks to recover this in this action for money had and received. The defendant retains it as a part of the one hundred dollars commission to which he claims to be entitled and in this position he is legally justified.

The court below so ruled and the entry must therefore be,

Exceptions overruled.

FRANK M. CONNERS' CASE.

Sagadahoc. Opinion December 20, 1921.

After the expiration of the time within which an appeal may be taken from a final decree of the Chairman of the Industrial Accident Commission, under the Workmen's Compensation Act, a rehearing cannot be had on the merits of the case on the ground of newly discovered evidence. An appeal upon questions of law may be had to a single Justice, and thence to the Law Court, and a review may be had within two years after decree on the ground that the incapacity of employee has subsequently increased, diminished or ended.

After a final decree has been made and entered by the Chairman of the Industrial Accident Commission under the Workmen's Compensation Act, and the time for taking an appeal therefrom has expired, the Chairman has no

power to grant and hold a rehearing on the merits of the case upon motion presented therefor on the ground of newly discovered evidence.

An appeal upon questions of law to a single Justice of this Court and thence to the Law Court is provided by R. S. Chap. 50, Sec. 34, and a review of compensation awarded may be had by the Chairman within two years after entry of decree upon the ground that the incapacity of the employee has subsequently increased, diminished or ended, under Section 36, but these are the only instances in which a review is provided for, and the present proceeding does not come within either of them.

The rights of the parties are governed entirely by statute, and the statute knows and authorizes no such procedure as was attempted here.

On appeal. This is a petition by claimant under the Workmen's Compensation Act praying for a rehearing on the ground of newly discovered evidence, after a full hearing had been held on claimant's original application for compensation and a final decree entered denying compensation, and the time within which an appeal may be taken as fixed by statute had expired without any appeal being taken. The Chairman of the Industrial Accident Commission granted the petition, and a decree by a single Justice was entered in accordance therewith, from which decree an appeal was taken by defendants. Decree reversed. Petition dismissed.

Case is stated in the opinion.

David O. Rodick, for plaintiff.

Hinckley & Hinckley, for defendants.

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

CORNISH, C. J. The claimant received an injury on October 19, 1918. On March 14, 1919, he filed with the Industrial Accident Commission a notice and application for compensation under the Workmen's Compensation Act. Answer was filed on the same day. The claimant was still in the hospital at Bath, where he had been since receiving his injuries. The chairman of the commission was present. The claimant had no attorney. The record and decree pertaining to the hearing read in part: "Under a mutual agreement to proceed with the hearing before the Chairman the parties entered into the following stipulation upon the record: 'It is understood and agreed by and between the parties to this hearing that the petition for adjustment of claim of the injured employee filed this day and

the answer of L. P. Soule & Son Co. and the Contractors Mutual Liability Ins. Co. shall be the foundation for all proceedings in this hearing as if regularly filed and notice thereof ordered, and the answer filed in accordance with the provisions of the statute and that all formalities are waived.'

"After full hearing of the parties and their witnesses the Chairman makes the following finding of facts. First, that the injured employee Frank M. Conners, on or about the 19th day of October, 1918, or at any other time while in the employ of L. P. Soule & Sons Co. did not receive a personal injury by accident arising out of and in the course of his employment. Dated March 15, 1919."

This decree was signed by the then Chairman of the Commission. No appeal from this decision was taken.

On September 13, 1920, the claimant filed with the Chairman the petition now under consideration, asking for a rehearing on the ground of newly discovered evidence. This petition recites the facts connected with the first hearing and decree and then alleges that since the signing of that decree the petitioner has discovered new and important evidence and witnesses, that this evidence was not presented at the previous hearing and could not have been discovered by the petitioner owing to his mental, physical and financial condition. The petitioner then proceeds to state the names of the witnesses and the facts to which each would testify. In short the same general form is adopted as in cases of a motion for new trial on the ground of newly discovered evidence after verdict and before judgment in an ordinary action at law in a common Law Court.

The defendant filed answer denying the power of the commission to grant this petition, but the petition was granted and a new hearing ordered from which order an appeal to this court was duly perfected.

The important question for decision is whether after a final decree has been signed and the time for taking an appeal has expired, the Commissioner has power to grant and hold a rehearing on the merits of the case upon motion presented therefor on the ground of newly discovered evidence. We are unable to discover that such power is inherent in the commission or has been conferred upon it by statute.

The Industrial Accident Commission is not a court of general nor even of limited common law jurisdiction, but an administrative tribunal specially created by the Legislature to administer the Workmen's Compensation Act (adopted in this State in 1915) with the

aid of the Supreme Judicial Court. Public Laws, 1915, Chap. 295, R. S., 1916, Chap. 50 as amended by Public Laws, 1919, Chap. 238. As such administrative arm of the Legislature it possesses only such jurisdiction, powers and authority as are conferred upon it by express legislative grant or such as arise therefrom by implication as necessary and incidental to the full and complete exercise of the powers granted. *Levangie's Case*, 228 Mass., 213; *Sterling's Case*, 233 Mass., 485. It has a procedure all its own and it borrows nothing by implication from the courts of common law.

No power of reopening or rehearing a case upon its merits, in which a decree has been entered, and of determining anew the liability or non-liability of the employer is granted by the statute. That decree, in the absence of fraud, is declared to be final upon all questions of fact. Section 34.

In two instances, and in only two, is the right given to review or modify the decision of the Commission. The first is by appeal to a single Justice of the Supreme Judicial Court and thence to the Law Court as provided in Section 34. But in such appeal questions of fact are not involved. It concerns itself simply with questions of law. The time allowed for taking such appeal was ten days under the original statute of 1915, and is now twenty days under the amended statute of 1919. That appeal was not attempted here. The second method is by way of review under the following provision: "At any time before the expiration of two years from the date of the approval of an agreement by the Commission or the entry of a decree fixing compensation, but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement or decree, but not afterwards, any agreement, award, findings or decree may be from time to time reviewed by the Chairman of said Commission upon the application of either party, after due notice to the other party, upon the ground that the incapacity of the injured employee has subsequently ended, increased or diminished. Upon such review the said Chairman may increase, diminish or discontinue the compensation from the date of application for review in accordance with the facts, 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." Section 36.

This provision as to review is expressly limited to cases where by the original decree a compensatory award has been made, and where

the petitioner asks to have such award increased, diminished or ended because of conditions that have arisen since its making. Therefore it has no application to the pending controversy and none is contended for by the petitioner.

Further, in this reviewing provision it is declared that the chairman of the commission "shall order no change of the status existing prior to the application for review." This court has very recently defined the term "status" as here used to mean "the relation in which an injured person stands toward him who was his employer at the time of the accident. It goes to his right to recover compensation." *Fennessey's Case*, 120 Maine, 251. Evidently the Legislature did not intend that the original determination as to liability should be overturned by any subsequent evidence except in cases of fraud which vitiates all judgments.

We see therefore that two proceedings subsequent to the original decree are authorized, the one on appeal in matters of law, and the other in modification of damages because of subsequent facts and conditions, and the authorization of these two impliedly excludes all others according to the general rule for the interpretation of statutes.

But the petitioner claims that without such statutory authority the commission has the inherent power to grant a new trial on ground of newly discovered evidence where justice would seem to require it.

To this we cannot give assent. In the first place, were there such inherent power it is wrongly invoked in this case. Section 34 provides that the decree of the commission "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." Proceedings in equity know no such machinery as a motion for new trial on the ground of newly discovered evidence. Such a motion is cognizable only in actions at law. Moreover, in actions at law it can be employed only after verdict and before judgment. After judgment the remedy is by writ of review or writ of error.

The petitioner claims, however, that the practice contended for prevails in Courts of Probate, which are also creatures of the statute, and therefore by analogy this practice should prevail under the Compensation Act. Assuming that the analogy is complete, which it is not necessary to decide, the power residing in a Probate Court to

reopen a case upon petition for rehearing is far more restricted than the petitioner would argue. It can be exercised in cases of fraud or clerical mistake, or as the court has phrased it in case of a decree, "Clearly shown to be without foundation in law or fact and in derogation of legal right." *Merrill Trust Co., Appellant,* 104 Maine, 566. Instances of the exercise of this power may be found in the probating of a later will and revoking the decree probating an earlier, which in law had no vitality and therefore was "in derogation of legal right;" *Cousins* v. *Advent Church,* 93 Maine, 292; in revoking a decree admitting to probate a will which was forged, a palpable fraud upon the court; *Merrill Trust Co., Appellant,* supra; in reopening a guardian's final account where the allowance had been obtained by fraud; *Moore, Appellant,* 112 Maine, 119; in reopening a decree of distribution inadvertently made containing manifest clerical errors; *Bergeron, Appellant,* 98 Maine, 415.

But this is the limit of the power to reopen. The Probate Court has no general authority so to do in every case where rights have been determined. This was carefully guarded against in the Bergeron case where the court say: "We do not hold that a Probate Court can, after the term it was made, annul or modify a decree as to a matter which was passed upon and determined in the making of such decree or that even such a decree as this would not be ample protection to any person who had acted upon it, but simply that before a decree has been acted upon, upon application by a person interested and after notice to all persons interested, that the Probate Court may annul or modify a previous decree containing manifest errors and mistakes inadvertently made and which were not considered by the Probate Court and determined by it."

Recurring now to Industrial Accident cases it should be observed that our statute notes the vitiation of all decrees of the Commissioner by fraud, and fixes their finality in all other cases, in these words: "His decision in the absence of fraud, upon all questions of fact shall be final." Section 34.

Our attention has been called to no authorities holding that the power of rehearing is vested in the Commission except in those States where the authority is expressly conferred by statute.

In *Beckman* v. *Oelrich,* 174 App. Div., 353, 160 N. Y. Supp., 791, cited by the Chairman in his decision, where on petition a rehearing was granted, the proceeding was under Section 74 of the New York

Workmen's Compensation Act which is as follows: "Jurisdiction of Commission to be continuing. The power and jurisdiction over each case shall be continuing and it may from time to time make such modification or change with respect to former findings or orders relating thereto as in its opinion may be just." The power to rehear is expressly granted by this statute and was exercised under that grant. Connecticut has a somewhat similar provision, and modification of awards in that State are governed exclusively by statute. In a very recent case (1920) the court in discussing the subject say: "The defendant attempts to liken the award to the judgment of a court and the proceedings to modify the award to those for a new trial. There is no such similitude. The award is subject to modification at any time for the causes named in the statute, and these are radically different from causes which give ground for a new trial. The award is the creation of the statute; it is subject to modification upon the grounds specified in the statute." *Saddlemire* v. *American Bridge Co.*, 94 Conn., 618.

The decisions of Industrial Accident Boards in other States which have been called to our attention are also found upon examination to base the right of reopening or rehearing upon express statutory authority and therefore are not in point in the case at bar.

On the other hand where no such statutory provisions exist, the right of rehearing on the merits has been denied. *Pocs* v. *Buick Motor Co.*, 207 Mich., 591; *Benjamin and Johnes* v. *Brabban*, 92 N. J. 508; *Simpson Const. Co.* v. *Industrial Board of Illinois*, 275 Ill., 366.

In *Hunnewell's Case*, 220 Mass., 351, upon an application of an employee to have compensation extended beyond the time first fixed by the board, the question of its power was considered and the court employed this significant language: "The action of the board was not an unqualified decision to end all payments under the act. Such a decision would mean that incapacity of whatever degree arising from the injury had disappeared finally. Doubtless after such a decision the board would be without power to revive the matter. It would have become ended and become a thing of the past. The doctrine of res judicata would apply to it."

Our conclusion, therefore, is that the rights of the parties are governed by the statute, and the statute knows no such power or procedure as is here invoked. It well may be that the Legislature purposely avoided such a practice. The design of the entire Work-

men's Compensation Act is the speedy, inexpensive and final settlement of the claims of injured employees. Its procedure shuns protracted and complicated litigation; and yet if the practice here asked for is recognized and adopted there would seem to be no end to litigation. If the employee can ask a rehearing on the merits in this manner, the same right must be given to the employer and a weapon placed in his hands that by delay would thwart the very salutary purpose of the act. Then, too, there would seem to be no limitation to the time when such a petition could be filed. In short, these cases intended to be speedily and "summarily" disposed of might be dragged to an interminable length.

As to the claimant's further point that the defendant's appeal was not filed within the prescribed period of twenty days and therefore cannot be heard, and the decree of the chairman must stand, it is only necessary to say that the decree itself being void as beyond his jurisdiction, the court will so declare it whenever the matter is brought to its attention.

The entry will be,

Decree reversed.
Petition dismissed.

WILLIAM H. PHINNEY *vs.* MOREY GARDNER et als.

Washington. Opinion December 20, 1921.

In a description in a deed the following words, "the same being intended for a burying ground and to be used for no other purpose," import merely the purpose of the parties, and in no way legally limit or restrict the title, or constitute a condition subsequent. Abandonment at common law does not apply to real estate. Title by adverse possession not sustained.

In the instant case, an action of trespass against the selectmen of a town acting under a vote instructing them to cause the boundaries of a cemetery lot to be plainly marked, the deed of said lot to the town containing the following words, "the same being intended for a burying ground and to be used for no other purpose," it is

Held:

1. That the words in the deed as to the use of the lot do not limit or restrict the deed or create a condition subsequent, but merely import the intention of the parties as to the future use to which the lot was to be devoted. The title in the town was an absolute fee.
2. There was no legal abandonment by the town. That term at common law applies to personal property and to inchoate and equitable rights and incorporeal hereditaments, but not to real estate.
3. Nor has the plaintiff proved title by adverse possession. The only acts relied upon appear to be occasional trespasses by wandering cattle rather than an open, notorious, hostile, exclusive and adverse occupation under a claim of right. Moreover, as long as the lot continued to cherish the remains of those once buried there, we should hesitate to hold that the possession by the town had been or could be interrupted or invaded. Burial grounds are not the subject of trade and commerce, but are in a sense consecrated ground, and the law should and must protect them as such.

On report on agreed statement. This is an action of trespass brought for the purpose of determining the title to a lot of land in Machias of about four acres. The inhabitants of the town of Machias for their title relied upon a deed, dated May 1, 1841, describing the lot and concluding with the following sentence: "The same being intended for a burying ground and to be used for no other purpose." Plaintiff claimed title by adverse possession, and by abandonment by defendants. By agreement of the parties the case was reported to the Law Court upon an agreed statement of facts. Judgment for defendants.

Case is fully stated in the opinion.

Gray & Sawyer, for plaintiff.

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

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

CORNISH, C. J. This is an action of trespass quare clausum to try title to a four-acre parcel of land in Machias, used as a burying-ground, and is before the Law Court on an agreed statement of facts.

On May 1, 1841, Amos B. Longfellow and Amasa B. Longfellow conveyed this lot by warranty deed to the inhabitants of Machias, describing it by metes and bounds, the description concluding with these words: "the same being intended for a burying ground and

to be used for no other purpose." Under this deed the defendants, who were selectmen of Machias, and acting at the time of the alleged trespass under a vote of the town, claim title in the inhabitants of the town and defend as their agents. This four-acre lot was part of a larger parcel used as a pasture, and the plaintiff is the admitted record owner of the pasture through mesne conveyances from Amos B. Longfellow, he having made with Amasa B. Longfellow parol partition of the premises held by them as tenants in common. In this suit he claims also to be the owner of the cemetery lot and bases his contention upon either of two grounds, abandonment of the lot by the town, or upon title by adverse possession through himself and his predecessors.

Before deciding these contentions it may be well to consider the legal effect of the words in the deed to the town, viz.: "the same being intended for a burying ground and to be used for no other purpose." These words import merely the purpose of the parties when the conveyance was made and their intention as to the future use to which the lot should be devoted. They did not in any way legally limit or restrict the title, nor did they constitute a condition subsequent. In *Rawson* v. *School District*, 7 Allen, 125, the words of the habendum were as follows: "to the said town of Uxbridge forever, to their only proper use, benefit and behoof for a burying place forever." In *Barker* v. *Barrows*, 138 Mass., 578, the conveyance was to the inhabitants of a school district, and this sentence followed the description: "Said lot of land to be used, occupied and improved by said inhabitants as a school house lot and for no other purpose." The court held that in neither instance was an estate upon condition subsequent granted. At most the words in the deed under consideration imposed but a moral obligation upon the town to use the premises for no other purpose than for burial. The town has faithfully fulfilled this obligation, except that for several years, just when and for how long the record does not disclose, a schoolhouse was maintained upon the lot by the town but was removed prior to the plaintiff's deed in 1891. The title of the town, therefore, under its deed was an absolute fee.

1. ABANDONMENT.

There is no opportunity for the application of the doctrine of abandonment in the case at bar. "The characteristic element of

abandonment is the voluntary relinquishment of ownership, whereby the thing so dealt with ceases to be the property of any person and becomes the subject of appropriation by the first taker." 1 R. C. L., Page 2. The term is used in connection with personal property, inchoate and equitable rights, and incorporeal hereditaments, but "at common law a perfect legal title to a corporeal hereditament cannot, it would seem, be lost by abandonment." 1 C. J. Page 10. Its very essence is inconsistent with the attributes of real estate. Moreover, it is inconceivable that the inhabitants of a town, even if they had the legal power so to do, would voluntarily abandon a lot set apart for burial purposes and in whose soil five persons were sleeping the sleep that knows no waking. Such an act, even if legally possible, would be little less than sacrilege. Had any one without the permission of the town clerk wilfully removed a single body from the lot he would have been guilty of a criminal offense and subject to punishment. R. S., Chap. 126, Sec. 42.

2. ADVERSE POSSESSION.

After receiving its deed the town went into immediate possession of the lot, as appears from the agreed statement, cleared off surface rocks, constructed a wall of split boulders one rock in thickness and three feet high, as a retaining wall laid up against the bank along the front or highway side of the lot and said wall is still standing in fair condition for two-thirds the width of the front and in a dilapidated condition the remainder of the distance. Not long after the lot was conveyed to the town, five persons were interred within its limits, but their graves are unmarked and cannot now be located. Later on a schoolhouse was built by the town and used for several years before its removal. In 1901, nineteen years before this suit was brought, someone claiming to act for the town renewed the boundaries of the lot by spotting the trees on the lines. The town records show no vote authorizing such action, but it is difficult to believe that the person was not acting in the interest of the town. The lot is now grown up to trees and bushes, but on the easterly line as now spotted is a ridge of field rocks gathered from the cemetery lot and extending nearly the length of the line which is a little over twenty-five rods in length, and on the westerly line is a similar ridge of rocks running a few rods southerly from the highway, so that with the stone wall in front the lines of the lot are somewhat defined on three sides.

Finally, at a meeting held on March 22, 1920, the town voted to accept the report of a committee previously appointed, "they recommending that the land known as the cemetery lot in Atus District be acquired for a new cemetery and to authorize the selectmen to borrow money for said purpose on the faith and credit of the town." The use of the word "acquire" is commented upon by counsel for plaintiff as negativing the idea that the town still owned the lot, but it will be observed that this was the language not of the town but of the committee, and if not a happy expression as stating the exact situation it was the verb of the committee and not that of the town. The next vote clearly shows the attitude of the town, viz.: "Voted that the selectmen be authorized to have run out the lines of the town cemetery lot situated in Atus District, and which was conveyed to the town by Amos B. Longfellow and another by deed dated May 1st, 1841, and to cause the boundaries thereof to be plainly and permanently marked and the expense so incurred to be taken from the contingent fund." This vote carries no uncertain sound as to claim of ownership of the "town cemetery lot" and it was because of the acts of the selectmen in carrying this vote into execution that the present action was brought.

The plaintiff has failed to prove the necessary elements that ripen into title by adverse possession. The use of the cemetery lot as a pasture in connection with his own by the owner of the balance of the large lot, there being no division fence enclosing the cemetery lot, is the only act tending to show adverse possession and this would appear to be occasional trespasses by wandering cattle rather than an open, notorious, hostile, exclusive and adverse occupation under a claim of right. Moreover, as long as the lot continued to cherish the remains of those once buried there we should hesitate to hold that the possession by the town had been or could be interrupted or invaded. Burial grounds cannot be regarded like other tracts of land. They are not the subject of trade and commerce. They are in a sense consecrated ground and the law should and must protect them as such.

In order that there may be no misunderstanding as to a legal principle involved, it should be added that after the passage of R. S., 1847, Chap. 147, Sec. 12, and until its repeal by Public Laws, 1885, Chapter 368, a period of thirty-eight years, the State and therefore a political subdivision thereof might as a matter of law, if the facts

warranted, be disseized of its public lands by twenty years adverse possession. *Roberts* v. *Richards*, 84 Maine, 1; *United States* v. *Burrill*, 107 Maine at 386. That statute when in force limited the effect of the common law rule that "Nullum tempus occurrit regi." But the evidence in this case when applied to the character of the occupation by the town during those thirty-eight years falls far short of proving adverse possession. Since 1885 the only exception to the common law rule in this State relates to the maintenance of buildings and fences upon any way or land appropriated to public use for forty years or more, R. S., Chap. 24, Sec. 106, and this gives title to the land so occupied only to the extent of the occupation. *Stetson* v. *Bangor*, 73 Maine, 359; *Charlotte* v. *Pembroke Iron Works*, 82 Maine, 391; *Kelley* v. *Jones*, 110 Maine, 360.

The plaintiff having failed to prove title as claimed, the entry must be,

Judgment for defendants.

MAINE SAVINGS BANK, In Equity

vs.

ARTHUR D. WELCH AND WILLIAM B. MAHONEY as administrators of the Estate of Margaret F. Fell and James P. Jordan.

Cumberland. Opinion December 23, 1921.

An entry on a deposit account in a bank as follows: "A or B, pay either or survivor" does not constitute a testamentary disposal, as it is neither a gift inter vivos, nor a donatio causa mortis, not being fully executed before the decease of the donor.

The estate in controversy consisted of money in the Maine Savings Bank represented by a bank book and prior to about March 12, 1918 stood in the name of Margaret F. Fell. On or about that date she caused an entry to be made on her deposit account so that said account stood as follows:

"Margaret F. Fell or James P. Jordan, pay either or survivor."

Held:

1. That there is but one way of making a testamentary disposition of property and that is by will.
2. That a gift inter vivos, or a donatio causa mortis, must be fully executed before the decease of the donor.
3. That the unfortunate undertaking of Miss Fell to dispose of her property so that the title might vest in her donee after her decease, and, at the same time to retain in herself the right to use any or all of it during her life, was an attempted testamentary disposal.

On appeal. A bill of interpleader brought by plaintiff bank against the administrators of the estate of Margaret F. Fell, deceased intestate, who claimed the fund in dispute as the property of the estate of intestate, and one James P. Jordan, who claimed the fund as a gift from intestate either as a gift inter vivos or as a donatio causa mortis. The funds in dispute at the time of the death of intestate were on deposit in plaintiff bank. Prior to about March 12, 1918 the account stood in the name of intestate. On or about that date intestate caused the following entry to be made on her deposit account; "Margaret F. Fell or James P. Jordan, pay either or survivor." Upon a hearing on the bill and answers the presiding Justice found that the administrators were entitled to the two thousand and forty dollars, with accrued interest, the fund in dispute on deposit with plaintiff bank, and James P. Jordan appealed. Appeal denied. Decree of the sitting Justice affirmed.

The case is fully stated in the opinion.

Verrill, Hale, Booth & Ives, for Maine Savings Bank.

Jos. E. F. Connolly, for Arthur D. Welch and William B. Mahoney, Adm'rs.

William H. Gulliver, and John B. Thomas, for James P. Jordan.

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

SPEAR, J. This is a bill of interpleader by the Maine Savings Bank of Portland against Arthur D. Welch and William B. Mahoney, administrators of the estate of Margaret F. Fell and James P. Jordan, claimant, all of Portland.

The administrators claim the estate by virtue of their official appointment and Jordan claims it either as a gift inter vivos or as a donatio causa mortis, as the fact may appear.

The estate in controversy consisted of money in the Maine Savings Bank represented by a bank book and prior to about March 12, 1918 stood in the name of Margaret F. Fell. On or about that date she caused an entry to be made on her deposit account so that said account stood as follows:

"Margaret F. Fell or James P. Jordan, pay either or survivor."

There is a stipulation in the case that the answers of each of the defendants shall be taken as and for their pleadings.

There is no controversy with respect to the purpose and intention of Margaret Fell in adding the name of Mr. Jordan as payee to her deposit account.

The sitting Justice has found and the evidence discloses that it was her intention, by adding Mr. Jordan's name, to vest in him after her decease title to the money represented by her bank book. The evidence further discloses as was found by the sitting Justice that in view of the intimate relation between herself and her niece, Catherine H. Jordan, wife of the claimant, that she really intended by this transaction to convey her bank account to her niece.

Upon these facts the appellant invokes the reasonable and usual rule of interpretation that effect should be given to the intention of the parties to a transaction written or oral. But that rule has its necessary and well defined exceptions in all such proceedings and especially with respect to the transfer of all kinds of property.

There is but one way of making a testamentary disposition of property and that is by will; the statute of wills was invented and adopted for the express purpose of establishing a legally defined procedure to be employed in giving post mortem effect to an ante mortem disposal of property.

A gift inter vivos, or a donatio causa mortis, must be fully executed before the decease of the donor. In the latter case the gift must be perfected by delivery with all the formalities necessary to a gift inter vivos, although subject to revocation before the decease of the donor. Otherwise the door, through which real and personal property, must pass, would be left, not merely ajar, but propped wide open, to every species of fraud that ingenuity in the invention of evidence might be

able to devise. Hence, to give stability and certainty to the transmission of property definite modes of transfer had to be established by law.

The unfortunate undertaking of Miss Fell in the present case to dispose of her property, so that the title might vest in her donee after her decease, and at the same time to retain in herself the right to use any or all of it during her life, was clearly an attempted testamentary disposal, which could be accomplished only by a will. It was also inconsistent with a gift, causa mortis.

Accordingly, however inclined, the court might be to give effect to the intention of Miss Fell in her attempted disposal of her bank account, it feels itself unable legally to do so.

We can give no better or more comprehensive resume of the evidence and the law than is found in the decision of the sitting Justice from which we quote as follows:

"From the evidence we are satisfied and so find that the adding of the defendant, Jordan's, name to her accounts and the later directions given were all done in apprehension that her death might result from her sickness."

The evidence, however, clearly discloses, we think, not a gift in presenti, either inter vivos or causa mortis, but an attempted testamentary disposition of her property after death.

She had long had in mind adding the name of her niece or her husband to her bank accounts and making them payable to the survivor in case of her death, not with a view to surrendering up her control over them during her lifetime, but upon the understanding that at her death the money would then go to her niece.

We do not find that the acts done on Tuesday morning when the orders were signed were done with a view to relinquishing her rights in or control over the bank deposits during her lifetime, but only in case anything happened to her. The bank books were delivered to Jordan not for the purpose of then passing title to him either in his own right as a joint owner, or as trustee for his wife after the death of Miss Fell, but for the purpose of having the transfers made at the Banks. She requested him to retain them not because she then considered the funds as belonging to him even jointly with her, but for convenience so that in case she needed any money he could draw it for her.

Nor did the acts of Wednesday morning have any other significance or purpose than the disposition of her effects and the conduct of

her affairs after her death, and amounted to no more than an attempted testamentary disposition of her property which can only be done by a valid will.

To constitute a valid gift either inter vivos or causa mortis, there must be the intent to absolutely surrender all control over the gift by the donor, subject in case of a gift causa mortis to revocation during lifetime and conditioned upon the death of the donor. *Barstow et als.* v. *Tetlow*, 115 Maine, 96.

For the same reason we think her acts did not create a trust, as such a purpose, if she had it, was not executed in her lifetime, but at best was purely executory to be consummated after her death.

While her intent was clear that her niece should have the bulk of her property she failed to adopt a course in attempting to carry it out that can be upheld without opening the door to the perpetration of great frauds, though none was practiced in this case.

Donations made, not in conformity with the statute of wills and frauds, but suited to contravene them are not favored in law, but are admitted with greatest caution. *Farnsworth* v. *Whiting*, 106 Maine, 430. We hold the acts of the deceased to be only an ineffectual attempt at a testamentary disposition of her property.

This case presents only a question of law as it involves a conclusion from uncontraverted facts. There is no legal fault with the decision declared by the sitting Justice. The entry must be.

Appeal denied.
Decree of sitting Justice affirmed.

JOHN W. LERMOND et als., In Equity.

vs.

BURNHAM HYLER et als.

Knox. Opinion December 23, 1921.

A residuary clause in a will which provides one-half of income for life to A, and the other half of income for life to B, and the whole income to the survivor of either for life; and further provides that at the death of the survivor of A and B, one-half of the income to go to C for life, and the other half of the income to go to D for life, and the whole income to the survivor of C and D for life, and further provides that after the death of the survivor of C and D "I give, bequeath and devise all of my property to my then heirs as provided by law," creates a remainder to take effect at the close of all the life estates.

In this case it is held upon both authority and reason that the phrase, "my then heirs" means just what it says when referred to the context of the paragraph in which it stands, and to the other paragraphs of the will.

"After the death" of all the life tenants, the testatrix gives "to her then heirs." "Then" is clearly used as an adjective.

The language of the residuary clause of the will was intended to and did create a remainder to take effect at the close of all the life estates.

On report. A bill in equity to determine the construction of a paragraph in the will of Helen A. Anderson of Thomaston. Upon an agreed statement of facts, and by agreement of the parties, the case was reported to the Law Court for the determination of the rights of the parties. Bill sustained. Decree in accordance with the opinion.

The case is stated fully in the opinion.

A. S. Littlefield, for plaintiffs.

H. L. Withee, for F. Robinson, Y. Robinson, G. M. Robinson and Marion Dow.

Chas. T. Smalley, for all other defendants.

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

SPEAR, J. This is a bill for the construction of the following paragraph in the will of Helen A. Anderson of Thomaston:

"I give and bequeath the income of all the rest and residue of my property both real and personal, my bank stock, bonds, and interest in two ships J. H. Thomas and H. D. Rice; one half of the income to go to my sister Priscilla Brown, and one-half to my niece Kate A. Brown during their lives, and if Priscilla Brown dies first the income is all to go to Kate A. Brown; and if Kate A. Brown dies first then the income is all to go to Priscilla Brown; and after the decease of Priscilla Brown and Kate A. Brown, one half of the income of my property is to go to my niece Mary P. Lermond, and one half to my nephew William B. Brown; and if Mary P. Lermond should die before William B. Brown, then all the income of my property is to go to William B. Brown; and if William B. Brown should die before Mary P. Lermond then all the income of my property is to go to Mary P. Lermond; and after the death of Mary P. Lermond and William B. Brown I give, bequeath and devise all of my property to my then heirs, as provided by law."

Priscilla Brown died January 4, 1907; Kate A. Brown died October 17, 1917; William B. Brown died April 20, 1901; and Mary P. Lermond died June 10, 1902.

The question for decision is, who are the persons to take under the residuary clause, which reads as follows: "And after the death of Mary P. Lermond and William B. Brown, I give, bequeath and devise all of my property to my then heirs, as provided by law." Eliminating still further, the interpretation of the clause may depend upon the meaning of the word, "then" considered in connection with the context and the other paragraphs of the will. The testatrix provided that the income of her estate should go first to her sister, Priscilla Brown and her niece, Kate A. Brown in equal shares; and upon the death of either, the whole was to go to the survivors. "After the decease of" Priscilla and Kate A. then the income was to go to her niece, Mary P. Lermond and William B. Brown, in equal shares, and upon the death of either, the whole was again to go to the survivor. It is perfectly evident from this language that the testatrix did not contemplate the survival of Priscilla or Kate A. over the life

of Mary P. Lermond and William B. Brown. It should be here noted that both of the last group of life tenants died before either one of the first group, so that this contingency upon which the corpus was to vest occurred at one of three different times: First, it may be regarded as a vested remainder and go to those persons who would have been heirs of the testatrix at the date of her decease. Second, it may have gone to those who would have been her heirs had she deceased on June 10, 1902, when William B. Brown the last of the second group died. Third, it may have gone to those who would have been her heirs upon the decease of all the life tenants, in whatever order they died.

The bequest to the second group of life tenants, Mary P. and William B. was based upon the hypothesis of the decease of the first group, before that of the second, as expressed in the clause creating the second group, namely: "After the decease of" Priscilla and Kate A. then the income is to go to Mary P. and William B. and, as a necessary consequence, all provisions relating to the use and disposal of her property after the decease of the first group, and the creation of the second group of life tenants, were based upon the same hypothesis. In other words, when the testatrix came to the provision for the second group, in her vision, the first group had passed away, had ceased to sustain any further relation to her property. Therefore when she came to the residuary clause she contemplated Mary P. and William B. as the last survivors of the life tenants. That is, when, at the time of dictating the residuary clause she looked ahead for a time when it should go into effect, in her mind, she contemplated that either Mary P. or William B. would be the last of all the life tenants to decease.

Whatever may be said with respect to this improvidence of the testatrix with reference to the uncertainty of the second group of life tenants surviving the first, it is nevertheless evident from an analysis of the will that she did not provide for, if she anticipated, such result.

From the above analysis of the residuary clause the paramount question is to determine the intention of the testatrix as to when she intended the corpus of her estate to vest in her heirs.

The language of the residuary clause under interpretation, if given its ordinary meaning is clear and explicit. The clause begins with the conjunction, "and" following a semi-colon, which is used to indicate something in addition to what has gone before. Namely,

"and after the death of Mary P. Lermond and William B. Brown I give bequeath and devise all of my property to my then heirs, as provided by law." There is neither ambiguity nor uncertainty in the import of the above language, when given the usual and ordinary meaning of the words. The remainder, upon the face of the words, would vest upon the death of the survivor of Mary P. and William B., that is in 1902.

But we do not think this construction gives effect to the intention of the testatrix. While she omitted to make any proviso for the decease of Mary P. and William B. before the first group of life tenants, she, nevertheless, provided for such contingency by necessary implication. In her own mind she contemplated Mary P. or William B. as the last of all the life tenants. She, therefore, did not intend that her estate should vest upon the decease of Mary or William, because of the fact of their decease, but because of the contemplated time of their decease, which she unquestionably regarded as fixed at the decease of the last, and consequently, of all the life tenants. That is, the thought paramount in her mind was that the second group would outlive the first group, and that at the decease of the second group, at that point of time, she would vest her estate in her "then heirs" in whatever order they may have deceased. It is claimed, however, that the construction of the residuary clause in question should be so construed as to create a vested instead of a contingent remainder, and that it should be declared the intention of the testatrix that the remainder of her estate, after the death of the life tenants, should go to the persons who were her legal heirs at the time of her decease.

Leaving open the time when the testatrix intended the title to vest in the remaindermen, there can be no question as to when she intended her property to vest in the enjoyment or possession of the life tenants; as it could not so vest at the death of Mary P. or William B. as in that case it would, in fact, as well as theory, have deprived the first group of life tenants of the full benefit of their tenancy. It is therefore evident that her intentions would have been carried out more clearly and precisely as she meant it, if instead of her phraseology "and after the death of Mary P. and William B." she had said "after the death of (all the life tenants), I give, bequeath and devise all of my property to my then heirs, as provided by law."

We come, therefore, in the last analysis, to what the testatrix intended in giving expression to the residuary clause of her will in the phraseology as above construed. The phrase, "after the death of all the life tenants" refers to a specific event the time of which relates to a date subsequent to the death of the testatrix.

"After the death of the life tenants," that is after her own death, in point of time, she gives and bequeaths to her "then heirs."

The question is, shall that phraseology, the meaning of which is obvious and plain, and strikes the reader at once as the correct, if not the only meaning, be interpreted and distorted to sustain a fictitious rule of law, adopted to create the doctrine of vested remainders, by making over wills by construction, or is it to be given its common and ordinary meaning as is required in case of other written instruments.

What reason or justification can be offered for forcing a construction that distorts the meaning and thwarts the intentions of the testatrix?

Were it not for rules of construction invented to give a judicial meaning to the use of certain phrases in disposing of property by will, no person would ever think of giving a construction to the phraseology in the residuary clause of the present will that would make it say that the testatrix meant by the words "then heirs," "now heirs," those persons who would have been her heirs had she died at the time of the decease of the last life tenant.

If every intelligent reader would thus construe the language, it is reasonable to infer that the testatrix understood it in the same way; then why should her property be diverted from the channel in which she intended it to go, by any rule of construction? The very statement so often made, that the law favors vested remainders is an acknowledgment that such a rule contemplates a forced and not a natural interpretation of the language used. There is no reason to be found in the definition or purpose of vested and contingent remainders that should make a contingent less reputable as a property right than a vested remainder.

The vested or contingent character of a remainder to survivors depends upon whether the words of survivorship relate to the death of the testator or to some later period. If the words of survivorship should be referred to the death of the testator the remainder is of course vested, but if it relates to the death of the life tenant or some other person, or to some later event or period, the remainder is con-

tingent. 23 R. C. L., 542, Paragraph 86. Whether the words of survivorship relate to the one period of time or the other is a question that has resulted in no little conflict of opinion. The early English cases for a long period held that words of survivorship should be construed in favor of a vested remainder, unless they expressly or manifestly referred to some other period. After two hundred years, exceptions began to be made, "holding that under the language of particular wills it was the intention of the testators for the words of survivorship to apply to the time of the death of the life tenant or to the time of distribution."

As said in Paragraph 86 supra "Ultimately the exceptions and the dissatisfaction practically changed the rule in England, so that the general rule to be derived from the later English authorities is that the rule which reads a gift to the survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred and that where such gift is preceded by a life or other prior interest it takes effect in favor of those who survive the period of distribution, or the termination of the precedent estate, and in favor of those only."

After saying that the early English rule has been adopted by some courts in the United States, it is then declared in the same paragraph: "But, as will appear from the various cases involving the questions which follow, the prevailing rule in the United States is that words of survivorship generally relate to the termination of the particular estate. And whether the one or the other of these rules be adopted, it is not a rule of substantive law, but merely a rule of interpretation adopted by the courts as one means of ascertaining the intention of the testator as expressed in the will, and the rule must yield to that intention."

It accordingly appears that the rule in this country and England now is to give the language of the contents of a will that creates remainders an interpretation that will reasonably carry into effect the intention and scheme of the testator.

We find, running through all the cases, that the rule of construction in determining the character of a remainder, must yield to what is often spoken of as the "general intent" of the testator.

It would require a small treatise to analyse the almost numberless cases, that have been reviewed by the courts, and in which the rule and the exception have become so equally divided, that it may be

said in a general way that there are two classes of cases upon this subject, namely, the cases which adhere to the rule, and the cases which are an exception to the rule.

We therefore, find no rule of substantive law that requires any forced construction of the language in the residuary clause of the present will. If that language expresses the general intent of the testator it should be given effect. But we do find a universal and emphatic rule that the general intention of the testator, as gleamed from the four corners of the will should prevail. "When the particular intent cannot be executed, the general intent must direct the construction." *Hawley et al.* v. *Northampton*, 8 Mass., at Page 37, *Hall* v. *Tufts*, 18 Pick., at Page 460, *McArthur* v. *Scott*, 113 U. S. at 378. In our own state it is said: "It is elementary law that the intention of the testator, collected from the whole will and all the papers which constitute the testamentary act, are to govern" *Tibbetts* v. *Curtis*, 116 Maine, 336.

We cannot therefore, limit our interpretation of this will by considering the residuary clause, alone. Under the foregoing rules of construction that the general intent of the testator should prevail, we are bound, as a matter of law, to examine the other parts of the will, to discover if any other provision throws any light upon the specific or general intent. "Does the scheme of the will intend a vested or contingent remainder?" *Hale* v. *Hobson*, 167 Mass., 399.

Proceeding under that rule, if we now resort to an examination of the last paragraph of the will before us, we find revealed in clear outline the general scheme and intent of the testatrix.

"I give and bequeath to my sister Priscilla Brown and my niece Kate A. Brown conjointly, during their lives, and to the survivor during the rest of her life, the use, improvement and income of my homestead in said Thomaston and its appurtenances, with all the books, plates, pictures, furniture and other personal property now therein contained; they to keep the buildings in good repair, and pay all the taxes on the above named property as long as they occupy or receive the income therefrom; and after the decease of my sister Priscilla Brown and my niece Kate A. Brown I give and bequeath the improvement and income of the same to my niece Mary P. Lermond and my nephew William B. Brown, and to the survivor during the rest of his or her life provided they keep the buildings in good repair, and pay all taxes on the above named property, as long as they or

either of them receive the income or occupy my homestead; and after the decease of my niece Mary P. Lermond and my nephew William B. Brown, I give bequeath devise the same to my then heirs as herein provided. In case my niece Kate A. Brown should survive my sister Priscilla Brown, then a home is to be provided for my nephew William B. Brown by my niece Kate A. Brown during the residue of her life and occupancy of the homestead, provided he needs one and shall live with her in said homestead and nowhere else."

Having made two bequests to the amount of twelve hundred dollars, she then in the residuary paragraph disposes of the income of all the rest and residue of the property real and personal as well as the residuum, as already appears.

Having done this she then proceeds to the next and last paragraph in which she disposes of the real and personal estates, themselves, as life estates, and prescribes the manner of their use, care, and manumission by the life tenants to their successors and remaindermen.

In her scheme, the first life tenants turn over the property to the second life tenants, in good repair, taxes paid, and with improvements. The second life tenants turn over the property to the remaindermen in good repair, taxes paid, and with improvements, if any. To condense still further: She gives first, the property to the first group of life tenants. She gives, second, the *same* to the second group of life tenants. She gives, third, the *same* to her "then heirs." The *same* as used in the last paragraph means the real and personal property, with improvements, kept in good repair and taxes paid, as that property stood at the decease of the last life tenant.

In contemplation of the future her scheme had brought her down to the last group and through the life of the last group to the final disposal of the estate, itself, her immediate friends having been provided for.

And she then gives the estate, not necessarily as it was at the time of her decease, but as it was at the decease of the last life tenant, "the same" that had been enjoyed by the first group of life tenants; the *same* that had been enjoyed by the second group of life tenants, with improvements; the *same* which passed from their enjoyment to her "then heirs."

A fair construction of the last paragraph clearly confirms the obvious meaning of the residuary clause of the third paragraph. It carries forward the residuum of her estate to the last survivor of the

life tenants and gives "the same," that is her estate as it was at that time, to her "then heirs," as provided by law.

If she had intended to vest her estate in the remaindermen at the date of her own decease, then the language of the last paragraph is contradictory of the language of the first, and describes what might be a different property. Just what the property might be with possible improvements at the time of the decease of the last tenants, could not be ascertainable until that time. The last paragraph, therefore, brings the case in close analogy to *Hale* v. *Hobson,* 167 Mass., Page 399 in which it is said as one of the reasons for declaring a contingent remainder. "The fact that the residue is unascertainable until the time of distribution arrives tends to show an intention to postpone possession and also the acquisition of an absolute interest."

Moreover, she evidently intended that the life estates should take care of the life tenants, as she gave them, during their lives the entire use, income and enjoyment. But in addition to this, if she intended a vested remainder, all the life tenants took in fee, as well as for life, at her decease, and their heirs would become residuary legatees, at the time of distribution, as well as the other heirs of the testatrix existing at the time of her decease.

The residuary paragraph and the last paragraph when read together make clear the intent of the testatrix in the words of the phrase "then heirs."

The only precedent for the exact phraseology employed in the present will, "then heirs" is found in *Proctor* v. *Clark,* 154 Mass., 45 in the following language: "Upon the decease of my said wife, then to pay and convey in fee all the trust property, as it then exists, to my said brother, Charles Henry Hancock, if then living, but if he is not then living, then to convey the same in fee to his then heirs at law, whereupon this trust shall end."

The language in that case is "to his then heirs at law," in the present, "to my then heirs, as provided by law."

The Proctor case not only construes the meaning of the phrase "then heirs" but notes the rule and the exception, as follows:

"The words mean those who would have been entitled if Charles Hancock had died at the moment appointed for the conveyance, that is, at the death of the testator's widow on Jan. 6, 1890. The gift is to Charles Hancock's "then heirs." The word 'then' takes the case out of the general rule illustrated by *Dove* v. *Torr,* 128 Mass., 38,

Abbott v. *Bradstreet,* 3 Allen, 587, and *Whall* v. *Converse,* 146 Mass., 345, and brings it within the exception established by *Knowlton* v. *Sanderson,* 141 Mass., 323, *Fargo* v. *Miller,* 150 Mass., 225 and *Wood* v. *Bullard,* 151 Mass., 324. For, qualifying heirs as it does, it can only mean heirs ascertained as of that time.

The Proctor case is the only parallel case that has yet been found by the able attorneys who represented the different interests in the estate, or by the court in its research of the law.

We find many analogous cases, but as each case stands upon its own particular facts, as the present case does, they would be of but little if any aid in pointing to a correct conclusion.

It is therefore the opinion of the court upon both authority and reason that the phrase in the present case, "my then heirs" means just what it says when referred to the context of the paragraph in which they stand, and to the other paragraphs of the will. "After the death" of all the life tenants, she gives "to her then heirs." "Then" is clearly used as an adjective. According to Webster's New International Dictionary, "then," used as an adjective is defined: Existing, acting at, or belonging to the time mentioned; "as the then current of opinion." The time mentioned in the will was "after the death" of the last life tenant.

We are of the opinion that the language of the residuary clause of the will of Helen Anderson was intended to and did create a remainder to take effect at the close of all the life estates, to wit: October 17, 1917.

Bill sustained.
Decree in accordance with this opinion.

WESTBROOK TRUST COMPANY

vs.

FREMONT E. TIMBERLAKE et als., Adm'rs.

Cumberland. Opinion December 23, 1921.

An extension of payment for a time certain, for a consideration by a holder of a note to the principal promissor, relieves an unassenting accommodation promissor of liability, if the holder knows of his relation to the note, and knows that he is unassenting to such extension.

An accommodation maker on a note becomes discharged of liability when and if the holder, knowing the accommodating one in that relation, and knowing too, that he is unassenting to a change, sees fit to grant the principal promissor an extension of payment for a definite time, on a sufficient consideration.

On motion for new trial. An action by plaintiff to recover from the administrators of the estate of Fred E. Richards upon a note of $20,000 dated December 18, 1916, on sixty days, signed by Ludwell L. Howison, as the principal promissor, and signed by Fred E. Richards, as an accommodation promissor. On February 16, 1917 the plaintiff received from Ludwell L. Howison, the principal maker of the note in suit a new sixty-day note for the same sum, signed by him, but not signed by the accommodation maker, Fred E. Richards, which was entered upon plaintiff's discount register. The note in suit was stamped "Paid" by the plaintiff and retained. Defendants among other things alleged that an extension of the time of payment of the note had been granted by plaintiff to Ludwell L. Howison for a consideration without the assent of the accommodation promissor, Fred E. Richards.

The jury returned a verdict for defendants, and the plaintiff filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

William Lyons, for plaintiff.

Woodman, Whitehouse & Littlefield, for defendants.

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

DUNN, J. Even a cursory reading of the record will show that Fred E. Richards, on December 18, 1916, signed a promissory note for twenty thousand dollars on sixty days with one Howison to aid the latter in procuring a loan from the Westbrook Trust Company, and that the bank as payee discounted the note with a full knowledge of the purpose of Richards' signature. Mr. Richards lent his credit as an accommodation and the bank lent money. As between himself and Howison, Richards' engagement was nothing else but one which he might have rescinded at any time before the negotiation of the note. But when that instrument was put in circulation the rights and liabilities of Richards became those of a promissor receiving valuable consideration for his signature; save that, in the event of an action being brought upon his promise, it would be open to him to establish by parol that he had signed as surety, without consideration, and that such fact was known to the plaintiff. *Lime Rock Bank* v. *Mallett*, 34 Maine, 547; *Cummings* v. *Little*, 45 Maine, 183; *Harris* v. *Brooks*, 21 Pick., 195.

At maturity the note was not paid. The bank requested Howison to pay it. He tendered his personal note without endorsement. This the bank received, but not in payment of the old note as it tells, and the telling seems borne out. Nothing further took place, in spite of repeated demands to Howison for a settlement, until one day in the following August. Howison at that time paid five hundred dollars to the bank, which was credited as for six months interest on the original note; that is to say, for the period of time inclusively from the maturity of the note to a day about one week ahead of that on which the interest payment was made. And, besides, the time for payment of the principal of the note was thereupon extended for sixty days, as the bank record shows; Richards, the virtual surety, neither expressly nor by implication being in any sense a party to the arrangement. The note without an endorsement was now entered with the discounts of the bank and extended for payment as was the one before it. But the possible effect of this is not especially urged in argument. *Andrews* v. *Marrett*, 58 Maine, 539; *Thomas* v. *Stetson*, 59 Maine, 229. At the end of the sixty days, Howison brought to the bank a thirty thousand dollar note on sixty days, which was passed for discount, and thereupon the two earlier notes, regarded as

a single item for the amount of the very first, were charged against the proceeds; but the thirty thousand dollar instrument was not legitimately born. Endorsement on this note, and as well the endorsements on three more notes given in respective renewals of it, eventually were determined to be spurious. Therefore, neither the initial forgery-tainted note, nor any of the like notes in the series which it begins, had efficacy to pay the original note (*Sandy River Bank* v. *Miller*, 82 Maine, 137), that the bank had stamped as paid, upon having the first of the false ones, but never has surrendered. Later, in innocence and in rashness, the bank's treasurer attempted to erase from the note the impressions indicative of cancellation which a rubber stamp had made. Whether that action was destructive of evidentiary power is a subject that the occasion does not necessarily call to attention. For the purpose of this decision the original note is to be regarded as clothed in its primary potency.

The bank would have defrayment of that obligation by the administrators of Mr. Richards' estate. A jury has found for the defendants. Plaintiff's motion for a new trial is without worth.

An accommodation maker on a note becomes discharged of liability when and if the holder, knowing the accommodating one in that relation, and knowing too, that he is unassenting to the change, sees fit to grant the principal promissor an extension of payment for a definite time, on a sufficient consideration. *Lime Rock Bank* v. *Mallett*, 42 Maine, 349; *Dunn* v. *Spaulding*, 43 Maine, 336; *Andrews* v. *Marrett*, supra; *Stewart* v. *Oliver*, 110 Maine, 208; *First National Bank* v. *Blake*, 113 Maine, 313; *Guild* v. *Butler*, 127 Mass., 386. So is the rule, as law has adopted it from equity. The receipt of the interest in advance was a good consideration for the agreement which extended the time of payment. *Stewart* v. *Oliver*, supra. The length of an appreciable extension is of no importance. Allow it said in distinction, though, that the mere taking of advance interest on an overdue note would not absolve an accommodation maker from liability. *Freeman's Bank* v. *Rollins*, 13 Maine, 202. The ruling element lies in a contract for the extension of the time for the payment of the note itself. The receiving of interest is only a circumstance. It may satisfy the jury that an agreement to give further credit was made, or it may not. The existence of the agreement is the significant thing, and such existence must be shown by proof. *Manufacturers Bank* v. *Chabot Company*, 114 Maine, 514.

A reason is assigned in the books for the rule. To have the debt paid by the principal at its maturity, or to pay it then himself, and in either event to have his responsibility terminated, is of the legal rights of a surety. A valid and binding agreement, entered into between the creditor and the chief debtor, without the consent or knowledge of the surety, for an extension of the time of payment, alters the contract that the surety made. It interposes obstacles suspending the exercise of a right of his. He could not, with the agreement outstanding and in force, impel the creditor to proceed in enforcement of payment against the principal. Nor could he himself step in and pay, and, paying, seek indemnity from him who ought to have paid in his stead. *Berry* v. *Pullen*, 69 Maine, 101. *Stewart* v. *Oliver*, supra; *Manufacturers Bank* v. *Chabot Company*, supra.

The legal effect of the facts regarding the extension of the time for payment of the note securely upholds the verdict.

Motion overruled.

CALVIN R. WAUGH et als., In Equity *vs.* ELMER J. PRINCE et als.

Piscataquis. Opinion December 23, 1921.

A town has an implied power to defend and indemnify its officers for liabilities incurred in a bona fide discharge of their duties; otherwise when not acting in good faith.

The bill alleges in substance that Elmer J. Prince, F. Wallace Cleaves and Walter R. Farnham, being selectmen of Sangerville, libeled one Arthur Stanley, that a civil action was brought against them, judgment recovered, and the judgment was satisfied by the defendants in the libel suit.

The town at its annual meeting held in March, 1920, voted to reimburse the selectmen, and this bill seeks to enjoin the present selectmen and teasurer from paying pursuant to said vote of the town.

Held:

1. We find nothing in the evidence in the instant case to justify the town, or its officers, in paying the damages and costs arising in the libel suit above mentioned.

2. It is well settled that among the implied powers of a town is that of defending and indemnifying its officers when they have incurred liability in the bona fide discharge of their duty.
3. The phrase "in good faith," as it is used in the law, simply means honesty, without fraud, collusion or deceit; really, actually without pretense.

On appeal. A bill in equity brought by plaintiffs as taxable inhabitants of the town of Sangerville, against the selectmen, treasurer, and the inhabitants of said town, seeking to enjoin the selectmen and treasurer from paying any sum, pursuant to a vote of the town, to former selectmen of the town indemnifying them for the amount paid by them in satisfaction of a judgment recovered against them in a libel suit by Arthur Stanley. The sitting Justice found the allegations of the bill to be true, and sustained the bill, and granted a permanent injunction, from which finding the defendants appealed. Appeal dismissed. Decree of sitting Justice affirmed with additional costs.

Case is fully stated in the opinion.

C. W. & H. M. Hayes, for plaintiffs.

J. S. Williams, and Fellows & Fellows, for defendants.

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

HANSON, J. This is a bill in equity brought by fourteen taxable inhabitants against the present selectmen and treasurer of Sangerville, and the inhabitants of said town of Sangerville.

The bill alleges in substance that Elmer J. Prince, F. Wallace Cleaves and Walter R. Farnham, being selectmen of Sangerville, libeled one Arthur Stanley, that a civil action was brought against them, judgment recovered, and the judgment was satisfied by the defendants in the libel suit.

The town at its annual meeting held in March, 1920, voted to reimburse the selectmen for the year 1918 for the damages and costs paid by them, and this bill seeks to enjoin the present selectmen and treasurer from paying any sum pursuant to the vote of the town.

The sitting Justice found as a fact that the allegations set forth in the bill were true, sustained the bill, and granted a permanent injunction. The case is before the court on appeal.

The bill alleges, and the answer admits, that the municipal officers made the following statement in their annual report to the town:

"Arthur Stanley, larceny of culvert, $50." It is claimed by the defendants' counsel that because the town accepted the report containing the alleged libelous language, and had an interest in the report and the items comprising the contents thereof, the town had the power to appropriate funds to reimburse the former for the amount paid by them in settlement of the judgment in the libel suit, especially as the selectmen acted in good faith in making the report. The defendants urge that the only question involved in the instant case is that of good faith, and the testimony at the hearing was introduced for the purpose of establishing the good faith of the selectmen in making the report which was the subject of the suit for libel reported in *Stanley* v. *Prince,* 118 Maine, 360. The opinion in that case is decisive of the point raised here, and concludes as follows: "Moreover the attitude of the municipal officers from the beginning seems not to have been that of officials endeavoring in fairness and justice to perform their public duties, but rather that of partisans having some grudge to gratify either toward this plaintiff or Mr. Coburn. There is strong inferential evidence of actual malice, malice in fact. The speedy notification for settlement or arrest, the arrest and trial that followed with no delay, the claim of $50 for a metal culvert costing and worth about $20, the service of the civil writ therefor by arrest, instead of the usual course by summons, when so far as appears there was no pecuniary necessity therefor, the setting up of the truth in the pleadings by way of justification, *Davis* v. *Starrett,* 97 Maine, at 577, and the adherence to the same in argument, even after the Supreme Judicial Court had discharged the plaintiff from arrest under this same charge, all this reveals a persistent purpose on the part of the defendants to harrass and humiliate the plaintiff with respect to a matter which in itself and as among broad-minded business men would be regarded as trivial. It was a case therefore in which punitive damages might well be awarded if the jury saw fit to grant them." There was absence of good faith shown in that case and we find nothing in the evidence in the instant case to warrant a conclusion that an injustice has been done in *Stanley* v. *Prince,* supra, or to justify the town, or its officers, in paying the damages and costs arising in the libel suit above mentioned.

It is well settled that among the implied powers of a town is that of defending and indemnifying its officers when they have incurred liability in the bona fide discharge of their duty. Cooley Const.

Limitations, Page 306; *Nelson* v. *Milford*, 7 Pick., 18, 23. See also *Baker* v. *Windham*, 13 Maine, 74; *Fuller* v. *Groton*, 11 Gray, 340.

The phrase "in good faith," as it is used in the law, simply means "Honestly, without fraud, collusion or deceit; really, actually, without pretense." Words and Phrases, 3117.

In *Fuller et als.* v. *Inhabitants of Groton et als.*, 11 Gray, 340, a petition in equity to restrain the respondents from paying and indemnifying the school committee of Groton for the expenses incurred in defending a suit brought against them for an alleged libel contained in one of their official reports, it was held "that towns have power to raise money to indemnify their officers against liabilities incurred or damages sustained in the *bona fide* discharge of their duties, is now well settled." In that case, however, the circumstances were in no respect like the instant case. There the report under consideration, while stating their conclusions forcibly and leaving no room for doubt as to their meaning, contained no libelous words. In the libel suit underlying this case the officers did use libelous words and this court has so held. In *Fuller* v. *Groton*, supra, the subject of the vote of the town was expenses incurred in defending a groundless suit; here the vote includes not only expenses, but damages paid in a suit for libel, where the town officers were guilty of libel. In the former the school committee were acting in good faith in the performance of a legal duty. Here it must be held that from the very nature of the case, the selectmen were not acting in good faith. It was not an act of good faith to add to the list of assets of their town libelous words concerning any person. There was no necessity in accounting for the possession or absence of a culvert to add libelous words concerning the plaintiff in the libel suit. The use of libelous words were in no manner called for by the requirements of law in making a report. There were other words available for purposes of identification of the culvert, if any were needed at all. In any event the town was not interested in the description of the culvert adopted by the defendants in that action, and it matters not that the town voted to accept the report. Neither the vote accepting the report, nor the vote to reimburse the defendants, can make the town liable for the illegal act of the town officers in placing the libelous words in their report.

A town is not liable for the negligent acts of its public officers committed in the performance of their public duties, unless such liability is created by statutory provisions. 26 R. C. L., Page 807; *Brown* v.

Vinalhaven, 65 Maine, 402. It is not liable for the unauthorized and illegal acts of its officers even when acting within the scope of their duties; nor for their nonfeasance, misfeasance or malfeasance respecting their legal duties, but it may become liable when the acts complained of were illegal but done under its direct authority previously conferred or subsequently ratified. 26 R. C. L., Page 807; *Seele* v. *Deering*, 79 Maine, 343. In *Bulger* v. *Eden*, 82 Maine, at Page 357, the court say, "the liabilities of municipal corporations for the torts or negligent acts of their officers are fixed by statute. They are to be held liable for the negligence or misconduct of their officers only when made so by express statute, or the act out of which the claim originates was within the scope of their corporate power, and was directly and expressly ordered by the corporation." There is no pretense that publishing the libel in question was ordered by the town in its corporate capacity, or was later ratified by a vote of the inhabitants. In *Brown* v. *Vinalhaven*, 65 Maine, 402, it is held that the liability of a town upon contracts made within the scope of its authority, about the affairs of the town by such of its officers as are also its agents is unquestionable. But its responsibility for the torts or neglects of its officers in the performance of duties imposed upon them by law has never been affirmed, unless created by express statute provisions. On the contrary, the distinction between "corporations created for their own benefit" and "quasi corporations created by the legislature for purposes of public policy" in respect to their liability for such wrongs and neglects, was long since declared in our parent commonwealth in the case of *Mower* v. *Leicester*, 9 Mass., 247, and we believe has never been overlooked by our own court. See *Mitchell* v. *Rockland*, 52 Maine, 118.

We are of opinion that the findings of fact by the sitting Justice are supported by the evidence, and the decree being in accord with the facts must stand unreversed. The decision of a single Justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that such decision is erroneous; and the burden to show the error is upon the appellant. *Hartley* v. *Richardson*, 91 Maine, 424.

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

FRANK LEMELIN'S CASE.

Somerset. Opinion December 23, 1921.

A petition for review under the provisions of the Workmen's Compensation Act, where there has been an agreement for compensation made by employee and employer and approved by the commission, must be filed within two years from the date of such approval, and within the time for which compensation was fixed under such agreement.

An agreement for compensation made by and between the employer and employee under the Workmen's Compensation Act, and approved by the commission has the force of a judgment of a court (sec. 35) and is subject to review under Section 36, but only in the manner and within the time therein specified, viz.: "At any time before the expiration of two years from the date of the approval of the agreement by the commission————but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement————but not afterwards."

In the instant case had a petition for review been filed within two years after August 24, 1918, and within the one hundred and twenty-five weeks for which compensation was fixed under the agreement, it would have been within the statute. But the petition in this case is not a petition for review. It is an original petition. If it could be construed into a petition for review, and it clearly cannot be, it would be barred by the statutory limitation of Section 36. Being an original petition for compensation, it is barred by the two-year limitation specified in Section 39. The court may construe the Act liberally but it cannot amend or add to it.

On appeal. An appeal from a decree of a sitting Justice confirming the findings of the Chairman of the Industrial Accident Commission under the Workmen's Compensation Act. The claimant entered into an agreement with the employer for compensation, under the terms of which compensation was to be paid at the rate of $7.27 per week for a period of one hundred and twenty-five weeks, which agreement was approved by the commission. The approval by the commission was dated August 24, 1918, and the period of one hundred and twenty-five weeks began June 4, 1918. On January 21, 1921, claimant filed a petition for award of compensation, and a hearing held,

and a decree rendered awarding compensation, from which decree an appeal was taken. Appealed sustained. Decree of sitting Justice reversed. Petition dismissed.

The case is stated in the opinion.

P. A. Smith, for plaintiff.

Andrews, Nelson & Gardiner, for defendants.

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

HANSON, J. This is an appeal from a decree of a sitting Justice under Section 34 of the Workmen's Compensation Act, now found in Chapter 238, Public Laws, 1919, confirming the findings of the Chairman of the Industrial Accident Commission.

On May 21st, 1918, Frank Lemelin, while in the employ of the American Woolen Company at the Kennebec Mills at Fairfield, Maine, received a personal injury by accident arising out of and in the course of his employment. As a result of the accident, Mr. Lemelin lost his right hand at the wrist. On or about the 24th day of August, 1918, an agreement for compensation was entered into between Mr. Lemelin and the American Woolen Company, as employer, and Employers Liability Assurance Corporation, Ltd., as insurance carrier, under the provisions of which compensation was to be paid at the rate of $7.27 per week for a period of one hundred and twenty-five weeks, beginning June 4th, 1918. Said compensation was so paid as per settlement receipt. It was admitted that the payment for one hundred and twenty-five weeks was the proper amount of compensation to be paid for the injury which he received, as specific compensation as provided by Section 16 of the Workmen's Compensation Act, then in force. January 18, 1921, Mr. Lemelin filed a petition for award of compensation with the Industrial Accident Commission. A hearing was had on March 11th, all parties in interest appearing.

The respondents in their answer opposed the prayer of the petitioner on the following grounds:

"1. Said petition is not filed within the time prescribed by the Compensation Act.

2. Agreement for compensation because of alleged accident was entered into between claimant and respondent and duly approved

by the Commissioner of Labor. Action for further compensation, if any, should be by petition for review brought within the required time.

3. Agreement in this case provided for compensation in the sum of seven dollars and twenty-seven cents ($7.27) per week for a period of one hundred twenty-five weeks, which sums have been duly paid, and during said period, no further petition was filed."

Findings of fact by the Chairman of the Commission:

"On May 21st, 1918, the petitioner, Frank Lemelin, then a man about 66 years of age, received a personal injury by accident arising out of and in the course of his employment with the American Woolen Company, at Fairfield, as a result of which he lost his right hand at the wrist. An agreement providing specific compensation in the sum of $7.27 per week for a period of 125 weeks was entered into between the parties and approved by the Commissioner of Labor August 24, 1918. Compensation has been paid in full according to the terms of the agreement, the date of the last payment being November 18, 1920. Previous to the accident, which resulted in the loss of his right hand, Mr. Lemelin had lost the middle and ring finger on his left hand, so that he now has but two fingers and a thumb on his left hand and the stub of the right arm extending to the wrist. Mr. Lemelin is a man now 68 years old. Up to the date of the accident he had always engaged in manual labor to earn a living. His occupation for several years prior to the accident was mostly digging sewers and hard manual labor of that nature. He can neither read nor write. He has no trade or profession.

Since the date of the accident May 21, 1918, he has worked about two weeks altogether at a corn factory carrying baskets which he can do when he can get the work providing he can work with another man so he can carry a basket with his left hand. Other than the work done at the corn factory he has performed no manual labor for hire since the accident. He has tried to get work but could find none he could perform in his crippled condition. Since the last payment of compensation in November he has earned no money and has been unable to earn any entirely because of the loss of his right hand together with the crippled condition of the left.

His average weekly wage at the time of the accident was $15.10, which entitled him, under the Workmen's Compensation Act then in force, to a weekly compensation of $7.27.

Based on the above facts it is found that Frank Lemelin, the petitioner, is totally incapacitated for labor at the present time and has been totally incapacitated for labor since November 18, 1920, because of the injury sustained by him May 21, 1918, and that he is, therefore, entitled to compensation for total incapacity since that date.

IT IS THEREFORE ORDERED AND DECREED that the American Woolen Company, or its insurance carrier, the Employer's Liability Insurance Company, pay to the petitioner, Frank Lemelin, compensation in the sum of $7.27 per week commencing November 18, 1920, and to continue so long as the said Frank Lemelin is totally incapacitated for labor because of said injury, provided that the compensation paid as herein ordered shall in no event exceed the sum of three thousand dollars nor the period for which compensation is paid exceed 500 weeks from the date of the injury.

Dated at Augusta, Maine,
April 5th, 1921.

ARTHUR L. THAYER,
Chairman, Industrial Accident Commission."

The respondents in their brief contend, 1, that the petition for compensation was not properly entertained; and, 2, that there is no evidence to support a finding that petitioner suffered a compensable injury which resulted in total incapacity for work. An agreement was entered into between the employer and employee which was duly approved by the Commissioner August 24, 1918. On the face of the agreement was written these words, "Subject to review as provided by the Workmen's Compensation Act." These words added nothing to the agreement, as the statute gave the right to such review without them, as follows: "Sec. 36. At any time before the expiration of two years from the date of the approval of an agreement by the commission, or the entry of a decree fixing compensation, but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement or decree, but not afterwards, any agreement, award, findings or decree may be from time to time reviewed by the chairman or associate legal member upon the application of either party, after due notice to the other party, upon the grounds that the incapacity of the injured employee has subsequently ended, increased or diminished."

The approved agreement had the force of a judgment of a court (Section 35) and this was subject to review under Section 36, but only in the manner and within the time therein specified, viz.: "At any time before the expiration of two years from the date of the approval of an agreement by the commission . . . . but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement . . . but not afterwards," any agreement may be reviewed, etc. That is, in this case the petition for review in order to be within the statute should have been filed within two years after August 24, 1918, viz.: before August 24, 1920, and within the one hundred and twenty-five weeks, but not afterwards. Had a petition for review been filed within those periods it would have been in season. None was filed. The petition herein is not a petition for review—it is an original petition. If it could be construed into a petition for review, which it clearly cannot, it is barred by the statutory limitation of Section 36. Being an original petition for compensation, it is barred by the two-year limitation specified in Section 39. It is clear that the claimant has slumbered on his rights, and this court cannot now restore them to him in the face of the positive limitations fixed by the Workmen's Compensation Act. We may construe the Act liberally, but we cannot amend or add to it.

Appeal sustained.
Decree of the sitting Justice reversed.
Petition dismissed.

ADA F. KENISON *vs.* WILLIAM H. DRESSER, Adm'r.

Cumberland. Opinion December 24, 1921.

A plaintiff in an action brought against an administrator of an estate on a claim not preferred, having filed the claim supported by affidavit in the Probate Court prior to bringing action, and the estate is subsequently decreed insolvent, and the claim is not presented to the commissioners, can either discontinue without costs, or continue, try, and have judgment rendered with the effect, and satisfied in the same manner provided in the case of appeal.

In an action against an administrator of an estate, which subsequently to the time of bringing the action was decreed insolvent, the plaintiff having prior to bringing the action filed the claim in the Probate Court supported by affidavit, and did not present the claim to the commissioners, it not being a preferred claim, two courses are open to the plaintiff: (1) to discontinue without costs; (2) to continue, try, and have judgment rendered with the effect, and satisfied in the same manner provided in the case of appeal.

On exceptions. An action of assumpsit against an administrator which was continued for several terms of court from term to term, and defaulted, and on motion by defendant the default was removed, and again at a subsequent term was defaulted and after the default was recorded and before final judgment thereon, the defendant filed a motion that the presiding Justice set aside the default and order it stricken from the records and discontinue the case without costs. This motion was denied by the presiding Justice and the defendant excepted. Exceptions overruled.

Case is stated in the opinion.

William Lyons, for plaintiff.

Howard Davies, and Harry C. Libby, for defendant.

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

HANSON, J. This was an action of assumpsit returnable to the Superior Court for the County of Cumberland at the December term,

1916, and was continued from term to term until the February term, 1921, when the case was defaulted, and the default was later stricken off upon the motion of the defendant. At the April term, 1921, of said court the case was again defaulted, and after the default was recorded and before final judgment thereon, the defendant filed a motion that the presiding Justice set aside the default and order it stricken from the records and discontinue the case without costs. This motion was overruled by the presiding Justice, and the defendant excepted. The case is here on defendant's exceptions to the above ruling. The defendant concedes liability, but claims that in June, 1917, the year after this action was brought, he represented decedent's estate insolvent, and that for this reason, and because the plaintiff in the first instance before this suit was brought filed his claim in the Probate Court, this action cannot be maintained. Defendant's counsel urge that the presiding Justice should have granted the motion of the defendant for either of the two following reasons:

1. That by filing the proof of claim in the Probate Court before action brought, and citing the administrator to settle his final account, the plaintiff did present her claim to the Commissioners of Insolvency, and made her election under the statute, and that the pending action was thereby discontinued without costs.

2. That the plaintiff is guilty of laches in allowing the pending action to slumber from June, 1917, until February, 1921.

As to the first contention: The action had been in court several months before the decree of insolvency. The case remained in court thereafter until the April term, 1921, at which term the motion mentioned was filed. In support of the first reason, the defendant quotes R. S., Chap. 71, Sec. 5, which provides that "Any claim filed in the Registry of Probate supported by affidavit as provided in Section 14 of chapter 92 shall be considered as if presented to said Commissioners (referring to the Commissioners of Insolvency) provided the same is so filed before the expiration of the six months period named in the preceding section."

But this section does not authorize the use he would make of it, nor does it have the effect in any manner to control a plaintiff in a suit brought after filing in Probate Court a claim against an estate as provided in Sec. 14 of Chap. 92, R. S., if he desires to continue his suit thereunder. *Neally* v. *Segar*, 57 Maine, 563, cited by defendant,

is not an authority supporting his contention. In that case the writ was dated April 14, 1866, was entered at the following May term, and continued until the January term, 1869, when it came on for trial. After entry of the action the defendant died; letters of administration taken out; the estate rendered insolvent; commissioners of insolvency were appointed, who gave the notice required by law. The plaintiff left his writ with the commissioners, but did not support the claim therein set out by affidavit or other proof. The commissioners disallowed the claim. The court considering the case on report, held that "two courses were open to the plaintiff,—(1) To discontinue without costs; (2) to continue, try, and have judgment rendered with the effect, and satisfied in the same manner provided in the case of appeal." *Bates* v. *Ward*, 49 Maine, 87.

The plaintiff's right to "continue, try, and have judgment" is the same under Chap. 71, Sec. 19, of the R. S. of 1916, which provides as follows: "Actions pending on claims not preferred when a decree of insolvency is made may be discontinued without costs; or continued, tried and judgment rendered with the effect, and satisfied in the manner provided in cases of appeal. No action can be commenced, except on a preferred claim, after such decree."

In *Shurtleff* v. *Redlon*, 109 Maine, 62, this court in considering the foregoing section, among other conclusions held, that "No action, except the action for money had and recieved by way of appeal, can be commenced upon any unpreferred claim after the decree of Probate Court adjudging the estate insolvent, and appointing commissioners, but an action commenced before such decree may be further maintained, provided plaintiff does not present the claim declared upon to the commissioners.

As to the claim of laches on the part of the plaintiff, it may be said that from the information to be gathered from the exceptions, it does not appear that delay was due to the fault of the plaintiff alone. If there was delay beyond the usual time necessary in such cases, the defendant from the record was a party to the same. The ruling of the presiding Justice was correct.

Exceptions overruled.

AGNES M. COOPER *vs.* JAMES C. HAMLEN et als.

Cumberland. Opinion December 24, 1921.

It is within the discretion of the court to grant a motion requesting that a case be placed on the jury list for trial, where the plaintiff failed to write on the writ itself a claim for jury trial, but did send to the clerk's office a written claim for jury trial, which was filed with the writ before the return day.

The plaintiff, not being familiar with the laws of this State, by mistake or accident, failed to write on the writ a claim for jury trial, as provided by statute but did send to the clerk's office a letter claiming a trial by jury which was filed with the writ before return day.

Under such circumstances it is within the discretion of the court to grant a motion that the case be placed on the jury list for trial.

On exceptions. An action of tort. The plaintiff did not endorse on her writ her desire for a jury trial in the manner provided by statute, but instead wrote a letter by her attorney to the clerk claiming trial by jury which was filed with the writ before return day. At a subsequent jury term the plaintiff requested that the case be placed on the jury list. She also requested the ruling that her claim for jury trial when filed with the writ became a part of her writ so far as her request for jury trial was concerned. The presiding Justice denied both requested rulings and ruled affirmatively as a matter of law that plaintiff was not entitled to an order placing the case on the jury list, and plaintiff excepted. Exceptions sustained.

The case is stated in the opinion.

John H. Casey, for plaintiff.

Verrill, Hale, Booth & Ives, for defendants.

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

HANSON, J. This is an action of tort, and comes up on exceptions to rulings of the Justice of the Superior Court for the County of Cumberland.

The case may be stated from the exceptions, as follows:

"This action was begun on the second day of April, 1919, by writ returnable to the Superior Court for said county on the first Tuesday of May, to wit, May 6, A. D. 1919, in which the plaintiff is stated to be of Boston, Massachusetts, her action one of tort and her damages put at $10,000.

The plaintiff not being familiar with the laws of Maine, by accident and mistake, as she contends, failed to write on the writ *itself* her claim for jury trial, but did on the first day of May send to the Clerk's office her written claim for jury trial which was received at said office on the second day of said May and filed with said writ on said first Tuesday of May, and has ever since been with said writ on the files of said court. A copy of her said written claim for jury trial is made part hereof and marked Exhibit B.

On the 22d day of October, 1920, the plaintiff made a motion in open court before Sanborn, J., in which she stated the foregoing facts, which were not denied, and introduced said written claim in evidence and requested a ruling that as a matter of law she was entitled to an order that said case be placed on the jury list for trial. She requested the further ruling that her said claim for jury trial when filed with the writ becomes part of her writ so far as said request was concerned.

The court refused to rule as requested and ruled as a matter of law that she was not entitled to such order and denied the motion. To which refusal and denial and ruling the plaintiff excepted and her exceptions were allowed."

The written claim referred to is as follows:

"Re *Agnes M. Cooper* v. *James C. Hamlen* et als.:

Please take notice that the plaintiff claims a trial by jury in the above entitled case returnable the first Tuesday of May.

Yours very truly

AGNES M. COOPER
% JOHN H. CASEY."

The question of procedure here involved arises under Sec. 92, Chap. 82, R. S., which provides that "If the plaintiff in either of said superior courts desires a jury trial, he must indorse the same upon his

writ at the time of entry. The defendant shall, within fourteen days after entry, file his pleadings, and if the plaintiff has not demanded a jury, the defendant must indorse on his plea his demand for a jury, if he desires one. But whenever by accident or mistake the plaintiff fails to indorse on his writ at the time of entry a request for a jury trial, or if the defendant by accident or mistake fails to indorse upon his plea, when filed, a demand for a jury, the court may, on motion of either party, at its discretion order a trial by jury in the cause. Whenever a jury is so demanded by either party, or ordered by the court, the clerk shall enter the fact on the docket, and all other cases, except appeals, shall be tried by the justice without the intervention of a jury, subject to exceptions in matters of law, in term time, or if both parties desire, at chambers."

We think the exceptions should be sustained. We are of opinion that the facts and circumstances disclosed by the exceptions bring the case clearly within the meaning and intent of the statute, and that the reasons stated constitute in this case accident or mistake. It is not a case of neglect to move for a jury trial, but a mistake in acting; neither is it a case where a waiver may be fairly claimed, for the same reason. It was not a voluntary surrender of a known right, but a mistaken attempt to assert a known right.

Against the plaintiff's motion the defendant's counsel urge "that statutes of this sort should be complied with literally and the defendants can find no ground in reason and authority in law for any such lax doctrine as that contended for by the plaintiff." We cannot adopt this view. We think it is plain that the Legislature did not so intend; for if such had been the case, the language creating the discretion would have been omitted. Discretion was created for a purpose, created to be exercised in a proper case such as this.

In view of the broad discretionary power given by the statute, the court could remedy the mistake if it desired to do so, and was therefore not debarred from acting as a matter of law.

The fact that a letter was filed with the writ, instead of indorsing notice on the writ as required by the statute, should not deprive a party of a constitutional right as a matter of law. We are of opinion that the motion for an order to have the case placed on the jury list for trial should have been granted.

The ruling of the Justice presiding, as a matter of law, that the plaintiff was not entitled to such order, was in effect expressly deny-

ing that the trial court had the power, in the exercise of its discretion, to grant the motion. The motion could have been granted in the discretion of the court. *Washburn* v. *Allen*, 77 Maine, 344.

Exceptions sustained.

STATE *vs.* JAMES WALLACE AND HARRY H. CLANCY.

Cumberland. Opinion December 24, 1921.

The question as to whether alcohol is an intoxicating liquor is a question of fact for the jury, and the jury have a right to take judicial notice of the fact that it is an intoxicant. In a liquor nuisance indictment, no specific place being named, adjoining premises, one used for hiding intoxicants, the other for illegal sale, it follows that the illegal use of any part of the premises thus connected to form one place or tenement and constitutes a nuisance.

It is a matter of common knowledge that alcohol is an intoxicating liquor; used in sufficient quantity with other ingredients to produce intoxication, and under the law of this State is an intoxicating liquor. A jury has the right to take judicial notice of the fact that alcohol is an intoxicant.

In a liquor nuisance indictment where no specific place is name in the indictment, adjoining premises, one of which is used for hiding intoxicating liquors, and the other used for selling the same illegally, are not separate and distinct places or tenements. Such connection once established, it follows that the illegal use of any part of the premises thus connected to form one place or tenement would constitute a nuisance.

On exceptions. The respondents were indicted at the January term, 1921, of the Superior Court for Cumberland County, for maintaining a liquor nuisance. The jury returned a verdict of guilty. During the progress of the trial several exceptions by respondents were taken on which the case went to the Law Court. Exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.

Clement F. Robinson, County Attorney, and Ralph M. Ingalls, Asst. County Attorney, for the State.

William C. Eaton, for respondents.

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

HANSON, J. This was an indictment for maintaining a liquor nuisance, and was returned by the grand jury at the January term, 1921, of the Superior Court for the County of Cumberland.

The jury returned a verdict of guilty as to each respondent, and the case is before the court on exceptions.

Exception 1 relates to State's Exhibit 2, claimed by the State to be intoxicating liquor. After the evidence was closed, and before the case was given to the jury, respondents requested the presiding Justice to instruct the jury "that there was not sufficient evidence in the case to warrant them in finding that the contents of State's Exhibit 2 was intoxicating liquor within the meaning of those words as used in the Statutes of the State of Maine." The request was refused and properly so. There was positive evidence, uncontradicted, that Exhibit No. 2 not only contained alcohol, but was alcohol. It was for the jury, not the court, to decide whether or not "the contents of State's exhibit 2 was intoxicating liquor."

Exception 2 relates to the following language of the presiding Justice in his charge to the jury concerning the exhibit in the case, and the testimony of the officer who seized the exhibit and testified to the nature of its contents, namely: "Counsel for the defense has alluded to the Exhibit No. 2, *the small bottle of alcohol,*" and in the next sentence but one of the charge, the following: "You will judge of his knowledge of whether it was or was not (alcohol), and judge of whether you think there is any reason to believe that it was anything except what he testified it to be—*ordinary, drinkable alcohol.*"

Respondents' counsel contends "that the words of the phrase underlined were objectionable and exceptionable because, in the first phrase, his use of the words "ordinary, drinkable alcohol" were absolutely unwarranted and legally improper." It is true that the witness did not use the exact words, "ordinary, drinkable alcohol," but he did testify in answer to defendants' counsel in cross-examination as follows: "Q.—What do you know about it? A.—I know it is straight alcohol." Further answering in cross-examination, the witness repeated, "it is straight alcohol, grain alcohol;" that he could tell it was alcohol by smelling it; that it would burn, and that he had burned it, and that it did not contain formaldehyde. In fact,

the only other question raised as to Exhibit 2 was "whether it was a beverage or not," and upon this point defendants' counsel stated his position very clearly, so clearly in fact, that the use of the words "ordinary, drinkable alcohol" could not have prejudiced the respondents. The presiding Justice very properly left the question as to whether it was intoxicating liquor to the jury.

The language objected to was not prejudicial to the respondents in view of the position of counsel, and the instructions as a whole. *State* v. *Piche*, 98 Maine, 348; *State* v. *Starr*, 67 Maine, 242; *State* v. *McCafferty*, 63 Maine, 223.

Counsel cites *Heintz* v. *LePage*, 100 Maine, 545, as defining the term "intoxicating liquor," viz.: "So I repeat, any liquor containing alcohol, which is based on such other ingredients, or by reason of the absence of certain ingredients that it may be drank by an ordinary person as a beverage, and in such quantities as to produce intoxication, is intoxicating liquor. If its composition is such that it is practicable to commonly and ordinarily drink it as a beverage and to drink it in such quantities as to produce intoxication, then it is intoxicating liquor." The case thus cited but recognizes a conclusion reached in earliest times, and takes judicial notice that alcohol is an intoxicating liquor, and when diluted, or mixed with other ingredients, if the resultant liquid used in sufficient quantity produces intoxication, that mixture is, under our law, intoxicating liquor.

The statute names "wine, ale, porter, strong beer, lager beer and all other malt liquors . . . . and all distilled spirits as well as any beverage containing a percentage of alcohol, which by federal enactment, or by decision of the Supreme Court of the United States, now or hereafter declared, renders a beverage intoxicating" and declares that "this enumeration shall not prevent any other pure or mixed liquors from being considered intoxicating." (R. S., Chap. 127, Sec. 21 as amended by 1919, Chapter 235).

It is idle at this late day, in view of the world-wide knowledge and action upon the matter of suppression of the liquor traffic, to further discuss or to seek to refine a phase of the subject settled ages ago. What all the world knows and discusses, the trial court and jury may be presumed to know. It is a matter of common knowledge that alcohol is an intoxicating liquor; used in sufficient quantity with other ingredients to produce intoxication, under our law it is an intoxicating liquor. When the question is submitted as in this case,

in addition to the affirmative evidence, the jury had the right to take judicial notice of the fact that alcohol is an intoxicant. The testimony of the officer was competent to show what Exhibit 2 was. *Commonwealth* v. *Leo*, 110 Mass., 414; *Commonwealth* v. *Peto*, 136 Mass., 155. In *Commonwealth* v. *Peckham*, 2 Gray, 514, where in overruling exceptions to the refusal of the trial Judge to instruct the jury that the Commonwealth must prove that gin was intoxicating, and to an instruction that the jury might "infer" that it was intoxicating, the court said:

"Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters. Now everybody who knows what gin is, knows not only that it is a liquor, but that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor, without evidence that it was not a solid substance, as that they could not find that it was intoxicating, without testimony to show it so. No juror can be supposed to be so ignorant as not to know what gin is. Proof therefore, that the defendant sold gin is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin."

Exceptions 3 and 4 are based upon the same grounds. The indictment in the usual form charges the respondents with maintaining a liquor nuisance at Portland in said county in "a certain place, to wit, a tenement there situate." The "place" of business of respondents was at No. 30 India Street, and the State introduced evidence tending to show sales of intoxicating liquor at that place, which has already been considered under Exceptions 1 and 2. Exception 3 is to the admission of testimony connected with a vacant store adjoining No. 30 India Street and numbered 32. The testimony objected to disclosed that No. 32 which had been vacant for some months, was bolted and barred on the inside, and inaccessible from the outside except by breaking a door or window. Access was had in this manner by the officers, and the evidence shows that in that building was found a hide containing alcohol and whiskey in large quantities, and that from the cellar of No. 32 a well beaten path had been made from the stairway to and through a board partition to the cellar of No. 30.

Counsel in his brief urges that under such an allegation it is elementary that only one "place" is covered by the indictment, and cites *State* v. *Lashus*, 67 Maine, 564, in support of his contention, but in

that case the indictment for nuisance specified a certain locality and the court held that evidence could not be offered by the State as to a nuisance in any other locality. That is the settled law in such cases, but as has been seen, no specific place was named in the instant case, and that being so we think upon reason and the weight of authority that the evidence offered by the State was clearly admissible in connection with the other testimony in the case, and that the presiding Justice was correct in his ruling.

It is doing no violence to settled rules of procedure to so hold, and while there has been no similar case in Maine heretofore, the same necessities from the nature of the business involved have produced such cases in other states, and will no doubt furnish other cases here.

Exception 4 was to that part of the charge of the presiding Justice in which he uses this language: "Now, if either of these places were used for the transaction of this business in any of these methods, any of these respects, which are described in the indictment and are specified in the law, if either of these places, you find, have that characteristic, or if both of them have, and you find that '32' was actually used and occupied, although only for this purpose of hiding liquor, by the defendants, why, then the defendants would be responsible under this statute and under this indictment."

We discover no error in the instruction. Analyzed, the language used presents but one question,—was No. 32 used by the respondents as a hiding place for intoxicating liquor which the respondents sold or intended to sell in No. 30. This was an issue in the case, a question of fact for the jury and the jury alone. Immediately following the words objected to, the presiding Justice instructed the jury as follows: "So if you have a question about No. 32, you will inquire what the evidence leads you to conclude about No. 32 as well as No. 30. That is a case of inferential conclusion from certain known facts, or facts brought before you in testimony which you find to be facts. You will conclude what they mean. There is nothing unusual about that. . . . Now you have introduced here that kind of evidence in regard to the hide, in regard to the No. 32. Was that No. 32 used in connection with No. 30 by these defendants? Was there a passageway, a place there with these planks, these boards, in it, in the partition, so arranged that the two places were accessible? Was there anybody else using that No. 32? Was it accessible, as it stood, to anybody else? What the Sheriff said about a path there,

the ladder and the trap-door, and the oilcloth, and the hide, and the liquor—does that lead you to a conclusion as to the purpose of that liquor, as to the control of that liquor, as to the control of that tenement? If you find that is so, then that belongs in this case, and it is for you to find as to that part of the testimony what your conclusion is as a matter of common sense and a matter of common judgment."

The contention of respondents' counsel is that No. 30 and 32 were separate and distinct "places or tenements," "and that any contention to the contrary is absolutely without foundation." That contention was very properly submitted to and determined by the jury, and they found that the "places" were not separate and distinct, and in this they were fortified by the law and the evidence. The jury could find from the evidence that No. 32 was used in connection with No. 30 by these defendants. Such connection once established, it follows that the illegal use of any part of the premises thus connected to form one place or tenement would constitute a nuisance.

In *Commonwealth* v. *Fraher*, 126 Mass., 56, the evidence offered under an indictment for nuisance, was in part that the defendant occupied the second story of a certain building for a dwelling, and the rest for other purposes, including one room on the first floor, which contained a bar. There was no direct evidence of illegality in this barroom, but there was evidence of illegality in a rear room connected with it. The defendant asked that the government be required to elect as to the premises on which it relied to make out the nuisance, but the judge refused, and ruled that the tenement might consist of two rooms used together, and immediately connected with each other, and "if the two were thus used, alternately or interchangeably . . . . they might be considered to be parts of one and the same tenement, *and the illegal use of either, while thus connected* and used, would be an illegal use of the tenement." Exceptions were overruled with the statement that "the instructions given to the jury were appropriate and sufficient."

In *Commonwealth* v. *Wallace*, 143 Mass., 88, an indictment for nuisance, it appeared that the defendant was licensed to sell liquor at No. 107 South Water Street; he also occupied the premises next adjoining. Evidence was offered that both premises were being used for liquor selling, and the defendant requested instructions that if the jury were satisfied that there was insufficient evidence of a nuisance in the adjoining premises, then all evidence regarding the use of these

adjoining premises must be disregarded in passing on the question of whether the defendant was conducting a nuisance at No. 107 by transgressing the terms of his license. The judge refused so to instruct, and exceptions were overruled, the court saying: "The situation of the premises No. 107 South Water Street and of the premises next south of those may have been such in reference to each other that the use made of the latter by the defendant was properly some evidence that the former was kept by him for the illegal sale of intoxicating liquors."

In *Commonwealth* v. *Buckley,* 147 Mass., 581, the defendant was convicted of a nuisance where it appeared among other facts that the defendant kept and sold liquors in a barroom on the ground floor and also had a dumb waiter connecting from it to a room on the second floor where he also sold liquor. The defendant requested an instruction that the two rooms were separate tenements, to only one of which could the evidence offered be applied, and that the jury must acquit the defendant unless the government should elect on which tenement to seek a conviction. The judge refused this instruction and ruled that the government must prove the single offense of keeping one tenement, but that such tenement might consist of one or several rooms, the jury having the right to decide which rooms made up the tenement. Exceptions were overruled, the court saying in part: "The only tenement . . . . was the hotel. . . . What rooms were included in that tenement was plainly a question of fact for the jury. There was evidence sufficient to warrant a finding that the room below was a part of it."

In *Commonwealth* v. *Clynes,* 150 Mass., 71, it appeared that two separated rooms were used in connection with the one purpose, and here, too, a conviction for nuisance was affirmed, exceptions being overruled. The defendant asked the judge to require the State to elect in which part of the building the tenement was, and to rule that two separate tenements were disclosed, but the judge refused. The court said in part: "The word 'tenement' in its modern use often signifies such part of a house as is separately occupied by a single person or family, in contradistinction to the whole house . . . . It may consist of a single room or of contiguous rooms, or of rooms upon different stories, if such rooms are controlled by a single person and are used in connection with each other."

In *Commonwealth* v. *Patterson*, 153 Mass., 5, separate buildings on the same lot were held part of the same "tenement" in a nuisance charge. The court said: "While it may have been divided into several tenements, it was not so divided, but was used as one tenement, and constituted one nuisance, the keeping of which was one offense."

A nearby room, which a person uses in connection with the business conducted by him in his regular place of business, is a part of his "place of business," within the purview of the general prohibition statute. *Bashinski* v. *State*, 5 Georgia Appeals, 3, 62 S. E., 577; *Holland* v. *State*, Georgia Appeals, 72 S. E., 290; *Mundy* v. *State*, Georgia Appeals, 72 S. E., 300; *Flahine* v. *State*, Georgia Appeals, 73 S. E. 536.

We are of opinion that the instructions of the presiding Justice were correct.

The entry will be

Exceptions overruled.
Judgment for the State.

NATHAN M. RODMAN COMPANY *vs.* PETER KOSTIS.

York. Opinion December 30, 1921.

A new trial is granted on newly discovered evidence, as a rule, when a different result seems probable.

As a general proposition, a motion for a new trial on the ground of newly discovered evidence will be sustained if, in the exercise of the court's sound discretion, it seems probable that upon another trial there would be a change in the result.

On motion for new trial. This is an action of assumpsit brought by Nathan M. Rodman Company against Peter Kostis to recover for certain produce sold by plaintiff corporation to defendant. The action was tried by jury at the January term, 1921, of the Supreme Judicial Court in York County, and the jury rendered a directed

verdict for plaintiff, and defendant filed a general motion for a new trial. At the following May term of said court defendant filed a motion for new trial on the ground of newly discovered evidence. The newly discovered evidence motion sustained. General motion not considered.

The case is stated in the opinion.

Willard & Ford, for plaintiff.

Leroy Haley, and John V. Tucker, for defendant.

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

DUNN, J. This plaintiff is a corporation engaging in business as a commission merchant in Boston. Defendant lives at Sanford where he has a store. The action is assumpsit on an account annexed to the writ for fifty barrels of potatoes. Plaintiff's contention is that it sold and delivered the potatoes to the defendant in two lots, the first of twenty barrels on July 2, 1920, and the second exactly one week later. Liability is flatly denied. It is uncontroverted that defendant had the potatoes. There is no dispute that the one lot was shipped directly to him from the plaintiff's store, and that the other lot, starting from the same place, eventually came to his possession from one Karadakis, a Sanford fruit man, to whom it is said that shipment was made by mistake. Defendant insisted at the trial that his vendor in both instances was a former Boston individual called Pappas, whom he had already paid for the produce. To this, plaintiff rejoined that Pappas was but an agent for the defendant. Thus there was presented a question of fact, to be determined by an examination of the concrete facts in the individual case. Decision was for the plaintiff. There is a general motion to avoid the verdict. But it need not be considered for the reason that a disposal of the case is founded otherwise.

Another phase of the situation is a motion on the ground of newly discovered evidence. Pappas, concerning whose connection with affairs the evidence at the trial had largely to do, was at that time out of the United States; "he gone away to the old country" testifies his son in supporting the present motion. His departure seems to have taken place soon after the shipment of the second lot of potatoes, and without the formality of previously paying for either shipment.

In recent years Pappas was dealing in fruits and other products. He had had no store, but he went a daily round among the markets of his city, buying, perhaps chiefly on a commission basis, to ship at once to retailers in the State of Maine and elsewhere. Plaintiff's president, speaking as a witness, stated that his concern had known Pappas only as "a brokerage;" that it never had sold goods to him personally; never had made charges to his account; never had received payments from him; but had done business with him merely as an intermediary, over whom and beyond whom, a sale and purchase of merchandise being effected, it looked to his principal as a sole debtor.

One day after the trial the defendant chanced to be in Boston. There in a market place he met the now testifying son. He told him of the outcome of the lawsuit. The son went to the house where his father had lived, and where the latter's married daughter was still living, and caused boxes of papers fetched from the cellar. Searching among these, on a second occasion, he found, so he says, the two exhibits here presented. These purport to be the original invoices of the particular sales. They are typewritten on printed billheads of the plaintiff company. If the offered lists shall stand they evidence sales to Pappas individually. The quantities and descriptions tally with those in the writ. So do the extensions of prices and of debits. Likewise the dates. And, going one point more in detail than does the annexed account, they show that the respective lots were shipped to Sanford, the one to Peter Kostis and the other to John Karadakis.

Plaintiff's rejoinder is that, if accepted as authentic, the invoices are not entitled to be classified either as newly known or indicative of new evidence; assigning that reasonable diligence would have discovered and produced them at the trial. The necessity for diligence in the procurement of evidence is recognized. *Atkinson* v. *Conner,* 56 Maine, 546, *Kimball* v. *Hilton,* 92 Maine, 214, and *Cobb* v. *Cogswell,* 111 Maine, 336, are well considered cases on the subject, cited by the plaintiff. But be it remembered that reasonable diligence is a relative expression. The presumption always is that the movant did not exercise due diligence. Presumptions of this nature are of inferential origin. They are disputable. When rebutted there's an end of them. And, as Mr. Justice HANSON has shown, when apparently an injustice looms, juridical postulates are soon repelled by countervailing proof. *Cobb* v. *Cogswell,* supra. Quite true is it,

in literal translation of an ancient proverb, that it is for the interest of the republic that there shall be an end of litigation. But proverbs, it has well been said, should go in pairs, for a single one tells simply half a truth. Equally true is it that it is for the interest of this Republic that verdicts begotten by falsehood be not a fashion of the courts. What constitutes due diligence depends on the facts of each case. *Hagar* v. *New England Ins. Co.*, 63 Maine, 502, 505. The evidence must not only be newly discovered but it must be strong. *Snowman* v. *Wardwell*, 32 Maine, 275. It must be of such character, of such weight, and of such value as to make it appear to the court, not that a different conclusion necessarily must be reached, but in probability that an unlike verdict would be arrived at, were the case to be tried anew. *Parsons* v. *Railway Company*, 96 Maine, 503; *Mitchell* v. *Emmons*, 104 Maine, 76. The idea, never very generally prevalent, that appearances of injustice are inconsequential, was long since thrown onto the scrap-heap of exploded notions.

Plaintiff's president was its principal witness. As the case poised he alone was its material witness. Against him was the defendant, Greek born. These two men, witnessing, gave virtually all the evidence; one of them it may be, did not comprehend the meaning in technical precision of the legal term "agent." The whereabouts of Pappas, the manner of whose identity with the case was of high importance, the defendant did not know. Perchance, had defendant sought long enough and far enough, he might have located him, though he had been gone from home a month before his own son knew where he was in Europe. But the efforts that defendant made to find him had proved unavailing. After the trial the invoices came into view. They seem to reveal both the probable presence of falsity designedly made and resulting glaring injustice done the defendant. The law laments injustice. It holds perjury in abomination.

It is the opinion of the court, in the exercise of a sound discretion, that it seems probable that upon another trial there would be a change in the result.

The newly discovered evidence
motion is sustained.
A new trial is granted.

STATE OF MAINE *vs.* LEVERNE ARRIS.

Androscoggin. Opinion January 12, 1922.

The offense of wilful neglect by a husband to provide for his family under R. S., Chap. 120, Sec. 38, is declared by the statute to be a felony, and a felony is punishable by imprisonment in the State prison, hence the offense must be charged by indictment, as required by the constitution.

In this case upon a complaint under R. S., Chap. 120, Sec. 38, alleging wilful neglect and refusal by a husband to provide and furnish his wife the complainant, and a minor child, with support and maintenance.

Held:

1. The statute declares the offense to be a felony.
2. A felony is punishable by imprisonment in the State prison.
3. The defendant being charged with a felony will be subject to imprisonment in the State prison.
4. That such punishment is infamous.
5. That such an offense must be charged by indictment.

On exceptions. This is a complaint made by the wife of the respondent charging him with wilful neglect to provide the necessary support and maintenance for her and a minor child, which originated in the Auburn Municipal Court under R. S., Chap. 120, Sec. 38. The respondent was found guilty and appealed to the Superior Court for Androscoggin County and was tried before a jury on the original complaint without any action by the grand jury, it not being a grand jury term, and was found guilty, and, before judgment, respondent filed a motion in arrest of judgment, on the ground that the offense charged was a felony by statute and in consequence thereof the proceedings must be by indictment, which motion was overruled by the presiding Justice, and respondent excepted. Exceptions sustained.

Case is fully stated in the opinion.

B. L. Berman, County Attorney, for State.

Frank O. Purington, and Tascus Atwood, for respondent.

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

SPEAR, J. This case comes up on exception. A statement of facts as taken from the defendant's brief is as follows:

"As will be seen by the complaint and motion, before the court as a part of the exceptions, this case originated before the Municipal Court for the City of Auburn on the complaint of Evelyn Mae Arris and is founded on Section 38, Chapter 130 of the Revised Statutes.

At the trial before the Auburn Municipal Court the respondent was found guilty and sentenced under the provisions of said Section, from which finding and sentence the respondent appealed and was ordered by said court to recognize with sufficient sureties for his appearance at the April term of the Superior Court for the County of Androscoggin, (which term is not a grand jury term), and did so recognize.

At the April term of said Superior Court the County Attorney elected to try the respondent before a jury on the original complaint without action of the grand jury, and on such trial the respondent was pronounced guilty by the jury and sentenced by the court; whereupon the respondent filed a motion in arrest of judgment, which motion was overruled by the court, to which ruling the respondent alleged exceptions."

We think the exceptions must be sustained.

This case originated in the Auburn Municipal Court under R. S., Chap. 120, Sec. 38, authorizing a complaint by the wife against the husband for his wilful neglect and refusal to furnish her and her children with support and provides in case of conviction for the following penalties, namely: that he "shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment with or without hard labor for not more than two years, or by both fine and imprisonment."

Section 41 of the same chapter provides that "judges of Municipal and Police Courts and trial justices within their respective counties shall have original and concurrent jurisdiction with the Supreme Judicial Court and Superior Court."

The only question for determination is whether the respondent should be required to answer to the complaint made against him except upon indictment by a Grand Jury.

Section 7 of Article 1 of the Constitution of Maine, so far as is material to the present case reads as follows:

"No person shall be held to answer for a capital or infamous crime unless on a presentment or indictment of a Grand Jury, except . . . . in such cases of offense as are usually cognizable by a justice of the peace." It is universally held that a felony is infamous within the meaning of the term as used in the constitution.

Moreover, it is competent for the Legislature to declare what offenses shall constitute a felony. In the present case they have done so, both in terminology and penalty. They have declared that the failure of the husband to support the wife as required by the Statute shall "be deemed a felony," and may be punishable as a felony, by imprisonment which may be for two years.

Sec. 11 of Chap. 133, R. S., says:

"The term 'felony' includes every offense punishable by imprisonment in the state prison."

The term "felony" as used in Section 38 must be construed in pari materia with the term as used in Section 11. Thus construed the explicit language of the statute, "shall be deemed a felony" leaves nothing to interpretation. The statute declares the offense to be a felony. A felony is punishable by imprisonment in the State prison. The defendant being charged with a felony would be subject to such imprisonment. Such imprisonment is infamous. Therefore such an offense must be charged by indictment.

It is not the prerogative of the court to legislate; and the only premise upon which the court could proceed to interpret the above language would be to declare that the word "felony," as used in Section 38 does not mean "felony" as defined in the other sections, and if it is so said then it is at once confronted with the question:

"What does it mean?"

This question opens up a field of mere conjecture. We are accordingly of the opinion that the explicit and well-defined language of the statute precludes any other construction than that conveyed by the clear meaning of the language used.

A felony being an infamous crime, the respondent could not be held to answer to the offense charged against him in the complaint, except upon indictment. As the offense charged in the statute is there defined, as a felony, we do not reach the question, at all, which

involves the discussion of whether certain statutory offenses, not so defined, may be regarded as a felony or some lesser crime as in *State* v. *Cram*, 84 Maine, 271. In other words an offense declared by statute to be a "felony" ends all discussions as to whether it is a felony or something else.

Exceptions sustained.

ANNIE P. SIMMONS,

Appellant from decree of the Judge of Probate in the matter of the first and final account of the Administrator of the Estate of Frances R. P. Skolfield.

Cumberland. Opinion January 14, 1922.

Parents by adoption do not have any rights of inheritance from adopted children. Words which will create an estate tail when applied to real estate, will give an absolute estate when applied to personalty. When a limitation over is upon a definite, not an indefinite failure of issue, the first legatee takes an estate for life only, and the limitation over is good, but when upon an indefinite failure of issue is void.

In a will, where the real estate and personal property are given for the benefit of an adopted child by the same clause and in the same words, there being nothing to indicate a different intent on the part of the testator in relation to his personal estate, from that manifested respecting his real estate, a limitation over, on an indefinite failure of issue, is too remote, when applied to personal estate, because it cannot be construed to create an estate tail therein, and is therefore void.

A bequest to a daughter provided she shall have children, but in the event of death without issue, the property to go to the heirs of testator, is an absolute gift if the daughter had children; otherwise the gift was determinable on the contingency of her dying leaving no children then living; and if such contingency happens, the gift becomes vested, by way of executory devise, in the heirs of testator.

On exceptions. This case reached the Law Court upon exceptions from the finding at nisi prius of the Justice of the Supreme Judicial Court sitting as Supreme Court of Probate, which finding reversed the decree of the Judge of the Probate Court allowing the account of the administrator of the estate of Frances R. P. Skolfield. The estate of intestate involved in this case consisting of personal property passed to her under the wills of Thomas Skolfield and Rebecca Skolfield, his wife, by whom intestate had been adopted by a special act of the Legislature.

The father by adoption gave to intestate, four-tenths of his whole estate, both real and personal, exclusive of household furniture, and in the event of intestate dying unmarried, leaving no issue, said four-tenths to go to the children of a brother of testator.

The mother by adoption gave in her will to intestate all of her household furniture, if she should have issue, but in the event of her dying without issue, said furniture to go to the heirs of testatrix. The questions involved consisted of the construction of the two wills and Act of adoption. The sitting Justice ruled that the furniture received by intestate under the will of her mother by adoption should go to the legal representatives of her adoptive mother; and further ruled that the personal property received by intestate under the will of her father by adoption passed to the heirs by blood of intestate, she having died intestate, unmarried, leaving no issue, to which rulings appellee excepted.

Exceptions overruled.

The case is stated in the opinion.

Wheeler & Howe, for appellant.

Augustus F. Moulton, for appellee.

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

MORRILL, J. Three points are presented for decision by this bill of exceptions.

1. The deceased, Frances R. P. Skolfield, was the adopted daughter of Thomas and Rebecca D. Skolfield; at her death she was possessed of certain personal property which she received as legatee under the will of Thomas Skolfield. The provision of that will for the benefit of deceased was under consideration in *Skolfield* v. *Litchfield*, 116 Maine, 440 and we there held that, as to the real estate, the

will created an estate tail in Frances R. P. Skolfield. It remains now to consider the construction of the will as to the bequest of personal property. The language which applies to the real estate also applies to the personal property and is contained in the same clause, as follows:

"I give, devise, and bequeath to Frances R. S. Perkins, my adopted daughter, four-tenth parts of all my estate real, personal and mixed, exclusive of my household furniture, and in the event of the said Frances R. S. dying unmarried, leaving no issue, it is my will that the said four-tenth parts of my estate shall go to the children of my brother Clement Skolfield, to have and to hold to them, their heirs, executors, administrators and assigns forever."

We have already held that this language creates an estate tail in the real estate; that the words "leaving no issue," look to an indefinite failure of issue. We can have no doubt that the testator intended precisely the same disposition of the personal property as of the real estate. But words which will create an estate tail when applied to real estate, will give an absolute estate when applied to personalty. *Cleveland* v. *Havens*, 13 N. J., Eq., 101. *Slade* v. *Patten*, 68 Maine, 380, 384. 1 Washburn Real Property, 4 Ed., 579, 2 Ib. 625. Many years ago a distinction was taken in the English Courts between an executory devise of real and personal estate, and it was held that the words "dying without issue" created an estate tail in real property; yet that, in respect to personal property, which is transient and perishable, the testator could not have intended a general failure of issue, but failure of issue at the death of the first taker; the result has been an irreconcilable conflict of opinion among eminent judges. In a note in 4 Kent, 8 Ed., Page 295, it is said: "The American cases, without adopting absolutely the distinction in *Forth* v. *Chapman*, 1 P. Wms., 663, are disposed to lay hold of slighter circumstances in bequests of chattels, than in devises of real estate, to tie up the generality of the expression 'dying without issue,' and confine it to dying without issue living at the death of the party, in order to support the devise over; and this is the extent to which they have gone with the distinction." But in the instant case where the real and personal property are given by the same clause and in the same words, there is nothing to indicate a different intent on the part of the testator in relation to his personal estate, from that manifested respecting his real estate, and the limitation over, being on an indefi-

nite failure of issue, is too remote, when applied to personal estate, because it cannot be construed to create an estate tail therein, and is therefore void. "To this extent the intent of the testator is necessarily defeated; because he has used words which by their legal import and signification will not permit that intention to be carried out." *Hall* v. *Priest*, 6 Gray, 18, 22. The ruling that an absolute estate in the personal property mentioned in the clause in Thomas Skolfield's will above quoted passed to Frances R. P. Skolfield, and that the appellee must account as administrator for all the personal estate of the deceased, including the bequest to her by Thomas Skolfield's will, which he received, was correct.

2. The deceased was also a legatee under the following clause of Rebecca D. Skolfield's will:

"I also give to my said daughter Fannie all my household furniture, to have and to hold to her and her heirs, if she shall have children; but in the event of her dying without issue, said furniture or so much thereof as she may have at the time of her decease, to go to my heirs."

Here the gift of personalty is not combined with a devise of real estate. The phrase, "in the event of her dying without issue," applied to a devise of real estate means an indefinite failure of issue; but applying it to the context we think that the intention of the testatrix may be carried out. We think that the construction placed upon this paragraph by the sitting Justice was correct, and we adopt the language of his decision:

"Construction, however, depends upon the meaning of the words as the testatrix used them; what she meant by those words is the criterion. And her meaning is to be gathered from the whole instrument. She made absolute gift to Fannie 'if she shall have children.' But 'in the event of her dying without issue' the furniture then remaining to go to the heirs of the testatrix. The law will avoid a forfeiture whenever and wherever it be possible consistently to do so. She seems to have regarded the words 'children' and 'issue' as true synonyms. So reading the clause, she intended Frances to have the furniture as an absolute gift, providing she had children; otherwise the gift to be determinable on the contingency of her dying, leaving no issue (children), then living, upon which contingency the gift, in its then condition, would vest, and did vest, by way of executory devise, in the heirs of the testatrix. When a limitation over is

upon a definite, not an indefinite failure of issue, the first legatee takes an estate for life only, and the limitation over is good. *Cleveland* v. *Havens*, supra."

The ruling that the appellee must account for the furniture under Mrs. Skolfield's will to the legal representatives of the latter, was correct.

3. The appellee seasonably filed a motion to dismiss the appeal on the ground that the appellant is not a party in interest in said estate; the sitting Justice overruled the motion, and upon hearing ruled that the personal property received by Frances R. P. Skolfield under the will of Thomas Skolfield passed to the heirs by blood of said Frances, she having died intestate, unmarried, leaving no issue. To these rulings the appellee has exceptions.

The question thus presented is: Must the heirs at law of Frances R. P. Skolfield be sought in the family into which she was born, or in the family of which she became a part by adoption? Was her relationship with her natural parents destroyed by the act of adoption? The appellee so contends.

Legal adoption by one person of the offspring of another was unknown to the laws of England or Scotland; it was known to the Roman law, and is said to have been known to the Athenians, and Spartans, and to other ancient peoples. *Ross* v. *Ross*, 129 Mass., 243, 262. 1 Bouv. Law Dict. Title "Adoption". *Hockaday* v. *Lynn*, 200 Mo., 456, 118 Am. St. Rep., 672. *Morrison* v. *Sessions*, 70 Mich., 297, 14 Am. St. Rep., 500, 506. Being unknown to the common law, it has been introduced into those portions of this country, deriving their jurisprudence from that source, and not from the civil law, solely by statute, and the effect of the act of adoption upon the status of the person adopted and upon the rights of the adopters depends upon the statute by which the act is authorized; the practice of adoption exists only by virtue of statute. To this effect is the opinion in *Warren* v. *Prescott*, 84 Maine, 483. Authorities from numerous other states are collected in 1 C. J., 1371, Note 15. This is also demonstrated by the course of legislation in this State. The original act (Public Laws 1855, Chapter 189), which was in force when the adoption in the instant case took place, expressly excluded rights of inheritance, and applied only to rights of custody, obedience and maintenance. By Public Laws, 1880, Chapter 183 the adopted child in future proceedings and where not otherwise expressly pro-

vided in the decree of adoption, acquired qualified rights of inheritance from the adopters. Thus, as stated in *Warren* v. *Prescott*, supra. "By adoption the adopters can make for themselves an heir, but they cannot thus make one for their kindred." Again by amendment (Public Laws, 1891, Chapter 78) the provision of R. S., 1883, Chap. 75, Sec. 1, Paragraph VI was applied to cases of adoption. But the present statute, broad as is its language, has its limitations. *Wilder* v. *Butler*, 116 Maine, 389.

Frances R. P. Skolfield was adopted by Thomas and Rebecca D. Skolfield by virtue of a special act of the Legislature (Private and Special Laws, 1864, Chap. 299, Sec. 1) which reads as follows:

"Be it enacted etc.

SEC. 1. Frances Rebecca Perkins of Brunswick, shall be allowed to take the name of Frances Rebecca Perkins Skolfield, and she is hereby declared to be the adopted daughter of Thomas Skolfield, and his wife, Rebecca Skolfield of Brunswick, and she shall hereafter sustain the same relation to them and to their estate at all times as if she had been the daughter of the said Thomas Skolfield and Rebecca Skolfield, born in lawful wedlock."

Can this act be construed as depriving the heirs by blood of Miss Skolfield, of their rights of inheritance from her, and of granting rights of inheritance in her estate to the heirs by blood of her adopters? We think not; it requires no strict construction of the statute to so hold. It would undoubtedly be competent for the Legislature to provide that property received from either adopter should go, upon the death of the adopted child, intestate, without widow or lineal descendants, to the adopting parents and their heirs as if such child were the child by birth of his adopters, as has been done in several states, and to a limited extent in this State by the act of 1891 above referred to. But under an adoption statute which wholly fails to bestow upon adopting parents any right of inheritance from adopted children, we think that such right of inheritance does not exist. *Upson* v. *Noble*, 35 Ohio St., 655. *Hole* v. *Robbins*, 53 Wis., 514. *Reinders* v. *Koppelmann*, 68 Mo., 482. *Heidecamp* v. *Jersey City, etc., Ry. Co.*, 69 N. J. L., 284, 101 Am. St. Rep., 707; authorities to the contrary may be found, and the reasons for holding that the adopting parents are entitled to the estate of the child adopted, in the event of his dying intestate, and leaving both natural and adopted parents,

are cogently set forth in a note to *Van Matre* v. *Sankey*, 148 Ill., 536, found in 39 Am. St. Rep., 228; but such view is there conceded to be contrary to the weight of authority.

The special act in question provides that the deceased "shall hereafter sustain the same relation to them (Thomas and Rebecca Skolfield) and to their estate at all times as if she had been the daughter of the said Thomas Skolfield and Rebecca Skolfield, born in lawful wedlock." The words "relation to them" undoubtedly refers to personal relations, those of custody, obedience, education and maintenance; the words "their estate at all times" cannot be construed to extend to, or relate to property which has ceased to be a part of the estate of either; they can only relate to the distribution of the estate of which the adopting parents might die intestate; they have reference to the rights of the child, not of the adopting parents; the statute fixed the status of Frances as to the intestate estate of her adopters; when the personal property bequeathed to her in the will of Thomas Skolfield had been delivered to her, it was no longer his estate. Under such a statute of adoption the adopted child will not inherit from the collateral heirs of the adopters. *Van Derlyn* v. *Mack*, 137 Mich., 146, 109 Am. St. 669 and cases collected in note, Page 675. *Hockaday* v. *Lynn*, 200 Mo., 456, 118 Am. St., Rep. 672 and cases collected in note, Page 687; and the statute wholly fails to bestow by apt language the right of inheritance to Frances's estate upon the nephews and nieces of her parents by adoption.

Exceptions overruled.

EMILINE A. LANDRY *vs.* ANTOINETTE LANDRY.

ANTOINETTE LANDRY *vs.* EMILINE A. LANDRY.

Cumberland. Opinion January 27, 1922.

Separation and intention to abandon the marital relation must concur to constitute utter desertion as a ground for divorce. Living apart by mutual consent is not sufficient. The continuity of the period of desertion is interrupted by service of a libel for divorce upon the one in desertion. The bringing of a libel for divorce does not of itself constitute an act of desertion.

Utter desertion, as a ground for divorce, is initiated by a separation, coupled with mental intention on the part of the deserter to abandon the marital relation. Where husband and wife are living apart by mutual consent, there is no desertion.

Where one spouse, being in desertion of the other, is libelled by the other for a matrimonial divorcement, the continuity of the desertion is thereby interrupted. But an effort, in good faith, to enforce a supposed legal right, though unsuccessful, would not brand the doer as one himself in culpable fault.

On exceptions. A libel for divorce brought by Antoinette Landry against Emiline A. Landry, in the Superior Court for the County of Cumberland, and a cross libel for divorce brought by libellee in the first libel against the libellant therein, utter desertion being alleged in each libel. Both cases were tried together before a jury and at the close of the evidence which consisted of the testimony of Antoinette Landry, libellant in the first case, libellee moved that the libel of his wife be dismissed on the ground of failure to prove utter desertion, which motion was granted and libellant excepted. Then the attorney for libellee in the second or cross libel moved that the cross libel of her husband be dismissed on the ground that the continuity of her desertion was interrupted by the filing of a prior libel by her husband alleging cruel and abusive treatment, which motion was granted, and libellant excepted. Exceptions overruled.

Case is fully stated in the opinion.
Raymond S. Oakes, for Emiline A. Landry.
Harry E. Nixon, for Antoinette Landry.

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

DUNN, J. The parties in these proceedings are husband and wife. Each would divorce the other from matrimony's bonds. Both cases are without merit.

Marrying, in the spring of the year 1915, this couple lived together till September 1st, 1917. The family purse was slender. It was necessary, in order to make better provision for herself and child, that the wife go out to work. She did so; her husband assenting. Incidentally, she went to her mother's to live, taking the baby along. The mother's house is nearby that in which the husband continued to stay. From her mother's she went daily to work in a box shop. Back there she came when the factory-day was done. The baby had first attention. Then she hastened to her husband's to take supper with him. On the first Saturday evening she took the baby to his father's house, where she and the child stayed until Sunday afternoon. The next Saturday they did not go there, the father being away from home.

When matters had gone on for a little longer than the fortnight, a divorce libel was left with the wife in service. In that libel the husband charged that toward himself his wife had been extremely cruel and cruelly abusive. The wife did not afterwards take the baby to see his father. She did not, however, discontinue her personal goings to that home until the libel was heard, somewhat more than two months later.

The case unsuccessfully met contest. Holding it in light esteem, Justice Connolly of the Cumberland Superior Court directed a dismissal. He did more. Feeling that a reasonable effort by the complaining husband would lead to a reconciliation, the judge taxed his energies in that direction. The wife was willing, even eager, to accede to his suggestions. She told, witnessing in the present case, that to her it had seemed that the judge had brought about what he aimed to do, but her husband proved to be unyielding. They left the court. The wife now ceased going to her husband's

as she had gone before, though she continued to go there to get the baby's milk, up to about the time that the husband filed a second libel, which he did some three weeks following the ending of the first; his libels being substantially identical in their allegations. The new attempt was no more successful than the old. It failed before a jury. Then the wife obtained a compulsory process for contribution to their child's support. Next, she had allotment from the husband's military pay, beginning three months later, and continuing for a year.

November 4th, 1920, Mrs. Landry filed a libel for matrimonial divorcement, charging an utter desertion of herself by her husband, continuous from the day that she and her child first went from his house to her mother's. Two days later the husband for the third time libelled the wife. He this time averred that on that self-same day in September, 1917, his wife unjustly deserted him. Jury trials were asked. The cases were jointly tried. When the wife's testimony had been given, and the evidence of previous libels had been introduced, her counsel moved to dismiss the husband's libel, and his counsel moved a dismissal of the wife's. Both motions were granted.

Mrs. Landry quit her husband's home with leave. To constitute desertion, separation and intention to abandon the marital relation must concur. *Lewis* v. *Lewis*, 167 Cal., 732; 52 L. R. A. (N. S.), 675; *Hardie* v. *Hardie*, 162 Pa. St., 227; 25 L. R. A., 697. A separation with the consent or acquiescence of the parties does not constitute desertion, no matter how long continued. *Lea* v. *Lea*, 99 Mass., 493; *Franklin* v. *Franklin*, 154 Mass., 515; *Freeman* v. *Freeman*, 82 N. J. Eq., 360; 49 L. R. A., (N. S.) 1042. Although Mrs. Landry was living elsewhere than under his roof, yet, in the eye of the law, the living separately being by consent, she was still living with her husband as his wife. Where husband and wife are living apart by mutual consent, there is no desertion. *Cooper* v. *Cooper*, 17 Mich., 205, 97 Am. Dec. 182. The rule is held to be the same when a wife lives apart from her husband, at his request, because of his inability to furnish satisfactory support for herself and her children. *Bennett* v. *Bennett*, 43 Conn., 313.

"To establish desertion," says Justice MORRILL, "three things must concur and must be proved; these are cessation from cohabitation continued for the statutory period, an intention in the mind of the deserter not to resume cohabitation, and the absence of the other party's consent to the separation." *Moody* v. *Moody*, 118 Maine,

454. Of these threefold basic principles, which each case must possess or fail utterly, the intent or the determination not to resume cohabitation is a decisive characteristic. Intent is essentially a question of fact; it must be proved as any other fact is proved. Many a separation between husband and wife is attributable to necessity and not to obstinancy on the part of either. An intention, a hope and desire to live together again may be fondly cherished by both husband and wife, no matter how wide the state of their separation.

This wife as a libellant is insistent that the pendency of her husband's first libel is decisive of the question of her desertion by him. Reliance is placed upon language in the opinion in *Moody* v. *Moody*, supra:

"When the libellant filed his former libel . . . and caused service to be made on the libellee, his act necessarily and conclusively imported an intention not to live with her; the absence of the libellee, if previous to that time it had been without his consent, was so no longer."

The excerpt, when the opinion is read at length, is found to be related to its context in a manner that is unmistakable. Every case has its peculiarities. In that of *Moody* v. *Moody*, a husband libelled his wife, alleging desertion. In libelling her previously, while she already was living away from him, he had charged cruel and abusive treatment. That libel, and still another libel, the latter stating additional grounds, were dismissed without prejudice, each in its turn. Later on came the desertion libel. The point in issue, when the last mentioned libel came up for consideration, concerned the effect to be given to it, in view of the first or the cruel and abusive treatment libel. Decision plainly goes only to the extent of holding, that although, before the filing of the first libel, the wife may have been in desertion of her husband, yet, by the filing of that libel, the continuity of the period of her desertion was interrupted. The husband, in consequence of the filing and the service of the libel, thereby thus defining his attitude to his wife:

I,—for what to me is sufficient reason—no longer wish for you to come back. The door of my house is barred.

In the mental vision of the judge who spoke for the court, all the facts were swelling forward in a mass, in which the element of the husband's libel, still remaining plainly distinguishable, signified that man's intention of not longer living with his wife. Nowhere is it intimated that that libel initiated a desertion of the wife by the

husband. A husband may rightfully leave his wife, for cause; to desert her would be wrongful. An effort in good faith, to enforce a supposed legal right, though unsuccessful, would not brand the doer as one himself in culpable fault.

Turning to the present case, and looking its facts in the face, Landry's first libel may have manifested an intention not to live with his wife. Without cause, as he weighed the situation? No! Because he felt her guilty of a wrong-doing.

In utter desertion time is reckoned for "three consecutive years next prior to the filing of the libel." R. S., Chap. 65, Sec. 2. Count backward in this case and, well within three years, the husband and the wife are living apart, by agreement; he is keeping his house open; there she comes and goes at will, taking supper with him every night; and all the while he is providing milk for their baby. The several elements of an utter desertion, as grounds for a divorce, are not present. There is no taint of error in the rulings of the Justice of the Superior Court. In each case the entry will be,

Exceptions overruled.

PEOPLE'S FERRY COMPANY *vs.* CASCO BAY LINES.

Cumberland. Opinion January 30, 1922.

All ferries in this State are governed not by common law, but by statute, general or special. Plaintiff does not have exclusive rights of transportation between Portland Pier in Portland, and Forest City Landing on Peak's Island. Vested rights of defendant not impaired by successive legislative acts in an attempt to acquire exclusive rights of transportation.

1. The plaintiff's right of recovery rests wholly upon its claimed possession of exclusive rights of transportation between the two points in question, and the solution of that question determines this action.
2. It is unnecessary to consider the rights of a ferry existing at common law because no common law rights are involved here. All ferries in this State are governed not by common law, but by statute, general or special.

3. Chapter 27 of the R. S., the general ferry act, has no application in this case because the plaintiff's ferry was not established by the County Commissioners of Cumberland County under that statute, but by special act. Therefore the plaintiff acquired no exclusive rights under the general statute.

4 Under the original act of incorporation, Chapter 495 of the Private and Special Laws of 1885, the plaintiff company was empowered to maintain a steam ferry between Ferry Village in Cape Elizabeth and the city of Portland. That was not the route under discussion here.

5. By Chapter 277 of the Private and Special Laws of 1907, additional rights were conferred and its limits of operation were extended so that it might maintain and operate a ferry between Portland Pier and various islands in Casco Bay including Peak's Island, with the right to acquire all necessary real and personal property, wharves and wharf privileges.

6. By Section 8 of that act unless the company should establish its lines between Portland and at least one of the specified islands within two years from the passage of the act, the granted rights and privileges were to cease. The defendant contends that the company's rights were forfeited. But it is unnecessary to consider the effect of this section as applied to the facts in this case. Assuming without deciding that the rights were not forfeited the important consideration remains that no exclusive right was conferred upon the plaintiff by this amendment of 1907.

7. The Legislature of 1919, by Chapter 94 of the Private and Special Laws, still further amended the plaintiff's charter by adding two sections. Section 10 is as follows: "No other ferry or steam or other boat line operating between Portland and Peak's Island shall make or maintain a landing place at Peak's Island southerly or westerly of Trefethens Landing, without the written consent of the Public Utilities Commission; but nothing herein shall be construed to interfere with or impair the existing vested rights of any other transportation company."

8. It is evident that the plaintiff sought by this amendment to obtain exclusive rights at the Peak's Island landing place, rights which it thereby impliedly admitted it had not possessed prior to that time, but the last clause thwarted the attempt as against the defendant, because the defendant's assignor, a "transportation company," did have "existing vested rights" at that landing place

9. The Casco Bay and Harpswell Lines, incorporated under the general law in 1907, carried on the steamboat business between Portland and the Islands in Casco Bay including Peak's Island, and acquired a large amount of property, including a ten-year lease, dated June 3, 1914, of wharf property, waiting-room, etc., at Forest City Landing This company went into the hands of Receivers on July 10, 1919, and under an order of court this lease was assigned by the Receivers to the defendant, the trustee under the trust mortgage joining in the assignment. These leasehold rights are held by the defendant and are protected under the clause above recited.

10. It is unnecessary to decide whether the approval of the defendant's schedule of fares between Portland and Forest City Landing by the Public Utilities Commission in 1920 can be construed as their written consent to use the Forest City Landing as provided in the Act of 1919, because the defendant's vested rights have taken the defendant corporation out of the prohibition attempted by that act.
11. Section 11 of Chapter 94 of the Act of 1919 in terms authorizes the city of Portland to create a subsidy in aid of the People's Ferry Company "or any other ferry line, steamboat line or power boat line making landings at Portland and any of the islands of Casco Bay." This section recognizes other lines and is inconsistent with a legislative intent to grant an exclusive right to the plaintiff.
12. We are unable to discover any source of the exclusive rights claimed by the plaintiff and therefore the case at bar is without legal foundation.

On report. This is an action brought by the People's Ferry Company against Casco Bay Lines, to recover damages for alleged interference by the defendant corporation with what the plaintiff corporation alleges to be its exclusive rights of transportation between Portland Pier in the city of Portland and Forest City Landing on Peak's Island in Casco Bay.

A plea of general issue was filed with a brief statement alleging justification. By agreement of the parties the case was reported to the Law Court upon so much of the evidence as was admissible for the determination of all issues raised by the pleadings, and if the defendant be held liable, the case to be remanded to the trial court for assessment of damages. Judgment for the defendant.

The case is fully stated in the opinion.

William H. Murray, for plaintiff.

Nathan W. Thompson, and A. S. Littlefield, for defendant.

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

CORNISH, C. J. The plaintiff corporation owns and operates a steam ferry between Portland Pier in the city of Portland and the ferry slip at Peak's Island in Casco Bay. The defendant corporation owns and operates a line of steamboats running between Custom House Wharf in the city of Portland and Forest City Landing on Peak's Island, as well as between various other points on the islands of Casco Bay. The two wharves in Portland are about one hundred and twenty-five feet and the two landing places at Peak's Island about forty feet apart.

This action on the case is brought to recover damages in the sum of fifteen thousand dollars because of the alleged unlawful transportation of passengers and property for hire by the defendant between June 1, 1920, and the date of the writ, and the consequent interference with and injury to the alleged exclusive right of the plaintiff to maintain and operate its ferry between the points aforesaid. The case is before the Law Court on report for the purpose of determining simply the question of liability. If this action is maintainable then it is to be sent back to the court at nisi prius for the assessment of damages. If it is not maintainable then judgment is to be rendered for the defendant. The material facts are not in dispute. The plaintiff's right of recovery rests wholly upon its claimed possession of exclusive rights of transportation between the two points in question, and the solution of that question will determine this action.

It is therefore imperative to inquire from what source these alleged exclusive rights have been acquired by the plaintiff because their existence is not to be assumed. Monopolies are not favorites of the law.

1. In the first place it is unnecessary to determine or consider the rights and remedies of a ferry existing at common law because no common law rights are here involved. All ferries in this State are governed not by common law but by statute, it may be by the general statute regulating the establishment, licensing and control of ferries by County Commissioners as set forth in detail in R. S., Chap. 27, Sec. 1 to 13 inclusive, *Peru* v. *Barrett*, 100 Maine, 213; where the court say: "the only proprietorship in a ferry in Maine is the franchise conferred by statute;" or it may be by special acts of the Legislature, *Day* v. *Stetson*, 8 Maine, 365.

2. The general statute, Chapter 27, has no application here because the plaintiff's ferry was not established by the County Commissioners of Cumberland County under that statute.

A casual reading of Section 5 of that chapter might lead one to think its provisions were applicable, but they are not. That section provides as follows: "When a ferry is established by the Legislature to be passed by a steam or horse boat no other ferry shall be established on the same river within one mile above or below it." When the original act regulating ferries was passed in Maine, R. S. 1821, Chapter 176, steam ferries were unknown. Their use was subsequently recognized and authorized when established, not by County

Commissioners but by the Legislature, Public Laws 1830, Chapter 457, and in 1842, the act which has been condensed into Section 5, above referred to, was passed. It was in these words: "Where a ferry has been established or may hereafter be established by the legislature on which a horse boat or steam boat is to run, the County Commissioners shall not have power to establish another ferry on the same river within one mile above or below the place of such horse or steam ferry." Public Laws 1842, Chapter 16. In the revision and condensation of 1857, Chap. 20, Sec. 5, which has remained in the same form throughout all subsequent revisions, the fact that the "other ferry" which is prohibited after the establishment of a steam ferry, means one established by the County Commissioners is not specifically expressed, but those words are necessarily implied considering the origin and history of the section. "A change in phraseology in the revision of a statute in a general revision does not change its effect unless there is an evident legislative intention to work such change." *Martin* v. *Bryant* 108 Maine, 253; *Glovsky* v. *Maine Realty Bureau*, 116 Maine, 378; *Camden Auto Company* v. *Mansfield*, 120 Maine, 187. The purpose of the Legislature was to prevent conflict of authority and, after a ferry had been established by the Legislature, not to allow the County Commissioners to establish another within the prescribed limits. The plaintiff corporation therefore acquires no rights in this case under Chap. 27, Sec. 5.

Nor is it benefited by Section 6 of the same chapter, which grants a remedy to an established and licensed ferry against any party transporting without authority persons or property for hire across such established and licensed ferry. This section is in substantially the same form as in the original Ferry Act of 1821, Chapter 4, and applies to ferries established and licensed by the County Commissioners. We may, therefore, eliminate R. S., Chap. 27, the general ferry act, as granting any rights or remedies of avail to the plaintiff here.

3. The plaintiff corporation was established by special act of the Legislature and we must therefore examine its charter, and the subsequent amendments thereto, to ascertain the scope and limits of its rights and powers.

The original act of incorporation is Chapter 495 of the Private and Special Acts of 1885, and under that act the People's Ferry Company was authorized to establish, set up and maintain a steam ferry

across Fore River between Ferry Village in Cape Elizabeth and the city of Portland. Rates of toll were established and certain rights and duties were prescribed, together with the right to acquire by lease, purchase, gift or in some other lawful manner the necessary property and equipment, but no exclusive right to maintain such ferry was granted or even intimated, and that route was not the one under discussion here.

4. By Chapter 277 of the Private and Special Laws of 1907 additional rights were conferred upon this company and its limits of operation were extended in these words: "The right to establish, set up, maintain and operate a ferry between Portland Pier, so called, and other points in the city of Portland and the following islands in Casco Bay: Great Diamond Island, Little Diamond Island, Long Island, Peak's Island and Cushing's Island and one or more points on the shore of the town of Cape Elizabeth and the city of South Portland" etc., with the right to acquire all necessary real and personal property, wharves and wharf privileges.

By Section 8 of that act unless the company should establish its lines between Portland and at least one of the specified islands within two years from the passage of the act, the granted rights and privileges were to cease. It is unnecessary to consider the effect of this section as applied to the facts of the case. For the purposes of this case it may be assumed that the additional rights were not forfeited and that the plaintiff legally and seasonably established its ferry between Portland Pier and Peak's Island. The important consideration remains that no exclusive right was conferred upon the plaintiff by this Act of 1907, and it is this act and the amendment of 1919 thereto, by virtue of which the plaintiff claims to base its recovery.

5. The Legislature of 1919, by Chapter 94 of the Private and Special Laws, still further amended the plaintiff's charter by adding two sections. Section 10 is as follows: "No other ferry or steam or other boat line operating between Portland and Peak's Island shall make or maintain a landing place at Peak's Island southerly or westerly of Trefethen's Landing without the written consent of the Public Utilities Commission; but nothing herein shall be construed to interfere with or impair the existing vested rights of any other transportation company." Section 11 has no bearing upon the point now under discussion, but will be considered later.

It is evident that the plaintiff company sought by this amendment to obtain exclusive rights at the Peak's Island landing place, rights which it thereby impliedly conceded it had not possessed prior to that time; but the last clause of that section thwarted the attempt as against the defendant, because the defendant's assignor a transportation company, did have existing vested rights at that Peak's Island landing place. The record shows that many transportation companies had successively been operating between Portland Pier and Peak's Island, covering a period of thirty or forty years. To go no further back than 1907, the Casco Bay and Harpswell Lines was then incorporated under the general law to carry on a general steamboat business between the city of Portland and the islands in Casco Bay, including Peak's Island. That company acquired and owned a large amount of property, real and personal and among other rights it held a ten-year lease dated June 3, 1914, from the Welch Land Company, of wharf property, waiting-room, etc. at the Forest City Landing. It went into the hands of Receivers on July 10, 1919, and under an order of court this lease was assigned on May 20, 1920, by the Receivers to the defendant, the Casco Bay Lines, the trustee under the trust mortgage joining in the assignment. These leasehold rights were existing and vested in the Casco Bay and Harpswell Lines when the amendment of 1919 was passed and therefore were as fully protected as if specifically named therein. They passed in due course to this defendant and this defendant now holds them under the same legislative as well as constitutional protection.

The question has been raised whether the defendant has not also complied with another provision in the act of 1919, and in fact obtained the written consent of the Public Utilities Commission to use the Forest City landing, because application was made by the defendant to that Commission in 1920 for a schedule of rates between Portland and its nineteen different landings in Casco Bay, including Peak's Island. That schedule was approved in writing by the Commission and established among others the rates between Portland and Forest City Landing. The defendant contends that the written approval of the rates between those two points necessarily had the legal effect of granting permission to run between those points and to use that landing. The plaintiff on the other hand claims that the consent contemplated by the Act of 1919 was

not an implied permission but an express consent and authority granted only upon petition therefor and after due notice to all parties interested and after hearing thereon.

It is unnecessary in the present case to determine this question because, as we have already seen, the defendant's vested rights at Forest City Landing have taken the defendant corporation out of the prohibition attempted by the Act of 1919.

In this connection one other expression of legislative intent should not be overlooked, and that is contained in Section 11 of Chapter 94 of the Private and Special Laws of 1919, the amendment to the plaintiff's charter already referred to, viz.: "The city of Portland may raise a sum not exceeding ten thousand dollars for the following purposes: To aid in defraying the expenses of securing adequate transportation for passengers, freight and vehicles by the People's Ferry Company or any other ferry line, steamboat line or power boat line, making landings at Portland and any of the islands of Casco Bay and for such purposes the city of Portland may enter into such contracts as the City Council may determine." This section is most significant. It authorizes a subsidy for the benefit not merely of the People's Ferry Company but of any other ferry line, steamboat line or power boat line operating between Portland and the islands, including necessarily Peak's Island. It recognizes other lines and is utterly inconsistent with a legislative intent to grant an exclusive right to the plaintiff company. The object to be accomplished was "the securing of adequate transportation service" and the selection of the company through which that could best be attained was left to the discretion of the City Council.

Without further discussion it is sufficient to state that we are unable to discover any source of the exclusive rights claimed by the plaintiff and alleged in the declaration and therefore the case at bar is without legal foundation. Under the stipulation the entry must be,

Judgment for defendant.

STATE OF MAINE *vs.* HOMER B. CARTER.

Waldo. Opinion February 6, 1922.

Remarks by the presiding Justice to a jury not sitting in the case at bar, unless they are an expression of opinion on some fact or facts in issue in the case at bar within Sec. 102, Chap. 87, R. S., are not subject to exceptions, the only remedy, if prejudicial, being upon motion. The ruling of the presiding Justice, in cases of misdemeanor, upon a motion for a new trial is final, being discretionary exceptions do not lie.

Remarks by the presiding Justice to a jury other than the one sitting in the case at bar, unless amounting to an expression of opinion as to some of the facts in issue in the case at bar within the meaning of Sec. 102, Chap. 87, R. S., are not subject to exceptions. If prejudicial, the only remedy is upon motion.

In cases of misdemeanor, the ruling of the presiding Justice upon a motion for a new trial is final. In such cases the granting of such a motion is discretionary with the presiding Justice and to his refusal exceptions do not lie.

On exceptions. This is a criminal process by complaint originating in the Belfast Municipal Court, charging the respondent with possession of intoxicating liquors with intent to sell in violation of law. Respondent waived a hearing in the Belfast Municipal Court, and upon being found guilty, appealed to the Supreme Judicial Court, where a trial by jury resulted in a verdict of guilty. The case went to the Law Court on exceptions by the respondent to certain remarks and comments made by the presiding Justice to another jury, upon a verdict of such other jury, within the hearing of the jury in the case at bar. Exceptions overruled. Judgment on the verdict.

The case is stated in the opinion.

Ralph I. Morse, for the State.

Buzzell & Thornton, for the respondent.

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

WILSON, J. The defendant was found guilty of illegally having in possession intoxicating liquors on complaint to the Judge of the Municipal Court for the city of Belfast, and on appeal to the Supreme

Judicial Court upon trial before a jury was again found guilty. Just at the close of the trial and as the presiding Justice was concluding his instructions to the jury, another jury which we shall hereafter refer to as the second jury, indicated their readiness to report the result of their deliberations in another criminal proceeding. Whereupon the jury in the case now before us vacated their seats, but remained in the court-room, while the second panel took the jury seats and in the case which had been submitted to them reported a verdict of "Not guilty."

The presiding Justice in discharging them spoke disapprovingly of their work as jurymen, clearly indicating that in his opinion their verdict of acquittal was unwarranted. To his remarks directed to the second jury, but, as it is claimed, within the hearing of the jury having in charge the case against this respondent, counsel for the respondent requested an exception, which was allowed.

He also filed with the presiding Justice a motion for a new trial alleging as one of the grounds, that an incident which took place in the presence of the jurors in this action, and the language and manner of the presiding Justice at the time a verdict of "not guilty" was rendered by another jury in another criminal proceeding was of such a nature as to prejudice and bias the minds of the jury in the case against the respondent. His motion for a new trial was denied by the presiding Justice and the time within which exceptions might be filed extended. Whether any exceptions were ever filed to the ruling of the court in denying the motion, the record before this court does not show. Nor is it material, as no exceptions lie in such cases.

At common law a decision by the presiding Justice at *nisi prius*, on a motion for a new trial was final. *Moulton* v. *Jose*, 25 Maine, 76, 85. The only redress in case of denial in this State is provided in Sec. 28, Chap. 136, R. S., in case of felonies, and that by appeal. In cases of misdemeanor, as in the case at bar, there is no redress. The decision of the Justice presiding at *nisi prius* is final, and it being a matter within his discretion no exceptions lie to his ruling. *State* v. *Simpson*, 113 Maine, 27. Hence, if respondent's exception to the denial of his motion had been filed and completed, it would not have availed him.

As to his exception to the remarks of the presiding Justice to the other jury. Exceptions only lie to a ruling of the court on matters of law. *Laroche* v. *Despeaux*, 90 Maine, 178. Improper remarks by counsel, or by the court in the presence of the jury, unless within the

provisions of R. S., Chap. 87, Sec. 102, which the remarks complained of are not, can only be taken advantage of by a motion for a new trial by the party claiming to be prejudiced thereby. *State* v. *Martel*, 103 Maine, 63; *Sprague* v. *Sampson*, 120 Maine, 353, 355. Certainly remarks of the presiding Justice at *nisi prius*, of whatever nature, though within the hearing of the jury sitting in the case in which the prejudicial error is claimed, but directed to the members of another panel and in relation to the performance of their duties in another case, unless perchance amounting to an expression of opinion as to some of the facts in issue in the case at bar within the meaning of Sec. 102, Chap. 87, R. S., cannot form the basis of exceptions.

Exceptions overruled.
Judgment on the verdict.

LUCIUS R. WILLIAMS *vs.* FREDERICK A. SWEET.

York. Opinion February 7, 1922.

The whole record becomes a part of the case upon exceptions to a directed verdict, though the bill itself embraces but a part of the record. A verdict should be directed where a verdict contrary to the one ordered would not be warranted by the evidence, hence unsustainable. A plea of non assumpsit puts in issue every fact alleged in declaration which plaintiff must prove in order to recover.

Exceptions to a directed verdict necessarily bring up the whole record, though the bill itself is mute upon the particular point, or perchance in summarizing it speaks in this regard with inexactness.

The province of a jury is to decide debatable questions of fact. Where, from all the facts, a single conclusion only would be consistently sustainable, the returning of a verdict proper to the circumstances should be directed.

A plea of non assumpsit puts in issue every fact included within the allegations of the declaration, incumbent on the plaintiff to prove in order to recover.

On exceptions. This is an action on an alleged contract to recover for board of defendant, his wife, her mother and sister at plaintiff's summer hotel called Colonial Inn, situated at Ogunquit, for two weeks

at eighty dollars per week. The action was tried in the Supreme Judicial Court for York County, and at the close of the evidence on motion by defendant the presiding Justice directed a verdict in his favor, and plaintiff excepted. Plaintiff also took exceptions to a ruling on the admissibility of testimony. Exceptions overruled.

The case is stated sufficiently in the opinion.

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

E. P. Spinney, for defendant.

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

DEASY, J., did not participate.

DUNN, J. A considerable page could quite easily be filled with detail of this case, but the narration would contribute to no especially useful purpose. On a former reviewal a verdict for the plaintiff was set aside and a new trial granted. 119 Maine, 228. Another trial has been had. This time the verdict is for the defendant, by direction of the presiding Judge. The plaintiff has vainly striven, in arguing an exception that he reserved, to attribute the unhappy outcome of his case in the court below to the final ruling which was there made. Exceptions to a directed verdict necessarily bring up the whole record. In such cases the complete record is embodied as part of the case, though the bill itself is mute upon the particular point, or perchance in summarizing it speaks in this regard with an inexactness not at first appreciated. Fundamental in a record is the writ. It furnishes the basis for the introduction of evidence. Determination that this kind of a complained-of ruling is erroneous cannot be made without an examination of all the evidence. *People's Bank* v. *Nickerson,* 108 Maine, 341; *Austin* v. *Baker,* 112 Maine, 267. And an examination of all the evidence contemplates the scrutiny of its resting place. An inspection of the original writ sued out here shows it to contain but a single count, and that one for the breach of a simple contract for board and lodging at the plaintiff's hotel. Insistence that the writ contains additionally an omnibus count utterly wants support. There is none; nor was there when the writ was served. The bill says otherwise, by mistake. But the accompanying record is inerrable. So is the situation as it awaits attention.

The territory of evidence is broader now in its expanse than it was before. Still, when laid out and measured, there is a lack of additive probative force, except in tendency to mark the defendant's vantage grounds even more perspicuously. The province of a jury is to decide debatable questions of fact. Where, from all the facts, it is manifest that a single conclusion only would be consistently sustainable, the canon of the law imports the duty that the sitting Justice shall instruct the returning of a verdict proper to the circumstances. The reason is in the principle that prevention is better than cure. *Heath* v. *Jaquith,* 68 Maine, 433; *Jewell* v. *Gagne,* 82 Maine, 430; *Coleman* v. *Lord,* 96 Maine, 192; *Reed* v. *Reed,* 113 Maine, 522; *Royal* v. *Bar Harbor Water Company,* 114 Maine, 220.

Another exception, noted first in the order of events but argued secondly, questions the admissibility, in view of the state of the pleadings, of the evidence touching non-performance by the plaintiff of his contract. There is absence of necessity for extended comment. A plea of non assumpsit was filed and joined. This put in issue every fact included within the allegations of the declaration, incumbent on the plaintiff to prove in order to recover. Every defense, either in law or in fact upon the merits, was thus made available to the defendant. *Gordan* v. *Peirce,* 11 Maine, 213; Chitty on Pleading, 16 Am. Ed. 489, 493; 31 Cyc., 190. In actions of contract it is affirmative defenses,—defenses going to the avoidance of the plaintiff's cause of action,—such as the statute of limitations, tender, set-off, bankruptcy or insolvency, and the statute of frauds that must be set up, either specially or by way of brief statement.

Both exceptions overruled.

INHABITANTS OF WHITING *vs.* INHABITANTS OF LUBEC.

SAME *vs.* SAME.

Washington. Opinion February 9, 1922.

The property of the State and that of its governmental divisions is presumptively immune from taxability, whether situated within or without the territory by which it is owned in absence of legislation to the contrary, and is free from taxation when used for public benefit. The State, however, may by legislation subject its own property and that of its political subdivisions to taxation, such power being an essential attribute of sovereignty, and not a constitutional grant, but subject to constitutional requirements or prohibitions, both Federal and State.

In absence of legislation to the contrary, the property of a municipal corporation used for the public benefit is free from taxation, whether it be within or without the territory by which it is owned.

But it is clearly within the absolute discretion of the State to subject its own property, and that owned by its political subdivisions, to the tax laws, in common with other property.

On report by an agreed statement. These two actions of debt were brought by plaintiff town to recover of defendant town taxes assessed for the years of 1920 and 1921 on property owned by plaintiff and situated in the defendant town. Plea the general issue and a brief statement under which it was alleged that the property upon which said taxes were assessed was exempted from taxation under the statute. By agreement of the parties both cases were reported to the Law Court, upon an agreed statement of facts, for the determination of the rights of the parties. Judgment in each case for plaintiff.

The cases are fully stated in the opinion.

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

J. H. Gray, and H. E. Saunders, for defendants.

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

DUNN, J. If one incorporated town own property in another, employing it adjunctively in supplying light and water to its citizens, as well as in furnishing its own similar corporate wants, is such property subject to general taxation by the authorities having jurisdiction within the locus where it is situated? So is the question broadly stated. A negative answer would find ready expression, had the Legislature not spoken. Analysis makes evident the purpose of the statute to qualify the otherwise prevailing rule. Laws of 1911, Chapter 120.

Taxation is an essential attribute of sovereignty. These words, when run down to their last retreat, define a power limited only by positive requirements or prohibitions in the Constitution of the United States or that of this State. No general discussion of the subject of taxation need be here attempted. Sufficient it seems to be to say, by way of stressing what already has been herein said, that the competency of the law-making branch of the government concerning this topic, though it knows constitutional bounds, does not seek its source in a constitutional grant. Thus recognized in scope, it is patent that the question of whether it be wise or unwise, fit or unfit, to prescribe that certain kinds and classes of property shall bear taxation, and that other kinds and classes shall not, is for the determination, not of the judiciary, but of the legislature. *Brewer Brick Company* v. *Brewer*, 62 Maine, 62; *Opinion of Justices*, 102 Maine, 527; *Sawyer* v. *Gilmore*, 109 Maine, 169; *Laughlin* v. *Portland*, 111 Maine, 486. The public property of the state and that of its governmental divisions is presumptively immune from taxability; *Camden* v. *Camden Vil. Corp.*, 77 Maine, 530; *Somerville* v. *Waltham*, 170 Mass., 160. This immunity does not result from a want of power in the legislature. Dillon Mun. Corp., Section 1396. It rests upon the implication that, when property is held by a body politic for an essentially public purpose, it is not to be presumed that the legislature intended to tax it. *Camden* v. *Camden Vil. Corp.*, supra; *Worcester County* v. *Mayor of Worcester*, 116 Mass., 193. There is little or no dissension in the authority but that, in the absence of legislation to the contrary, the property of a municipal corporation used for the public benefit is free from taxation, whether it be within or

without the territory of the municipality by which it is owned. *Camden* v. *Camden Vil. Corp.*, supra; *Somerville* v. *Waltham*, supra; *Wayland* v. *County Comm'rs.*, 4 Gray, 500; *Worcester County* v. *Mayor of Worcester*, supra; *Rochester* v. *Rush*, 80 N. Y., 302; *Trustees* v. *Trenton*, 30 N. J. Eq., 667; *New Castle Common* v. *Megginson* (Del.), 77 Atl., 565, An. Cases 1914A, 1207; *West Hartford* v. *Water Comm'rs*, 44 Conn., 360; *People* v. *DeWitt*, 69 N. Y. Sup., 366; *People* v. *Board of Assessors*, 111 N. Y., 505, 2 L. R. A., 148; *State* v. *Gaffney*, 34 N. J. L., 131; *Sumner County* v. *Wellington* (Kan.), 60 L. R. A., 850; *Com.* v. *Covington*, (Ky.), 107 S. W., 231, 14 L. R. A., (N. S.), 1214; *Smith* v. *Nashville* (Tenn.), 7 L. R. A., 469; *Schuylkill County Directors* v. *North Mainheim Directors*, 42 Penn., 21; *Stine* v. *Mobile*, 24 Ala., 591; *Foster* v. *Duluth*, 120 Minn., 484, 140 N. W., 129. But it is clearly within the absolute discretion of the state to subject its own property, and that owned by its political subdivisions, by its arms and by its instrumentalities, to the tax laws, in common with other property. Cooley on Taxation, 263; *Trustees* v. *Trenton*, supra; *Wayland* v. *County Comm'rs*, supra; *Foster* v. *Duluth*, supra. The right of the state to tax is always presumed.

The case in hand, as set out in facts agreed, in this: Lubec, a Washington County town, is empowered to furnish water and light for public and private consumption. It has been so providing water since about 1901; the lighting dates more recently. Public and Special Laws, 1901, Chapter 489; Public and Special Laws, 1919, Chapter 47. In the town of Whiting, approximately twelve miles away, is certain land with a waterfall upon it. There and thereabouts are a dam, a penstock and buildings, machinery and other estate, adapted and used for generating electricity. Transmission lines run thence to and throughout Lubec, where the current traversing them makes public and private lighting conveniently available. Besides, it affords motive power for the water-pumping station; superseding steam. The development in Whiting has been by Lubec, beginning around April 1st, 1920, when it entered into possession of an old mill and its privilege, as a nucleus of the present plant. At first, occupancy was under a contract of leasehold and for purchase. In the next year, Lubec bought the fee of this and contiguous real estate. In 1920, and again in 1921, the Lubec property intramarginal Whiting was taxed in the latter town. These actions are to enforce collection of the taxes. Plaintiff's insistence is that the Legislature, by restrict-

ing nontaxability of the property of public municipal corporation to

(1) that located within their respective territories and appropriated to public uses;

(2) the pipes, fixtures, hydrants, conduits, gate-houses, pumping stations, reservoirs and reservoir dams, located beyond their limits, used in supplying water, power, or light, devolved on the assessors in Whiting the doing of that which they did. Laws of 1911, Chapter 120. Defense goes only to the propriety of the assessments; regularity otherwise being conceded.

Blackstone regarded the principle of law as well settled that the crown is not bound by a statute, the words of which tend to restrain or diminish any of his rights or interests unless he be specifically named therein. 1 Blk. Com., 262. Like principle applies in favor of the states, in the United States. End. Inter. Stat., Sec., 161. In our own reports, Justice EMERY says: "However general and comprehensive the language, the state, the people, the public, is not to be considered as bound, unless expressly named." *Goss* v. *Greenleaf*, 98 Maine, 436. In Massachusetts: "When land is . . . . held for a public purpose, it shall be exempted from taxation in the absence of any express statutory provision to the contrary." *Milford Water Co.* v. *Hopkinton*, 192 Mass., 491. Chancellor Kent: "Statutes limiting rights and interests are not to be construed as embracing the sovereign power of government unless the same be expressly named therein, or intended by necessary implication." 1 Kent (13th Ed.), 460. Courts elsewhere thus state the proposition, in essence: where the legislature has made express provision for the exemption of certain classes of public property, the inference is clear that it did not intend that other classes should be exempt. *Gate City Guards* v. *Atlanta*, (Ga.), 39 S. E., 394, 54 L. R. A., 806; *Sanitary Dist.* v. *Martin*, (Ill.), 50 N. E., 201, 64 A. S. R., 110.

Under a statute providing that the property of a municipal corporation should be tax free, except the portion not owned within the corporation limits, it was held in New York that real estate owned by a city but located in another place, and used as a necessary adjunct to its waterworks system, was subject to taxation. *City of Rochester* v. *Coe*, 49 N. Y. Sup., 502. This decision is affirmed without opinion in 157 N. Y., 678, the appellate court saying, in an earlier case in the same volume, that such part of the waterworks system of a municipal corporation as is outside of the corporate limits is subjected to taxa-

tion where located. *City of Amsterdam* v. *Hess*, 157 N. Y., 42. A general tax law in that State so subjected it. *People* v. *DeWitt*, supra.

It is sound principle that, in the interpretation of public statutes, the state and its political subdivisions shall be regarded as excluded unless included by positive legislation. Dillon Mun. Corp., Section 1396, and cases cited. The distinction in the cases is not more marked than is that between denotation and connotation. But the 1911 statute, though applicable to the situation in hand, is not all inclusive. Using the word "exemption" for rhetorical ease, rather than in strict accuracy,—for "exemption" presupposes a liability to taxation, whereas public property is free therefrom till the legislature speaks,—yet exemption to some extent is still attendant in cases like that here.

Taxation is the general rule, urges the plaintiff. And, from Judge Cooley's work on the subject, counsel quotes:

"Where a municipality holds property not for governmental purposes, but for the mere convenience of its people, or to supply some need such as water or light which is commonly supplied by a private corporation, the presumption of an intention to exclude such property from taxation would be very slight."

Hence a rule of strict construction is invoked. But the recital is stopped too short. Taxation is the general rule as applied to private property, is the full text of the maxim. Tax laws, to speak in a general way, are understood and intended to apply to private, not to public property. End. Inter. Stat., Section 163. The great text-book, whose page was sought to buttress argument, is always, in matters of this import, somewhat in the nature of an opinion of a court of last resort. From where counsel paused in quotation, it immediately continues on:

"Such property is deemed, as is said in one case, to be held by the corporation in its social or commercial capacity as a private corporation, and for its own profit, but this unless confined to special assessments, would seem to be limiting the implied exemption unreasonably, and certainly more than other cases limit it."

Cooley on Taxation, 267, citing, among others, the case of *Camden* v. *Camden Vil. Corp.*, supra.

Even the rule of strict construction will not be so closely followed as to make unreasonableness. Often has it been stated in effect, that

the intention of the legislature is the law. Novelty may have gone from this expression but cogency is with it yet. Though the language of the law is inartificial, nevertheless, the real purpose of the legislature, if that purpose be discernible from its statute, will prevail over the literal import of the words employed. There is nothing hallowed about the rule of strict construction; there should be nothing wrongful. Nor is it purely mechanical. It is a very practical rule. Its oneness of aim is to effectuate, never to thwart, legislative intention. In the main it works well. Being a good rule it will work both ways. When it would be destructive of legislative intent, then the reason for using it ceases. Reasoning and judgment, not the mere bald literalness of statutory phrasing, must guide and control research for a judicious legislative design.

The Legislature has spoken in words not shaded by a meticulous precision. Its language, though at a first reading it be a trifle indistinct, does not leave meaning unascertainable. Free to act, as the public interest seemed to require, the Legislature limited tax exemption on the part of municipal corporations to property within their corporate limits. Then it broadened exemption by defining what one municipal corporation might own in another, tax free, joining its waterworks system. To this point intention is plain. The "pipes, fixtures, hydrants, conduits, gate-houses, pumping stations, reservoirs, and dams used only for reservoir purposes, of public municipal corporations engaged in supplying water . . . " shall not be subjected to tax. What else? The same accessories of power and light systems. The descriptive words are not now as appropriate. The act, as originally drawn as a bill and presented to the Legislature, may have embraced water systems only; "power and light" may have come in by way of amendment. Be this how it may, the term "fixtures" in the statute is wide-reaching. A fixture is that which was once a chattel, but which, by being affixed to realty or appurtenances, at least by juxtaposition, for use in connection therewith, has become part and parcel of it. *Farrar* v. *Stackpole*, 6 Maine, 154; *Roderick* v. *Sanborn*, 106 Maine, 159; *Squire* v. *Portland*, 106 Maine, 234. Factory machinery is a fixture. *Hinkley Co.* v. *Black*, 70 Maine, 473. The machinery and articles constituting a marine railway are fixtures. *Strickland* v. *Parker*, 54 Maine, 263. So, too, are telephone posts and insulators in a public highway, *Readfield Tel. Co.* v. *Cyr.*, 95 Maine, 287; and conduits, *Portland* v. *New England*

Tel. Co., 103 Maine, 240; and an electric light dynamo with appurtenant machinery installed by an electric light company, *Gunderson* v. *Swarthout*, (Wis.), 80 N. W., 465.

The real estate acquired by Lubec outside its territorial limits is taxable. But, in appraising the property, for the purpose of assessing a tax, the enumerated items in the statute, from pipes to reservoir dams both inclusive, should not be regarded as constituent portions, were the system merely a water-works. In the case of the light station, the "fixtures, conduits, gate-houses, reservoirs, and dams used only for reservoir purposes," to the extent that there be such, must likewise be excluded. And so as to its power station. The argument that Lubec's legislative authorization does not extend to a power-plant is not overlooked, but the general statute rules this case; and, moreover, Lubec, as the agreed facts say, has a power-plant in combination with an electric light station in Whiting. In any event, whether it be ultra vires the corporation of Lubec to have a power-plant is pointless here. If that town be transcending rightful power, there is a remedy, according to the nature of the case. It is not intended to imply, that if more electricity is generated than is required at all times for lighting purposes,—regard being had to probable reasonable demands therefor,—that the incidental use of it mechanically, until needed for lighting, would derogate from the principal character of the station. *Kaukauna Water Power Company* v. *Green Bay Canal Company*, 142 U. S., 254, 35 Law Ed., 1004; *State* v. *Newark*, 54 N. J. L., 62, 23 Atl., 129; 20 C. J., 575.

On April 1st, 1920, the defendant town was in possession of the premises as a tenant. For purposes of taxation a person in possession may be considered as the owner. R. S., Chap. 10, Sec. 9. The tax was laid, in the sum of $80.00, on the Crane mill and water power privilege. Water power as such is not taxable; land with a mill privilege on it is. *Union Water Power Co.* v. *Auburn*, 90 Maine, 60; *Saco Water Power Co.* v. *Buxton*, 98 Maine, 295; *Penobscot Chemical Fibre Co.* v. *Bartley*, 99 Maine, 263. But sufficiency of the assessment is granted. The "mill and privilege" then were the beginning of a lighting station, with neither of these parts exempted from taxation. A year later the defendant was in possession as absolute owner of both the original and other property, as a completed station. Under the agreed facts, the lands and privilege, and the mill dam thereon, are taxable; the amount of the tax is $112.50. The power-house is

taxable; the tax being $90.00. The penstock, a huge pipe through which water runs from the dam to the power-house, is a fixture. The generator and other machinery, and as well the transmission lines, are fixtures. Fixtures are exempted.

As affecting the question of costs, the bringing of these actions was authorized. (R. S., Chap. 11, Sec. 64), and demand for payment, made before the commencement of each, was refused. Idem.

The entry will be

Judgment for plaintiff, in each case. In that for 1920, the debt amounts to $80.00; in the other, to $202.50. Interest shall be computed from the date of the respective writs, and costs taxed and allowed.

MEXICAN PETROLEUM CORPORATION

vs.

CITY OF SOUTH PORTLAND.

Cumberland. Opinion February 11, 1922.

Imports as such under constitutional inhibition are immune from taxation. They lose their character as such either by sale, or by being separated from the original receptacle in which they were shipped, and thus become incorporated with the general mass of property and subject to taxation.

The levying of a local tax upon imports comes within the constitutional inhibition. There must be some point of time when imports lose their character as such and cease to possess rights superior to the general mass of property in the country.

Imported goods lose their character as imports either, first, when they have passed from the control of the importer as by sale, or second, when the original package has been broken and they have been separated from the original receptacle in which they were shipped.

On appeal. This is an appeal by the Mexican Petroleum Corporation from a decision of the Assessors of the city of South Portland in refusing to grant an abatement of a tax laid by said assessors on the "stock-in-trade" of the said Mexican Petroleum Corporation on April 1, 1920, which stock in trade consisted of oil in the tanks of said corporation located in said South Portland on land owned by said corporation. The case was taken to the Law Court on an agreed statement of facts with stipulations, that if said tax was legally assessed, judgment for defendant for $1,399.20, with interest from August 1, 1920, and costs; if tax not legally assessed, judgment to be entered for petitioner with costs determined by the court. Judgment for defendant.

The case is fully stated in the opinion.

Verrill, Hale, Booth & Ives, for plaintiff.

Stepehn W. Hughes, and Hinckley & Hinckley, for defendant.

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

CORNISH, C. J. This is an appeal from the decision of the assessors of the defendant city refusing to abate the taxes assessed against the plaintiff for the year 1920, and comes before the Law Court on an agreed statement of facts. The following excerpts from that statement give all that is material for the decision of the case, viz.:

"On the first day of April, A. D. 1920, the day on which the petitioner was assessed for the tax appealed from, the petitioner was a corporation duly organized under the laws of the State of Maine; its principal office as provided in its charter was located in the City of Portland, County of Cumberland and State of Maine, where the Clerk's records and other corporate records were kept; its principal office for administrative purposes was in the city of Los Angeles in the State of California; it had branch offices in various parts of the United States; on said first day of April, 1920, it had a branch office in the City of South Portland under the charge of a local superintendent; said branch office was located on land in the City of South Portland owned by said petitioner, and there were also located on said land four tanks used for the purpose of storing oil awaiting its sale and delivery.

"Petitioner's branch office in said South Portland is, and at the time of the assessment of said tax was, engaged solely in the business of selling and distributing the oil from said tanks to buyers throughout the territory comprising the Northern portion of New England; all contracts of sale are passed on to the New York office for approval; all of the oil sold and delivered by the said petitioner, through its branch office in said South Portland, is imported into the United States of America from the Republic of Mexico in bulk in tank steamers; said tank steamers proceed from the port of shipment in Mexico directly to their destination at petitioner's dock in South Portland without touching at any other port. Upon the steamers reaching their destination in said South Portland the oil from said steamers is pumped from said tank steamers into the tanks hereinbefore mentioned. No other oil is sold by said petitioner in its branch office in South Portland, except such as has previously been pumped from its steamers as hereinbefore described. At the time of pumping said oil from the said steamers there is always oil in said tanks, so that the oil from any steamer is mixed with oil that has previously been imported in the same manner and pumped into said tanks from other steamers; several tank steamers thus loaded with oil from Mexico are received at South Portland by said petitioner each year and their cargoes pumped into said tanks. For the purpose of sale suction lines are laid from said tanks to the boiler houses whence the oil is pumped through pipes to tank-car loading racks, motor-truck loading racks or the bunker line on the petitioner's wharf. The oil loaded on said tank cars is sold and delivered in various parts of the territory comprising Northern New England. The oil loaded into the tank motor-trucks is sold and delivered in Portland and immediate vicinity. Some oil from said tanks is drawn out and used by said branch office for its private purposes, namely, to generate heat and power.

"The parties agree to limit the issue in this case to the question as to whether on the above agreed statement of facts the petitioner could be legally assessed for the oil in said tanks. If the Court finds that the petitioner could be legally taxed under the above statement of facts judgment shall be rendered in favor of the City of South Portland for the sum of thirteen hundred ninety-nine dollars and twenty cents ($1,399.20) with interest thereon from the first day of August, 1920, and costs. If the Court finds that the City of South

Portland did not legally assess the tax on said oil in said tanks judgment shall be rendered for the petitioner and the Court may make such order relating to the payment of costs as justice may require."

The plaintiff's contention is that the tax upon the oil in the four tanks on the dock is a tax upon imports and therefore illegal as in violation of Article 1, Section X, Clause two of the Federal Constitution which is as follows: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." The levying of a tax upon imports by local authorities comes within this inhibition of the constitution, so that the discussion of the case at bar is resolved into a single point, namely, whether on the first day of April, 1920, the oil of the plaintiff company accumulated in these tanks, under the admitted facts, must be regarded as still retaining its character as an import, and therefore immune from local taxation; or whether it had lost its character as an import and therefore like all other property enjoying the protection of the local government was subject to taxation for its proportional part of the expense thereof.

Chief Justice Marshall in the leading case of *Brown* v. *The State of Maryland*, 12 Wheat., 419, (1827) discussed with characteristic fullness, clearness and power the principles underlying this question and blazed a path from which the courts have not strayed for the well-nigh completed century since that decision was announced. When goods are imported into the United States from a foreign country for sale and use here, there must be some point of time at which they lose their character as an import and therefore cease to possess rights superior to the general mass of property in the country. What that point is, just where the line of separation runs, depends upon the peculiar facts of each particular case and the manner in which the importer deals with the goods imported. In some instances the line may be sharply defined; in others it may be somewhat vague and indefinite. The great Chief Justice calls attention to this in his opinion in *Brown* v. *Maryland* when he says: "The distinction exists and must be marked as the cases arise. Till they do arise it might be premature to state any rule as being universal in its application." But he continues: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imimported, that it has become incorporated and mixed up with the mass of property in the Country, it has, perhaps, lost its distinctive

character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." The slight hesitation in announcing this rule as indicated by the word "perhaps" has entirely disappeared in subsequent decisions, and the general rule there announced has often been reiterated in substantially the same essence, though in varying form. Twenty years after the decision in *Brown* v. *Maryland,* Chief Justice Taney approved of the rule there laid down and restated it thus: "Goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the Country can in no sense be regarded as part of the mass of property in the State usually taxed for the support of the State Government." License Cases, 5 How. at Pages 575, 576, (1847).

The term "original package" later came into use, not as a statutory or constitutional term but as a judicial expression, applicable in this connection. In *Low* v. *Austin,* 13 Wall., 29, (1872) after considering the opinion in *Brown* v. *Maryland* and the License cases, the court said: "The goods imported do not lose their character as imports and become incorporated into the mass of property in the State until they have passed from the control of the importer or been broken up by him from their original cases."

The original package idea was more fully developed in *May* v. *New Orleans,* 178 U. S., 496 (1900). In that case the plaintiff was an importer of linen from Europe. The goods came in boxes or cases and in each box or case were many packages each of which was separately marked and wrapped. The importer sold each package separately. The question was whether each box or case was an original package or each separate package in the boxes and cases. The court held that the boxes or cases were to be regarded as the original packages and when such receptacles reached their destination in this country for trade or sale and were opened for the purpose of using or exposing for sale the separate packages, the goods thereby lost their distinctive character as imports and each parcel or bundle became a part of the general mass of property in the State and as such became subject to local taxation.

It may be regarded as settled then that imported goods lose their character as imports when either of two changes has taken place; first, when they have passed from the control of the importer as by sale, or second, when they have been separated from the original receptacle in which they were shipped. In the case at bar there is no claim that the oil had passed from the control of the importer. The plaintiff company still owned the property. The other question then remains whether the imported commodity had been separated from its receptacle, in other words, whether the original package had been broken.

The term original package has been defined in somewhat different language, but for the most part with a single inherent meaning. A comprehensive and satisfactory definition is this: "An original package, as applied to interstate and international commerce, is a package, bundle or aggregation of goods, put up in whatever form, covering or receptacle for transportation, and as a unit transported from one state or nation to another. It is the identical package delivered by the consignor to the carrier at the initial point of shipment in which it was shipped." 12 C. J., Page 31.

The term package in such instances comprises two things, first, a receptacle of whatever form or character, and second, the contents thereof. Both together make up the package. The receptacle may be, for instance, a box, bale, case, barrel, hogshead or even a tank as used on a tank-car, or a tank-steamer; the contents may be, for instance, in parcels or bottles, or in bulk. They may be solid or liquid. Here the receptacle was the tank-steamer and the content was the oil in bulk. The oil could not be transported from Mexico to Maine without some sort of a receptacle, and the tank-steamer was that receptacle. The importer has the right to decide for himself the form and receptacle in which he shall import his property. *Guckenheimer* v. *Sellers*, 81 Fed., 977. He may use his own container or one furnished by the carrier. In re Harmon, 43 Fed., 372. When the goods have been placed inside the container then we have a completed package and it is that identical package, that unit, that entity received, transported and delivered by the carrier which constitutes the original package, and that entity as an article of commerce is protected by the Constitution until sale or breakage of the package.

In our opinion therefore, where the oil was stored and shipped in the steamer tank, the oil and the tank together may be considered as the original package. Had there been several movable containers, as casks or barrels, there would be no contention on this point. If the importer sees fit to ship the oil in one large container instead of several small ones, the principle remains unchanged. Oil in tank-cars has been treated by the Supreme Court of the United States as in the original packages, when considering the provisions of the Interstate Commerce Act, *Askren* v. *Continental Oil Co.*, 252 U. S., 444, and by parity of reasoning, oil in tank-steamers may be similarly regarded.

The next consideration logically is, whether that original package has been broken, within the purview of the established rule, so that the contents have become a part of the general mass of property.

In our opinion it has. When the steamer reached Portland the oil was pumped from the steamer tank, the receptacle in which it had been imported, into four tanks located on shore. The original package was thereby broken. The contents were separated from the container and we can detect no real difference between removing the contents from the container and the container from the contents. If the importation had been dry goods in cases, the removal of the cases enclosing the goods would have the same effect as the removal of the goods from the cases. In either case the original unit of importation has been destroyed by separation, and that we understand to be the test. Can it be said that the oil is in its original package when it has been removed from its original container and distributed among and deposited in four different containers on the shore? Neither in fact nor in law is the original package preserved; on the contrary, for it have been substituted four new and different packages. Suppose a large tierce of liquor was imported and, after the vessel reached port, the liquor was pumped from the tierce into kegs or jugs on the wharf. Could it be successfully contended that these kegs and jugs constituted original unbroken packages?

Or suppose in the case at bar, instead of pumping the oil from the steamer tank to the shore tanks the transfer were made by workmen with buckets. Would the same claim be made? Neither the method of transfer of the contents nor the nature of the new receptacles is of importance. The vital fact is the separation itself. The fallacy in the plaintiff's contention perhaps lies in the fact that because the oil is in the same form when in the shore tanks as in the steamer's tank, therefore the importation remains unchanged. The

oil is indeed in the same form, and necessarily so; but the same is true of other imported goods after they have been removed from the receptacle in which they were imported. That, however, is not the test. The test is whether the integrity of the entire package, that is the imported commodity and the receptacle in which it was imported, has been preserved. If so, the Federal Constitution says "hands off"; but if the separation has taken place and the entirety is not preserved then the constitutional inhibition is at an end. The importer can only deal with the goods as a whole, as an entity, if he wishes them to retain immunity. He cannot change the form of the package, nor open it, except perhaps to test its quality, nor draw from it, nor sell parts of it. *Guckenheimer* v. *Sellers*, 81 Fed., 998. The fundamental principle which underlies all the decisions is that a local tax prematurely laid intercepts the import as an import on its way to be mingled with the general mass of property. When, therefore, the commodity is taken out of the original receptacle in which it was transported and is broken up for distribution and sale the intent of the importer to so incorporate it with other property is clearly shown. This is the first ground on which our opinion rests.

The second ground is the treatment of the oil after it has been pumped into the shore tanks by the plaintiff, under the test laid down in *Brown* v. *Maryland*, that is, the action of the importer upon the thing imported. It is obvious that the oil was not placed in the shore tanks for storage as an imported article in its original package or awaiting sale in its original package. At that stage that was physically impossible. But it was pumped into them for immediate use and sale and for distribution among customers in such quantities as they might desire. Further, it was in the continuous process of such sale and delivery when the tax was laid. A part of it is delivered from the shore tanks in the regular course of business through pipes to tank-cars, for sale and delivery in various parts of New England, a part into tank motor-trucks for sale and delivery in Portland and vicinity, and a small portion is drawn out by the plaintiff for its private use in the generation of heat and power. In fact, the four tanks on shore do not constitute four warehouses for the storage of a commodity still in the eye of the law an import, but they are virtually four wholesale and retail stores of the Mexican Petroleum Corporation, so supplied with pipes, faucets and other necessary equipment that the oil can be sold and delivered therefrom, in such quantities as may be required.

The final significant fact is this. Some oil always remains in the tanks. There is no attempt to separate one importation from another. The oil from every steamer is mingled with the unsold residuum of what has been pumped into the tanks before. That residuum is clearly taxable and when the new importation is added that too, becomes taxable. It is one indistinguishable mass in each tank, the oil as it were being pumped in at one end for distribution and sale and drawn out at the other end when actually sold and distributed. The result is that when the faucets are turned and the tanks opened for the withdrawal and sale of any portion, at that moment, if not before, the entire oil in the tanks, whenever it may have been placed there, is exposed for sale and has become a part of the common property in the State. That process serves the same purpose in dealing with this liquid that removing goods from an original package does in the case of a solid. The package is thereby broken.

This situation brings the case at bar clearly within the rule established by the Federal Court that while the payment of import duties gives the importer the right to bring his goods into this country, to sell them in the original packages, and to store them in such original and unbroken packages awaiting sale, "he does not simply by paying the duties escape taxation upon such goods as property after they have reached their destination for use or trade and the box, case or bale containing them has been opened and the goods exposed for sale." *May* v. *New Orleans*, 178 U. S., 504, supra. It is the opinion of the court that the oil in question here was taxable property as much as the shore tanks which held it.

Our attention has been called to the Per Curiam decision of two Justices of the Supreme Court of New Jersey rendered in the case of *Mexican Petroleum Company* v. *The Borough of Roosevelt*, argued at the June Term, 1919, but not reported. The facts in that case are apparently the same as in the case at bar. We have examined that decision with care, but such examination has not led us to change the result reached in the pending case.

Under the stipulation the entry must be

Judgment in favor of the city of South Portland for $1399.20 with interest from August 1, 1920

STATE *vs.* JAMES E. DOUGLASS.

Cumberland. Opinion February 14, 1922.

An indictment for selling intoxicating liquor includes cider, only when it is sold for tippling purposes, or as a beverage. Hence, a respondent so indicted is furnished with knowledge of the offense charged. Cider sold for tippling purposes or as a beverage is an intoxicating liquor. The actual sale of intoxicating liquor under our statute is a malum prohibitum, and intent is not an ingredient of the offense charged.

The indictment is in the form prescribed by the statute. The first four exceptions, though expressed in different forms, in the last analysis come down to the single inquiry of whether evidence of selling cider as a beverage or for tippling purposes, is admissible at all under an indictment charging an offense which involves proof of a plurality of sales of intoxicating liquor.

The respondent claims that the mere selling of cider as such, is not an offense under the statute, and therefore, in order to charge it as an offense the indictment must describe the sales as for a beverage or for tippling purposes, so as to bring them within the inhibition of the statute.

The exceptions raise a question of proof rather than pleading. The statute in terms has prohibited the sale of intoxicating liquors, and proof of sale of any intoxicating liquor proves the offense. Cider sold for tippling purposes or as a beverage is an intoxicating liquor, and the moment it is so sold, it comes within the prohibited category of liquors enumerated in the statute.

On exceptions. The respondent was indicted at the January Term, 1920, of the Superior Court for the County of Cumberland, for being a common seller of intoxicating liquors in violation of Sec. 23, of Chap. 127, of the R. S. Respondent objected to the admission of testimony to the effect that the sale was of cider, and that under the indictment as drawn, it could not be shown that cider was sold, unless sold for tippling purposes or as a beverage, and that the indictment should so expressly recite. The testimony was admitted and respondent took exceptions. Other exceptions were taken to the refusal of the presiding Justice to give certain requested instructions. The jury found the respondent guilty. Exceptions overruled.

The case is sufficiently stated in the opinion.

Clement F. Robinson, County Attorney, and Ralph M. Ingalls, Assistant County Attorney, for the State.

Francis W. Sullivan, and Henry Cleaves Sullivan, for the respondent.

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

SPEAR, J. This case comes up on exceptions, and involves an indictment from the Cumberland Superior Court charging the respondent with the offense of being a common seller as follows:

"The Grand Jurors for said State upon their oath present that James E. Douglass of Gorham, in said County, on the first day of May, A. D. 1919, and continually thereafter up to the day of finding of this indictment, at Westbrook, in said County, without lawful authority, license or permission, was a common seller of intoxicating liquors against the peace of the State, and contrary to the form of the Statutes in such case made and provided."

The indictment is in the form prescribed by the statute. The first four exceptions, though expressed in different forms, in the last analysis come down to the single inquiry of whether evidence of selling cider as a beverage or for tippling purposes, is admissible at all under an indictment charging an offense which involves proof of a plurality of sales of intoxicating liquor. The respondent claims that the mere selling of cider as such, is not an offense under the statute, and that therefore, in order to charge it as an offense the indictment must describe the sales as for a beverage or for tippling purposes, so as to bring them within the inhibition of the statute.

In support of the above contention, the respondent cites *State* v. *Dunlap*, 81 Maine, 389, but the case is not pertinent. The indictment was not for selling intoxicating liquors, but for selling cider, and as selling cider, per se, was not an offense, it is perfectly obvious that an indictment merely charging the sale of cider would not charge any offense. Nothing more was involved in that case.

The present case, however, charges an entirely different offense. Here the indictment charges a common seller, a plurality of sales of intoxicating liquor. Intoxicating liquors in R. S. Chap. 127, Sec. 21 are defined as follows:

"Wine, ale, porter, strong beer, lager beer and all other malt liquors and cider when kept or deposited with intent to sell the same for tippling purposes, or as a beverage, as well as all distilled spirits, are declared intoxicating within the meaning of this chapter; but this enumeration shall not prevent any other pure or mixed liquors from being considered intoxicating."

In the present case the defendant is charged with a plurality of sales of intoxicating liquors. That is what constitutes a common seller. The statute makes cider, kept with intent to sell it for tippling purposes, or as a beverage, an intoxicating liquor.

An indictment for selling intoxicating liquor, then, includes cider, only when it is sold for tippling purposes, or as a beverage. Therefore, a respondent indicted as a common seller for selling cider, can be so indicted, only upon the hypothesis that he is selling it for tippling purposes, or as a beverage. Hence, a respondent so indicted is furnished with knowledge that he is charged, under the statute, with the offense of selling cider for tippling purposes, or as a beverage.

We are unable, therefore, to discern why, when a respondent is charged with being a common seller of intoxicating liquor, he does not have the same knowledge of the offense, when proof is offered in support of the charge, that he has sold cider as a beverage, or for tippling purposes, that he would have if proof was offered that he had sold whiskey, beer, ale, porter, or some mixed liquor in proof of the same charge.

We think the exceptions raise a question of proof rather than of pleading. This interpretation is fully sustained by *State* v. *Dorr*, 82 Maine, 342 in which it is said:

"The respondent makes several objections to the indictment. (2) That the indictment does not specify the particular kind of intoxicating liquor he unlawfully sold. No such specification is necessary. The statute in terms has prohibited the sale of intoxicating liquors. Proof of sale of any intoxicating liquor proves the offense. The State need not allege more than it need prove."

After the charge to the jury, the respondent requested two instructions, both of which were refused but the latter of which only, it is necessary to quote, as it fully comprises the contents of the first. It is as follows:

"Cider sold 'for tippling purposes or as a beverage' means cider sold by a seller who knows or ought to know that it is to be drunk as a beverage and bought by a buyer who intends to drink it or shares it with others as a beverage and who actually does share it with others or drink it himself as a beverage."

In support of this exception counsel cites *Owens* v. *People,* 56 Ill. App. 570 and *Commonwealth* v. *Joslin,* 158 Mass., 482, 489. We are of the opinion that neither case cited, supports the requested instructions. If they did we should be unable to follow them, for the reason that under our statute, it is only necessary to prove, in order to sustain the indictment, that the cider was sold for tippling purposes, or as a beverage, regardless of the intent.

Cider sold for tippling purposes or as a beverage is an intoxicating liquor. The moment it is so sold, it is as clearly within the prohibited category of liquors as whiskey, beer, ale, porter, or any other of the liquors enumerated in the statute.

The actual sale of intoxicating liquor under our statute is a malum prohibitum, and intent is not an ingredient of the offense charged. Proof of a sale, regardless of the intent, is sufficient to establish a violation of the prohibitory law.

Exceptions overruled.

CHARLES YOUNG *vs.* NATHAN POVICH.

Hancock. Opinion February 14, 1922.

In a lease of a furnished dwelling-house for temporary purposes there may be an implied warranty that the dwelling is reasonably suitable for use and occupation. If the lease is for a long term there is no implied warranty, and the rule of caveat emptor applies.

In the instant case, was there, as a matter of law, an implied warranty, that the house and furniture should be fit for occupation? The answer depends upon whether eight months under all the circumstances and conditions of the case would constitute an occupancy for a temporary purpose.

The lease shows that these premises were let on the eighth day of June, the beginning of the summer season at Bar Harbor.

The occupancy was to be eight months. The term was only two-thirds of a year. It continued for a limited time and cannot be said to be of long duration. The term was within the rule of implied warranty.

On report. This is an action for money had and received for the recovery of one hundred dollars paid in advance upon the execution of a lease of two furnished flats over the stores in the Povich Block in Bar Harbor. The plaintiff with his family moved into the premises and remained there one day, moving out the next day because of the unfit and unsuitable condition of the premises as a tenement. The question involved is as to whether there was an implied warranty that the tenement was reasonably suitable for use and occupation, or whether the rule of caveat emptor applied. By agreement of the parties the case was reported to the Law Court with a stipulation that if the questions of law and fact were determined in favor of the plaintiff, he should have judgment for one hundred dollars and costs, otherwise judgment for defendant. Judgment for plaintiff for one hundred dollars and costs.

The case is stated in the opinion.

B. E. Clark, for plaintiff.

H. L. Graham, for defendant.

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

SPEAR, J. This case involves an action for money had and received for the recovery of one hundred dollars ($100) paid in advance upon the following written instrument:

"I, Nathan Povich, of Bar Harbor lease to Charles W. Young, of Bar Harbor, for the sum of Three Hundred and Fifty Dollars ($350) until April 1, 1921, the two furnished flats over the stores in the Povich Block on Main Street, with the agreement that said Charles Young will pay One Hundred Dollars ($100) and the balance in amounts of Thirty-five Dollars ($35) or more, per month until the sum of Two Hundred and Fifty Dollars ($250) is paid, and that, should any of my family come to Bar Harbor, they shall be entitled to a room for the length of time they wish to stay."

The specifications under the declaration are as follows:

"By reason of said promise and agreement the said plaintiff entered into possession and occupancy of said tenement, but found the bed-bugs so amiable and friendly that he was unable to occupy said furnished flat. That they bit him and his family and made said tenement wholly uninhabitable."

The plea is unnoticed, as the case was reported to the Law Court as follows:

"By agreement of parties this case is reported to the Law Court: The Law Court to determine from so much of the foregoing evidence as is legally admissible. (1) Whether said house was fit for occupation as a furnished house; (2) As a matter of law whether there was an implied warranty that said house and furniture therein should be fit for use and occupation.

"If the Law Court finds from the evidence that said house as furnished was not fit for use and occupation, and that there was an implied warranty that said house and the furniture therein should be fit for use and occupation, judgment to be for the Plaintiff for the sum of one hundred dollars ($100) and costs otherwise judgment to be for the Defendant."

The report first presents a question of fact as to whether the house as furnished was fit for use and occupation. Without rehearsing the testimony we think it amply sustains the burden of proof that it was not fit for use and occupation.

This brings us to the question of implied warranty. The law is well settled upon the force and effect of a lease in the following respects:

(1) When a landlord leases an unfurnished dwelling-house to a tenant whatever the length of the period, there is no implied warranty that such dwelling-house is reasonably fit for habitation, unless he has made a valid agreement to that effect. The common law of caveat emptor is still in force in this State. *Bennett* v. *Sullivan*, 100 Maine, 118. We know of no exceptions to that rule.

(2) When a landlord leases a furnished dwelling-house for a period of years there is no implied warranty that the dwelling is fit for use and occupation. The rule of caveat emptor still applies. In *Davis* v. *George*, 67 N. H., 393 it is said: In a lease of a furnished house for a term of years there is no implied warranty that the house is suitable for the lessee's occupation.

(3) In a lease of a furnished dwelling-house for a short time for temporary purposes there may be an implied warranty that the dwelling is reasonably suitable for use and occupation. The source of this doctrine is found in *Smith* v. *Marble*, 11 M. & W. 5 an English case which holds that "in a lease of furnished rooms for a particular season of the year a warranty may be implied that the rooms are properly furnished and suitably fitted for such purposes."

Ingalls v. *Hobbs*, 156 Mass., 348, which is perhaps the leading case in that State, follows the doctrine laid down by the English case and so fully states its own rule, and the reason therefore, that we quote at length as follows:

"It is well settled, both in this Commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling house does not impliedly agree that it is fit for habitation. In the absence of fraud or a covenant, the purchaser of real estate, or hirer of it, for a term however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room or a furnished house for a few days or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who

lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract with reference to a well understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine of caveat emptor, which is ordinarily applicable to the lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time."

By dicta the above doctrine is approved in *Dutton* v. *Gerrish*, 9 Cush., 89, by Chief Justice Shaw; *Edwards* v. *McLean*, 122 N. Y., 302, 25 N. E., 483; See also *Cleves* v. *Willoughby*, 7 Hill, (N. Y.) 83, and *Franklin* v. *Brown*, 118 N. Y., 110, 23 N. E., 126.

We are impressed to the point of conviction that both the legal principle announced and the reason given for declaring it in the above case are equitable, just and in accord with the modern methods of the letting and occupancy of real estate. The letting of a house wholly or partly furnished for occupancy for short periods of time has become perhaps the predominant practice in seashore and summer resorts. To hold that a lessee for a "short term" should be obliged to remain in a tenement infested with bed-bugs or pay for the term if he quits would be little less than an outrage and should not be sanctioned by law, and cannot be sustained by reason.

The phrase "short term" as used in the *Ingalls* case comes within the rule of implied warranty. Conversely, the phrase "long term" would come within the rule of caveat emptor. Where then, between the two is the line to be drawn that would distinguish a "short term" from a "long term"?

It is apparent from the statement of these legal principles that no arbitrary time can be fixed. To say that three months or four months or six months should be the fixed time, for a "short term" would be the dogmatic judgment of the particular court before whom the question might arise. One court might say that four

months and another that six months was the line between a short and a long term. Such dogmatic rule would leave the law without precedent or certainty. We are of the opinion therefore, that this issue must be treated as a question of fact depending upon the circumstances of each particular case. We think that the phrase "for a temporary purpose" instead of the phrase "for a short term," under present methods of demise and occupancy, would more definitely present the question of fact to be determined in this class of cases. The elasticity of that phrase would allow a variation of the time, depending upon the purpose for which the lease was taken, and upon all the other circumstances and conditions surrounding the transaction, and thereby be subjected to the test of fact as well as to the test of law.

In other words the issue would present a mixed question of law and fact which would be submitted to the ruling of the court as a matter of law and to the decision of the jury as a matter of fact.

We have used the word "temporary" for another reason. It has a well defined meaning. Webster's New International Dictionary—"temporary, lasting for a time only; existing or continuing for a limited time; not permanent." Words and phrases —"lasting for a time only; existing or continuing for a limited time; not of long duration; not permanent; transitory; changing; but a short time."

We are unable to conceive of any other rational rule of determining the line of demarcation between the domain of implied warranty and caveat emptor than to treat it as a question of fact.

This case comes up on report and the court is required to exercise jury powers. The stipulation in the report submits two questions. First, whether the house was fit for occupation as a furnished house. We have already answered that question basing our conclusion upon the testimony of a disinterested witness, the health officer of Bar Harbor, who said in answer to the question:

Q. "What do you find?"

A. "I find plenty of evidence of being bed-bugs there; dead bugs in the cracks, under the loose wall paper, in places of every description, and practically every room."

Q. "On the second and third floor?"

A. "On the second and third floor."

It appears to have been the ancestral tomb, as well as the present abiding place, of bed-bugs.

The next question in the stipulation involves, as we have already noted, the question of law and fact, namely:

"As a matter of law was there an implied warranty that the house and furniture should be fit for occupation?"

The answer depends upon whether we find eight months under all the circumstances and conditions of the cases to be for a temporary purpose. The lease shows that these premises were let on the eighth day of June, the beginning of the summer season at Bar Harbor. The occupancy was to be for eight months. The term was only two thirds of a year. It continued for a limited time and cannot be said to be of long duration. The term was within the rule of implied warranty.

Judgment for the plaintiff for one hundred dollars ($100) and costs.

ABRAHAM BRADBURG *vs.* BENJAMIN L. SEGAL and Trustee.

Knox. Opinion February 24, 1922.

In a declaration for slander, unless the expressions and words alleged to be slanderous, can be interpreted as actionable with at least a reasonable certainty, they must be made certain by proper colloquium and averment. An innuendo is only explanatory of some matter already expressed, but cannot add to or enlarge or change the sense of the previous words, hence there must be an inducement stating such facts as will support an innuendo.

Words cannot be regarded, upon demurrer to a declaration in an action for slander, as actionable, unless they can be interpreted as such, with at least a reasonable certainty. In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the rule requires him to make the meaning certain by means of proper colloquium and averment.

An innuendo is only explanatory of some matter already expressed; it serves to point out when there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add to or enlarge or change the sense of the previous words. When what is complained of in the declaration as a libel does not upon the face of it apply to the plaintiff and impute a libel, there must be an inducement stating such facts as will support an innuendo and show the libelous application of the statement to the plaintiff. An innuendo cannot supply the omission of a necessary inducement of matter; and an innuendo introducing new facts, or otherwise than by reference to previous inducement, is fatally defective.

On exceptions. This is an action on the case for slander, plaintiff alleging that defendant used about and concerning him the following words: "He has been in the cemetery and moved the headstone of my wife sidewise from its place." The defendant filed a demurrer which was overruled by the presiding Justice and the defendant took exceptions. Exceptions sustained.

The case is fully stated in the opinion.

M. A. Johnson, for plaintiff.

A. S. Littlefield, for defendant.

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

HANSON, J. This is an action on the case for slander. The defendant filed a general demurrer to the declaration. The presiding Justice overruled the demurrer and the case is before the Law Court on exceptions to this ruling.

The alleged slanderous words are,—"He has been in the cemetery and moved the headstone of my wife sidewise from its place."

The offense with which the plaintiff says he was charged by the defendant is set out in R. S., Chap. 126, Sec. 43, as follows: "Whoever wilfully destroys or injures any tomb, gravestone, monument or other object placed or designed as a memorial of the dead, or any fence, railing or other thing placed about or enclosing a burial place; or wilfully injures, removes, or destroys, any tree, shrub or plant, within such enclosure, shall be punished by imprisonment for less than one year, or by fine not exceeding five hundred dollars."

The declaration alleges, "For that the said Plaintiff is a good, true and honest citizen of the State of Maine, and from the time of his nativity, hath hitherto behaved and governed himself as such, and during all that time hath been held, esteemed and reputed of a good

name, character and reputation, as well among a great number of fellow citizens, as among all his neighbors and acquaintance, and during all that time hath been free from the atrocious crime of wilfully destroying or injuring any tomb, gravestone, monument or other object placed or designed as a memorial of the dead, or any fence, or other thing placed about or enclosing a burial place; or wilfully injuring, removing or destroying any tree, shrub, or plant, within such enclosure; nevertheless, the said Defendant in nowise ignorant of the premises, but contriving and maliciously intending, not only to injure the said Plaintiff and deprive him of his good name, character and reputation, but also to cause the said Plaintiff to be brought under the pain and penalties of the law provided against injury to monuments, gravestones and places of burial, at said Rockland on October 3, 1920, and on divers other days before and after said date, speaking of the said plaintiff and in the presence and hearing of said plaintiff, and in the presence and hearing of many of his fellow citizens, falsely and maliciously, openly and publicly, and with a loud voice, pronounced and published the following false, feigned and scandalous English words about and of the said Plaintiff, to wit: 'He' (meaning the said Plaintiff) 'has been in the cemetery' (meaning the Jewish cemetery at South Thomaston, Knox County, Maine) 'and moved the headstone of my wife' (meaning the gravestone marking her grave) 'sidewise from its place' (meaning that the said Plaintiff had wilfully injured the gravestone placed at the grave of defendant's deceased wife by removing said stone from its original fixed foundation and placing it sidewise or crosswise of said foundation without any authority, legal or otherwise) 'and I can prove that he done it'; by means of the speaking and publishing of which said several false, scandalous and defamatory words and of the said false and malicious charge, he, the said Plaintiff, is not only injured and prejudiced in his good name and reputation, but has been liable to be prosecuted for the crime of wilfully injuring monuments, gravestones and places of burial," etc., etc.

Whether or not the language set out will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court. What meaning the words did convey to one hearing him is in such a case a question of fact for the jury. We have to do with the former only, and it is the opinion of the court that the excep-

tions must be sustained. The language used will not bear the interpretation given to it by the plaintiff. It is apparent that the words could reasonably apply to various conditions where the act complained of might relate to an occurrence entirely harmless, and without wilful, corrupt, or unlawful intent. Certainly the words describe a harmless act and intention with as much certainty as they would an illegal act and intent. It is not alleged that any injury was done to the gravestone. A change of location, a moving "sidewise from its place," is not such an injury to the gravestone as the statute contemplates,—in fact it is not claimed to be an injury in argument further than it is urged that a moving from its place in any manner constitutes the "wilful injury" provided for in the statute.

We cannot adopt the construction contended for. We think the statute was intended to provide for cases of wilful destruction or injury to "any tomb, gravestone, or monument," and any case falling short of such wilful destruction or injury would not be within the purview of the statute, and charging a person with an act which does not amount to such wilful destruction or injury is not charging him with a crime or misdemeanor. The charge, if true, might describe an act entirely commendable, equally innocent and free from unlawful intent, and which might arise from a claim of right to so move a gravestone. The words must therefore be said to be of uncertain meaning at least. It is apparent that the uncertainty was appreciated when the declaration was framed, for the innuendo was made use of to perform its own office, as well as the offices of an inducement and colloquium. The declaration lacks both of these essential elements. This omission was the principal ground for the challenge by demurrer, and the ground was well taken. It is true that if the defamatory words, taken in their natural and ordinary signification, fairly import a criminal charge, it is sufficient to render them actionable. *Gibbs* v. *Dewey*, 5 Cow., 503; *Miller* v. *Miller*, 8 Johns, 74; *Thompson* v. *Sun Publishing Co.*, 91 Maine, 203. But in cases of uncertainty as to the meaning of expressions of which a plaintiff complains, the law requires the pleader to make the meaning certain by means of proper colloquium and averment. *Thompson* v. *Sun Publishing Company*, 91 Maine, 203. And this requirement the plaintiff failed to perform.

In *Wing* v. *Wing*, 66 Maine, 62, the words alleged to be actionable were, "Almon Wing stole windows from Benjamin Jordan's house."

There were no special averments in the declaration. The defendant demurred generally to the declaration. The presiding Justice, demurrer being joined, sustained it, and the plaintiff excepted. The court say:—"The words uttered by the defendant do not impute the crime of larceny, but amount to an accusation of only trespass to real estate. The meaning conveyed by the words is at least doubtful. They may be susceptible of different constructions, perhaps. But words cannot be regarded, upon demurrer to the declaration, as actionable, unless they can be interpreted as such, with at least a reasonable certainty. In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the rule requires him to make the meaning certain by means of proper colloquium and averment. It is always in his power to do so. . . . . To constitute a 'malicious and wilful' injury to a building, it is not enough that the injury was wilful and intentional, but in order to create the criminal offense, it must have been done out of cruelty, hostility, or revenge." In *Emery* v. *Prescott*, quoted in *Wing* v. *Wing*, supra, it is held "that an innuendo is only explanatory of some matter already expressed; it serves to point out when there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add to or enlarge or change the sense of the previous words." . . . .

"When what is complained of in the declaration as a libel does not upon the face of it apply to the plaintiff and impute a libel, there must be an inducement stating such facts as will support an innuendo and show the libelous application of the statement to the plaintiff." "The innuendo cannot supply the omission of a necessary inducement of matter; and an innuendo introducing new facts, or otherwise than by reference to previous inducement, is fatally defective." See *Patterson* v. *Wilkinson*, 55 Maine, 43.

In the instant case the words alleged in the declaration do not import a crime or misdemeanor. It is true the innuendo says the act complained of was performed wilfully, but that is not what the defendant is alleged to have said. The word "wilfully" is not among the words set out as having been used by the defendant, nor were other words used in averment which are fairly to be interpreted as charging the crime alleged. These omissions cannot be cured or supplied by the pleader by way of innuendo. In *Brown* v. *Brown*, 14 Maine, 317, an action of slander, where the words used were, "Uncle Daniel must settle for some of my logs he has made away

with," these were followed in the declaration by the words, "thereby accusing the plaintiff of stealing," without any previous colloquium or averment showing such to have been the intention. The defendant demurred to the declaration and the plaintiff joined in the demurrer. It was held that "If the words used were intended to fix upon the plaintiff the charge of larceny, they should have been preceded in the declaration by a colloquium, showing that intention. *Holt* v. *Scholefield,* 6 T. R., 691; *Hawkes* v. *Hawkey,* 8 East., 427. It is true, it is stated in the declaration by way of innuendo, that the defendant meant to charge the plaintiff with the crime of stealing. The office of an innuendo is to apply the slander to the precedent matter; but it cannot add to or enlarge, extend or change the sense of the previous words. 1 Saunders, 243, Note 4. The words in the declaration, not in themselves importing a crime, are not enlarged or extended by innuendo. The declaration, being therefore insufficient by the settled rules of law, applied to cases of this kind, is adjudged bad." The rule thus stated applies with equal force in the instant case. *Carter* v. *Andrews,* 16 Pick., 6.

Exceptions sustained.

ARTHUR F. STOWELL *vs.* IRA E. HOOPER.

Cumberland. Opinion March 8, 1922.

A writ of capias or attachment upon which an attachment has been made is properly served by summons. Filing exceptions to the sustaining of a demurrer to a plea in abatement is not a waiver of the right to plead anew. Neither is the erroneous certification of a case to the Law Court. Furbish v. *Robertson, 67 Maine, 536, overruled.*

Literally construed, Chapter 82, Revised Statutes would seem to require all cases wherein exceptions are reserved to be marked "Law" (Section 46) continued (Section 46) and certified to the Law Court (Section 44). But Sections 58 and 94 are to be read into Section 46 as exceptions. Under Section 58 relating to dilatory pleas in the Supreme Judicial Court "the court shall proceed and close the trial, and the action shall then be continued &c." Under Section 94 relating to the Superior Courts the action remains upon the docket and is proceeded with "as if no exceptions had been taken."

When a demurrer to a plea in abatement is sustained the judgment is respondeat ouster i. e. that the defendant answer further. Filing exceptions to the sustaining of such demurrer is not a waiver of the right to plead anew. Neither is the erroneous certification of the case to the Law Court.

On exceptions by defendant. An action on the case for negligence. At the return term, the defendant made special appearance, and seasonably filed a plea in abatement, because of an alleged insufficient service of the writ, to which plea the plaintiff filed a demurrer after filing a motion to strike from the files the plea in abatement. The presiding Justice denied the motion, and adjudged the service sufficient, to which rulings the defendant took exceptions. Exceptions dismissed.

The case is fully stated in the opinion.

Gerry L. Brooks, for plaintiff.

Harry E. Nixon, specially, for defendant.

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

DEASY, J. The defendant's case is based on the mistaken theory that a writ of capias or attachment whereon an attachment has been

made must be served not by summons but by reading or copy like a writ of original summons.

The presiding Justice properly ruled that the service by summons was correct—R. S., Chap. 86, Sec. 17. Moreover the plea in abatement is defective in form.

The defendant's exceptions are, however, brought to the court prematurely. In effect though not in terms the court sustained a demurrer to a plea in abatement. This leads to the judgment of respondeat ouster. *McKean* v. *Parker*, 51 Maine, 390; *State* v. *Pike*, 65 Maine, 112; *Copeland* v. *Hewett*, 93 Maine, 554; *Waterman* v. *Merrow*, 94 Maine, 237.

The statute provides that the action shall "remain upon the docket of the Superior Court and be proceeded with as if no exceptions had been taken until the case is in such a condition that the overruling of said exceptions will finally dispose of it." R. S., Chap. 82, Sec. 94.

The plaintiff contends, however, that the case having been taken to the Law Court on the defendant's exceptions, his right to plead to the merits has been waived and lost. This point is not well taken.

It is clear that no waiver results from the mere filing of exceptions by the defendant. The statute regulating practice in both the Supreme and Superior Courts contemplates and provides for trials upon the merits after exceptions are taken to the overruling of dilatory pleas. R. S., Chap. 82, Secs. 58 and 94. In the former the rule applies to dilatory pleas only. R. S., Chap. 82, Sec. 58, while in the latter it includes all exceptions by defendant. R. S., Chap. 82, Sec. 94. (Sections hereinafter referred to in this opinion are Sections of R. S., Chap. 82).

A defendant therefore has by statute the right to file exceptions to the overruling of his plea in abatement without waiving his right to plead over. Because it was in the exercise of an unconditional right, the filing of exceptions by the defendant was not a waiver of his privilege of answering in bar.

Again the certification of the case to the Law Court was not a waiver by the defendant because it was not his act. The defendant filed his bill of exceptions. Being true they were allowed almost as a matter of course (Section 55). The case was then marked "Law" on the docket (Section 46) and continued (Section 46).

"The action is continued by the express command of the statute and no other entry on the docket is required except to mark the case 'Law.' That entry ipso facto operates effectually as a continuance of the action until its determination by the Law Court."

Savings Bank v. *Alden,* 104 Maine, 421.

The case having been marked "Law" and continued was certified to the Law Court (Section 44).

None of these acts, to wit, marking the case "Law" (an error in this instance as hereinafter appears) continuing and certifying case to the Law Court was done by the defendant. These acts of the Clerk of Courts cannot be charged to the defendant as waiving his rights. That finding his case certified to the Law Court he followed it there, can hardly be regarded as a waiver.

The plaintiff relies upon *Smith* v. *Hunt,* 91 Maine, 572. This case is not parallel. The defendant was ordered to "Answer further" (Page 573). He failed to obey the order and thereby waived his privilege. (Page 577). A defendant may plead in bar in the Supreme Court at any time before trial unless directed by the court to plead earlier. In *Smith* v. *Hunt* the defendant after the overruling of his plea in abatement was ordered to answer further. Had he done so the case would have been tried on the merits, after which trial all law questions reserved would have been certified to the Law Court.

He did not obey the order. He thus waived his right to plead over. The case was properly certified to the Law Court and decided finally against him. In the instant case there was no direction to plead anew. The presiding Justice in effect sustained the demurrer. Judgment that the defendant answer further should have, but did not follow. Sustaining the demurrer was not equivalent to such judgment. *McDonald* v. *Railway Co.* (Ala.), 26 So. 166; *Alexander* v. *de Kernel,* 81 Ky., 348.

But *Smith* v. *Hunt* refers to *Furbish* v. *Robertson,* 67 Maine, 35, and this in turn cites as its authority *State* v. *Innes,* 53 Maine, 536.

State v. *Innes* is not in point. The plea was in bar (Page 537). Exceptions to the overruling of a plea in bar compelled the continuance of the case and its certification to the Law Court. (Sections 46 and 44). Of course the defendant could not plead again in bar as a matter of right after his exceptions were overruled. As Judge Walton points out such practice would lead to interminable delay.

But exceptions to the overruling of a plea in abatement do not occasion a moment's delay. The case is not (or should not be) marked "Law." It is not continued. It is not certified to the Law Court. In the Supreme Court "the court shall proceed and close the trial." (Section 58). In the Superior Courts the action "shall be proceeded with as if no exceptions had been taken." (Section 94).

In *State* v. *Innes* the defendant having pleaded in bar and not having "obtained leave to plead double in the beginning" had of course no legal right to file a second plea.

Mayberry v. *Brackett*, 72 Maine, 103.

In *Furbish* v. *Robertson*, 67 Maine, 38 the plea was in abatement. The court inadvertently based its opinion upon the irrelevant case of *State* v. *Innes*.

In *Furbish* v. *Robertson* the defendant, after demurrer to his plea in abatement had been sustained, alleged exceptions. The provision of statute that "the court shall proceed and close the trial" was evidently overlooked, as was the equivalent provision of Section 94 in the instant case.

In the Furbish case, for the reason that the defendant alleged exceptions "without asking leave to plead anew," he was held to have waived his right to a hearing on the merits.

But the judgment and the only judgment recognized by any authority where the plaintiff prevails on an issue of law raised by a plea in abatement is that the defendant "answer further." 3 Blackstone, 303. Expressed in old Norman French the judgment is "respondeat ouster." "This judgment as its name implies does not terminate the action, but only requires the defendant to plead to the merits." 1 Black on Judgments, Section 29. Surely it is not necessary for a party to ask leave to do what the court has by its judgment ordered him to do.

See the earliest authorities on common law pleading—Tidds Practice 641, 3 Blackstone 303. Also the latest—1 Black on Judgments, Section 13. To the same effect are the decisions of all courts that have passed on the subject so far as we have been able to discover.

Birch v. *King*, (N. J.), 59 At ., 12; *Ocean Ins. Co.* v. *Portsmouth Co.*, 3 Met., 420; *Trow* v. *Messer*, 32 N. H., 362; *Cravens* v. *Bryant*, 3 Ala., 278; *Bradshaw* v. *Morehouse*, 6 Ill., 396.

The decisions of our own court are in harmony with other authorities. "When a plea in abatement is adjudged bad on demurrer the judgment is always respondeat ouster."

State v. *Pike*, 65 Maine, 112.

"It is a familiar rule in pleading that when a plea in abatement is adjudged bad upon demurrer on an issue of law the judgment is always quod respondeat ouster." *Waterman* v. *Merrow*, 94 Maine, 241. See also *State* v. *Peck*, 60 Maine, 501.

Still more important and decisive is that the statute governing the case says that "In all cases where exceptions are alleged by the defendant the action shall, notwithstanding, remain upon the docket of the Superior Court and be proceeded with as if no exceptions had been taken until the case is in such a condition that the overruling of said exceptions will finally dispose of it." R. S., Chap. 82, Sec. 94.

If "no exceptions had been taken" the defendant would of course not have had to ask leave to plead to the merits. The plea in abatement having been overruled as a matter of law the judgment respondeat ouster should have been ordered. The defendant had a right to a trial on the merits without obtaining or asking leave. This right is established by all authorities and emphasized by the statute.

Failure on the part of the defendant to ask leave to do what without asking leave he had a right to do cannot be held a waiver. It is not germane that judgments upon issues of fact raised by pleas in abatement are final. In the present case the issue was one of law decided on demurrer.

Smith v. *Hunt*, 91 Maine, 572 is distinguishable from this case. *State* v. *Innes*, 53 Maine, 536 is entirely irrelevant. *Furbish* v. *Robertson*, 67 Maine, 35 is a parallel case. The defendant was held in that case to have waived his right to a trial on the merits. This waiver on the part of the defendant was held to result from his failing to do one thing (ask leave to plead anew) and doing another (entering his action in the Law Court). The former no law required of him. The latter was done by a court officer. The doctrine of *Furbish* v. *Robertson* must be overruled.

The controversy in the present case grew out of a pardonable error made by the Clerk of Courts. R. S., Chap. 82, Sec. 46 says that "Cases in which there are . . . bills of exceptions . . . shall be marked 'Law' on the docket . . . and there continued." If Section 46 alone is considered this would seem to apply to all cases.

But Sections 58 and 94 must be read into Section 46 as exceptions. Under Section 58 relating to the Supreme Judicial Court "the court shall proceed and close the trial, and the action shall then be continued and marked law." Under Section 94 relating to the Superior Courts the action remains upon the docket and is proceeded with "as if no exceptions had been taken." The Law Court does not take "two bites at a cherry." When the exceptions are taken under such circumstances the case is not marked "Law" and continued, but stands upon the docket until it is in such condition that a rescript from the Law Court may be decisive and final. *Baker* v. *Johnson*, 41 Maine, 18; *Casualty Co.* v. *Granite Co.*, 102 Maine, 152.

The exceptions must be dismissed so that the case may be restored to the docket to be proceeded with "as if no exceptions had been taken."

Exceptions dismissed.

FISKE WARREN et als. *vs.* PORTLAND TERMINAL COMPANY.

Cumberland. Opinion March 8, 1922.

A common carrier having without reservation received merchandise for transportation is a qualified insurer of safe carriage. Loss or injury caused by a strike is not a defense. Its duty in prompt transportation is that of reasonable diligence and care, not as an insurer. A strike terminates the relation of master and servant, and the doctrine of respondeat superior does not apply.

A common carrier is under obligation to receive merchandise tendered to it and to transport the same in a reasonable time. What is a reasonable time depends upon the circumstances of the particular case.

In the event of a strike, while it may be responsible as insurer for loss or injury to merchandise caused thereby, it is not necessarily bound to transport such merchandise in a time that would be reasonable under normal conditions.

It is under obligation to use reasonable diligence to prevent the occurrence of a strike and to minimize its injurious consequences.

It is also bound to inform its patrons of the fact of a strike and to keep them informed in relation to it while transportation is delayed so as to give them every opportunity to protect themselves from loss.

On agreed statement. On August 27, 1917 the ship "Binghampton" arrived at Portland with a cargo of coal consigned to the plaintiffs and destined for Cumberland Mills. Under the contract of carriage between the plaintiffs and the ship owners four days were allowed for loading and discharging. Beyond such time demurrage at a stipulated rate was provided for. Two days, twelve and one half hours of the time remained for discharging.

The ship was not unloaded until September 10th. The plaintiffs thereupon became liable and paid to the ship owners as demurrage the sum of $7,208.81. The plaintiffs claiming that the defendant was under obligation to discharge the cargo, and that it was responsible for the delay, brought this action to recover the sum paid the ship owners as demurrage. The defendant admitted its obligation to discharge the ship and that under ordinary conditions the discharging of the ship would have been completed on August 31st, and further averred that the delay until September 10th, was entirely due to a longshoremen's strike for which it was not responsible. Judgment for defendant.

The case is fully stated in the opinion.

Bradley, Linnell & Jones, for plaintiffs.

Charles H. Blatchford, and George E. Fogg, for defendant.

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

DEASY, J. The plaintiffs, S. D. Warren & Company, paper manufacturers, are a partnership, with mills at Cumberland Mills and elsewhere. The defendant owns and operates wharves in Portland and a line of railroad between its wharves and Cumberland Mills. Its wharves are equipped with apparatus for discharging coal and other merchandise from ships. Its tariff schedule which as a public service corporation it has filed with the Public Utilities Commission provides among other things a rate for discharging coal.

On August 27th, 1917 the ship "Binghampton" arrived at Portland with a cargo of coal consigned to the plaintiffs and destined for

Cumberland Mills. Under the contract of carriage between the plaintiffs and the ship owners four days were allowed for loading and discharging. Beyond such time demurrage at a stipulated rate was provided for. Two days, twelve and one half hours of the time remained for discharging.

The ship was not unloaded until September 10th. The plaintiffs thereupon became liable and paid to the ship owners as demurrage the sum of $7,208.81, and claiming that the defendant was under obligation to discharge the cargo and that it was responsible for the delay, they have brought this suit to recover the sum paid the ship owners as demurrage.

It is unquestioned that on the day of the ship's arrival the cargo was tendered to the defendant for discharge and transportation to Cumberland Mills.

Admitting its obligation to discharge the ship and that under ordinary conditions the unloading would have been completed on August 31st, the defendant says that the delay until September 10th was entirely due to a longshoremen's strike for which it is not responsible.

Thereupon the plaintiffs reply that notwithstanding the delay was due to a strike, the defendant is responsible for all damages.

Numerous authorities treat of the liability of common carriers that have received goods for transportation. In such cases the liability is that of insurers. Nothing will excuse failure to transport such merchandise safely except act of God or public enemies, inherent defects in the merchandise or fault of the shipper. Carriers are also bound to transport such merchandise promptly. But the carrier is not an *insurer* of *prompt* transportation. Its duty is that of reasonable diligence. For mere delay, not affecting the safety of the merchandise transported there is no liability if due diligence is proved. "In cases like the present for delay in receiving and carrying the goods the carrier is not an insurer."

Railway Co. v. *Hollowell*, 65 Ind., 194, 32 Am. R. 67; *The Richland Queen*, 254 Fed. 668; *Eaton* v. *Chicago Railway Co.*, 123 Mo. App., 223. 102 S. W. 575; *Geismer* v. *Lake Shore R. Co.*, 102 N. Y. 563, 7 N. E., 828; *Railway Co.* v. *Thompson*, (Texas), 103 S. W. 684; *Railroad Co.* v. *Cheatwood*, (Ala.), 68 So. 722; *Railway Co.* v. *Hurst*, (Texas), 135 S. W., 599; *Bacon* v. *Railway Co.*, 155 Ill. App., 43. 10 Corpus Juris 283.

The carrier must "exercise reasonable care and diligence to transport in a reasonable time without unnecessary delay."

Johnson v. *Railroad,* 111 Maine, 266. *Young* v. *Railroad Co.,* 113 Maine, 116.

With greater reason the liability of a carrier is not that of insurer where the merchandise though tendered to, has not been received by it.

Anciently the liability of a common carrier like that of any other bailee depended upon proof of negligence. Difficulties encountered by plaintiffs in making this proof induced the adoption of a stricter rule making the liability of a common carrier, entrusted with goods for shipment, a qualified insurance liability.

This rule has never been so far extended as to impose an insurer's liability upon a carrier in respect to goods not entrusted to it. In such cases care and diligence are the tests.

But the plaintiffs argue that while all this may be true where delay is due to such causes as accident or freight congestion, it is not true of strikes causing delay. A strike it is urged is the act of the carrier's servants and for these acts it is responsible. It is true, of course, that a master is charged with responsibility for the acts of its employee within the scope of his employment. But refusal to be employed is not within the scope of his employment. A servant may or may not be justified in refusing to work, but his refusal is not a part of his work.

Moreover when an employee without the consent of his employer strikes and refuses to return to his work he is no longer an employee.

Hutchinson on Carriers, (2d Ed.), Sec. 334; *Geismer* v. *Railway Co.,* 102 N. Y., 570; *Railway Co.* v. *Hollowell,* 65 Ind. 195, 32 Am. R. 68.

Some authorities support the plaintiff's contention that a "peaceable strike" cannot be a good defense to an action against a carrier for delay in transporting goods entrusted to it for carriage. Strikes accompanied by violence will, but peaceable strikes will not, so these cases say, excuse a carrier's delay in carrying merchandise received by it for transportation.

Note 35 L. R. A. 625 and citations.

The opinions in these cases must be based upon one of two theories:—

(1) That one who has been an employee but who has struck and refused to return to his work is still an employee for whose conduct the employer is responsible, or

(2) That a common carrier's implied contract of insurance applies not only to safety but to promptness of transportation and (if applicable to the case at bar) extends not only to goods received for carriage, but to those tendered though not received. We think that neither of these theories is sound.

With actions upon express contracts we are not concerned, nor are we concerned with actions for loss of or injury to goods in transit for which the law makes the carrier liable as insurer. To such actions strikes cannot be interposed as a defense.

For damages caused by mere delay a carrier is responsible only when it fails to exercise reasonable diligence and care. It must exercise reasonable diligence in supplying itself with suitable and sufficient facilities and employees, in averting strikes and saving its patrons from strike losses. If it performs this duty it cannot be held liable through having imputed to it the fault of persons, once its servants, who have by striking put an end to the relation of master and servant.

The only case called to our attention where a strike was set up as a defense to an action against a carrier for refusal to receive goods for transportation is *Murphy Hardware Co.* v. *Railway Co.*, (N. C.), 64 S. E. 873. In this case certain cattle were tendered for shipment. The railroad company refused to receive them because of a strike on its road. No violence or intimidation was claimed. The action was to recover a statutory penalty, but the court says that the statute was "enacted in aid of the common law." The presiding Justice ruled that "the defense pleaded cannot avail the defendant even if true." This was held by the full court to be error. A new trial was granted.

We hold that the defendant was bound to discharge the cargo of coal and to transport it to Cumberland Mills within a reasonable time. What a reasonable time is depends upon the "circumstances of the particular case." *Johnson* v. *Railroad*, 111 Maine, 263. *Empire Co.* v. *Philadelphia Co.*, 77 Fed., 919, 10 Corpus Juris, 286.

The defendant was not necessarily bound to discharge the coal in a time that would have been reasonable under normal conditions. *Empire Co.* v. *Philadelphia Co.*, supra. In re 2098 Tons of Coal 135 Fed., 320; *Hick* v. *Raymond*, 2 Q. B., 626; *Marshall* v. *McNear*, 121 Fed. 428.

It was under obligation to use reasonable diligence to prevent the occurrence of the strike and to minimize its injurious consequences.

It was bound, moreover, to inform the plaintiffs of the fact of the strike and to keep them informed in relation to it, while the discharge was delayed so as to give the plaintiffs every reasonable opportunity to protect themselves from loss.

Eastern Railway Co. v. *Littlefield,* 237 U. S., 145.

Turning to the facts in the instant case and applying the above principles thereto we find that the cargo of coal was not received by the defendant. It was tendered, but in no part received, until about September 10 when it was promptly discharged. Until then it remained in the custody of the plaintiffs in their chartered ship. It could have been taken by them to any other dock or port. The defendant had no claim or lien upon it. We do not find that the defendant failed to exercise diligence. It was diligent in its efforts to bring the strike to an end and to minimize the injury caused by it. Timely notice of the delay and the cause of it was given to the plaintiffs.

The details of the strike are recited at length in the agreed statement. They may be thus summarized: Very soon after the arrival of the "Binghampton" had been reported one of the defendant's employees, a man named Barry, was discharged for insolence and insubordination. His discharge was unquestionably justified. By reason of this discharge at about ten o'clock on the morning of the same day, August 27th, all of the defendant's employees on wharf Number 2 and all trimmers on wharf Number 1 went out on strike. A contract was then in force between the defendant and Local Union No. 861, International Longshoremen's Union, of which the strikers were members, wherein it was agreed that in case of any controversy or misunderstanding "the men shall continue to work," and the misunderstanding, controversy or grievance adjusted or arbitrated. Application was made to the Local Union and a conference had with a committee, but the men did not return to their work. Then upon application, one William F. Dempsey, Secretary-Treasurer of the Atlantic Coast Division, International Longshoremen's Union, came to Portland and upon investigation disapproved the conduct of the men and ordered them to return to their work. They still refused to return. The case shows that the plaintiffs did all in their power to procure an opportunity to discharge said vessel at some other dock in Portland, and that the defendant in order to aid the plaintiffs made arrangements for unloading at another wharf, but this arrange-

ment failed inasmuch as the workmen upon the other dock, being in sympathy with the defendant's striking employees, refused to discharge the ship.

The agreed statement goes on to say: "Whereupon, on August 31, 1917, said defendant employed other men to take the places of the employees who had walked out, known as strike breakers, and endeavored to the best of its ability to continue the operation of its said coal discharging facilities; that said strike breakers assisted by the local employees on wharf Number 1 were unable to perform the operations of said wharves in a normal and satisfactory manner, thereby greatly delaying and curtailing the operations which said defendant could conduct in and upon its said wharves; that various attempts to settle said misunderstanding between said defendant and the members of Local 861 were made, finally resulting in definite conclusion that said Barry was wholly in the wrong in his altercation with said Superintendent of Wharves, whereupon the members of said Local 861 returned to work, which was September 10, 1917."

The ship was not unloaded until September 10th. In the meantime the plaintiffs, by reason of the conditions of their charter party had incurred a heavy liability. But we think that the defendant exercised reasonable diligence, and in view of the unusual conditions discharged the ship in a reasonable time.

On the morning of August 27th before the strike began the Captain of the "Binghampton" reported to the defendant and presented his bill of lading. The defendant's agent accepted the report and indorsed on the bill of lading the day and hour of its presentation. It is agreed that the indorsement signified "that the defendant accepted its obligation as a public service corporation as aforesaid to notify the Captain to dock his vessel (in its turn) and to discharge said vessel."

It is contended that the indorsement was equivalent to a receipt of the coal for transportation. We think that it did not have this effect. It entitled the ship to its regular turn with others at the discharging dock. It was the acknowledgment of a tender. It was not tantamount to a receipt of the coal.

The plaintiffs argue that the defendant did not employ strike breakers until the lapse of four days after the strike begun and in this respect failed to exercise reasonable diligence. But the employment of strike breakers often aggravates and prolongs a strike.

It may be wise to first try other means. This the defendant did. It appealed to the Local Union with which it had an agreement that in case of differences "the men shall continue to work." It then appealed to the International Union and was sustained by its official. It then employed strike breakers.

It is not shown that the defendants failed to exercise reasonable diligence either before or after August 31st.

The plaintiff's counsel urges that the defendant could at any time have put a stop to the strike by re-employing the man Barry who was justifiably discharged for insolence and insubordination. The application by the defendant of its disciplinary measure was proper enough, the plaintiffs say, but ill-timed. The defendant should have waited until the "Binghampton" was discharged so that the expense and loss would fall upon itself rather than upon the plaintiffs.

This reasoning is plausible but unsound. In a few days the plaintiffs would have had their coal at Cumberland Mills, but somebody would have been tendering merchandise for transportation. The reasoning of the plaintiffs, if carried to its logical conclusion would almost if not quite make a railroad company, however blameless in the case of any strike, however causeless, liable not only to loss of its income, not only for damage to all whose merchandise had been received or tendered for carriage, but liable for all injuries sustained by the public through interruption of traffic. We think that this is not the law.

Judgment for defendant.

OMAR W. CHASE et al. *vs.* GEORGE F. WEST et al.

Somerset. Opinion March 8, 1922.

The allegation that defendants were undisclosed principals in a contract between plaintiffs and Boyd & Harvey Co., a corporation, for the purchase of a quantity of hay, not sustained.

The relation of the parties is shown by a written contract between the corporation and the defendants.

This contract neither discloses nor contemplates the relation of principal and agent. The facts that the defendants reserved no right to control the operations; that a formal contract was made between the parties as to what payments and how payments were to be made for the property; that the corporation was to provide all needed capital above a certain sum and that the parties were to mutually agree as to contracts and arrangements with third parties are all inconsistent with the relation of principal and agent.

On report on agreed statement. This is an action of assumpsit to recover for a quantity of hay sold by plaintiffs to Boyd & Harvey Co., a corporation, the plaintiffs alleging that defendants were undisclosed principals of Boyd & Harvey Co., in the contract. The defendants denied the alleged agency. Upon an agreed statement the case was reported to the Law Court. Judgment for the defendants.

The case is fully stated in the opinion.

Charles O. Small, for the plaintiffs.

Butler & Butler, for the defendants.

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

DEASY, J. On agreed statement. Action of assumpsit to recover for a quantity of hay sold by the plaintiffs to Boyd & Harvey Co., a corporation. The plaintiffs claim to recover of the defendants as the undisclosed principals of Boyd & Harvey Co.

It is unimportant that the hay was sold upon the credit of the corporation and not upon that of the defendants because if the agency

existed as claimed such relation was admittedly undisclosed. *Upton* v. *Gray*, 2 Maine, 373; *Roberts* v. *Hartford*, 86 Maine, 463.

The defendants deny the alleged agency and thus the parties are at issue.

It appears that in 1915 the corporation (Boyd & Harvey Co. hereinafter called the corporation) having bargained for the purchase of a tract of Somerset County timberland known as the Bank Strip, for the purpose of financing the purchase of the land and lumbering operations thereon, entered into a contract with the defendants, which contract omitting formal parts and immaterial details is in substance as follows:—

Paragraphs (1) and (2) Defendants to take conveyance of the land and pay for same partly in cash and in part by notes and mortgage. (3) Defendants to furnish for lumbering operations $15,000—"as the progress of the operations shall demand." (4) Corporation to operate on the land at once, market the product and secure any further capital required for the purpose. Parties purchasing products and making advancements on same to be allowed the "usual liens." Contracts and arrangements to be mutually agreed upon by the corporation and defendants. (5) Proceeds of sales to go to defendants and "be disbursed by them in settlement of accounts accruing against said operations and purchase payments." (6) Corporation to receive $1.00 per M as an "administration fee." (7) Upon being reimbursed for all disbursements and liabilities and receiving the sum of $25,000, in addition thereto, defendants to convey to corporation the land together with all their interest in buildings, improvements, betterments, equipment, machinery, tools, timber, lumber, money, accounts, bills receivable or "property of any kind that may have been acquired by or for the said tract, or any operations connected therewith." (8) The corporation guarantees that the defendants shall receive said sum of $25,000, above disbursements and liabilities even though profits do not amount to so much. (9) Upon receiving conveyance of property as above, corporation to "assume and become responsible for the payment of any and all debts, claims and obligations then existing against or contracted for the said tract of land, or any operations thereon or in any connection therewith." (10) Corporation to cut and market at least 5,000,000 feet of lumber per year.

The agreed statement admits that the defendants furnished all moneys which by the terms of said contract they agreed to furnish, and applied all moneys received by them in accordance with the terms of said contract.

Some words in the contract seem to be consistent only with the plaintiffs' contention. Some phrases harmonize equally with both theories. But as a whole the contract clearly indicates that no agency was contemplated. An attempt is made to shuffle Boyd & Harvey Co. down to the bottom of the pack and turn up the defendant co-partnership as principal. The attempt though ingenious fails. The manifest and indeed admitted purpose of the contract was the financing of Boyd & Harvey Co.'s lumbering operations.

The defendants' connection with the matter was temporary, incidental and only for the purpose of securing their advancements and bonus.

The contract does not create the relation of principal and agent. A principal does not usually make a formal contract with his agent as to what the principal shall pay, and how he shall pay for the land upon which the agent is to operate. He does not ordinarily require the agent to supply the whole, or even a part of the capital needed for carrying on the principal's business. He commonly directs his agent and does not "mutually agree" with him as to what contracts shall be made.

The contract in this case gives the defendants no authority to control the lumbering operations. The defendants were to take title to the land, but merely to secure advancements and liabilities. They reserved the right to receive the proceeds of the operation but only to be disbursed and accounted for. They had no interest in the profits except as security for the payment of a fixed sum which, subject to the risk of insolvency, they were in any event to receive.

In the following cases involving facts somewhat analogous to those in the case at bar the relation of principal and agent was held—not shown.

Burton v. *Larkin*, (Kan.), 13 Pac., 398. *Krohn* v. *Lambeth*, (Cal.), 46 Pac. 164. *Davis* v. *Bank*, (Tex.), 133 S. W., 448. *Central Co.* v. *Bank*, (Ga.), 28 S. E. 863.

Somewhat complex relations between the parties are created by the contract. Under it the corporation is the defendant's debtor.

It is also an equitable mortgagor; (*Stinchfield* v. *Milliken*, 71 Maine, 570), and seemingly a lessee rather than a licensee. (*Marden* v. *Jordan*, 65 Maine 10, 24 Cyc., 889).

But taking the contract as a whole it does not make the corporation an agent to purchase supplies upon the credit of the defendants.

Judgment for defendants.

WILLIAM H. PUFFER *vs.* L. P. SOULE & SON COMPANY.

Sagadahoc. Opinion March 8, 1922.

To recover of A for services rendered at the request of B, it must appear that B was the duly authorized agent of A, or that the services enured to the benefit of A.

Action to recover for services rendered at the request of one Charles Glenn. The case fails to show that Glenn was, or claimed to be, the defendant's agent for any purpose, or that the services enured to the defendant's benefit.

The plaintiff also claims to recover under an alleged express promise by letter. The letter, however, seems to relate to other and earlier services, not involved in the suit, and which were admittedly paid for after the date of the letter.

If, however, the letter has reference to the services in suit, consideration necessary to make it a binding contract is lacking.

On report on agreed statement. This is an action of assumpsit to recover $93.15 for personal services and expenses in recruiting laborers for the defendant corporation. The defendant denied that it had ever employed plaintiff, or that he had been employed by any authorized agent of it. Judgment for the defendant.

The case is fully stated in the opinion.

Ralph O. Dale, for plaintiff.

Walter S. Glidden, for defendant.

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

DEASY, J. On agreed statement. The plaintiff was employed to secure laborers for the housing project of the Shipping Board Emer-

gency Fleet Corporation at Bath. Pursuant to this employment he performed services and incurred expenses between October 14th and 22d, 1918 as set forth in his writ. The defendant participated in the housing project under a contract with the Shipping Board which in the contract was denominated "the Owner." In the same contract the defendant was called "the Contractor."

According to the contract it was to furnish materials and employ labor with funds advanced or might pay for the same and be reimbursed. How the defendant was to be paid for its own services or that of its officers does not appear.

The plaintiff was employed by one Charles Glenn who was not an officer or member of the defendant corporation, but was and at the time of his employment, known by the plaintiff to be an agent or employee of the Shipping Board, to wit, its Project Superintendent.

The plaintiff contends however, that Glenn was authorized to employ, and did employ him (the plaintiff) to perform the services involved in this action for and upon the credit of the defendant.

The plaintiff also relies upon an alleged express written promise by the defendant to pay the bill in suit.

In September, 1918, the plaintiff was employed by Glenn as labor scout in the said housing project. The bill for this service seems to have been paid after October 16th, 1918. On October 10th, 1918, the plaintiff wrote the "Paymaster" to "Please inform me why I do not get my money."

The agreed statement says that "The defendant returned the letter to the plaintiff with the following reply written on the bottom of the same":

"10-16-18

This matter has been held up on account of our Auditor being busy with the Influenza Epidemic. He is now on the job and will endeavor to get a check to you next week.

L. P. SOULE & SON CO.

O. H. OLMAN"

This letter is claimed to be a promise to pay the bill in suit. This, however, is not credible. The plaintiff's communication was dated

October 10th, 1918, four days before the first items of labor and expense in the bill sued. It would seem that the correspondence must have related to the September bill which had not then been paid. The phrase "my money" used by the plaintiff evidently referred to money that he had already earned and not to money that he had not begun to earn.

The court must assume that the dates set forth in the agreed statement are correct. But if they are not, and if the communications were written after the bill was incurred they do not prove a contract for even assuming that the undertaking by the defendant was that of a principal, the consideration is lacking. *Ward* v. *Barrows,* 86 Maine, 148. *Gilbert* v. *Wilbur,* 105 Maine, 74.

No express contract on the part of the defendant to pay the bill in suit is shown.

Turning to the plaintiff's other contention it does not appear from the agreed statement that Mr. Glenn ever was, or ever claimed to be the agent of the defendant or that the defendant derived any benefit from the plaintiff's services.

The United States Shipping Board Emergency Fleet Corporation apparently owes the plaintiff a sum of money but it is not shown that the defendant is under any legal obligation to pay it.

Judgment for defendant.

WILLIAM C. HAM *vs.* MAINE CENTRAL RAILROAD COMPANY.

Somerset. Opinion March 10, 1922.

At grade crossings travelers and railroad companies have concurrent rights and mutual obligations. It is negligence per se for a driver of a conveyance to attempt to cross a railroad track without first looking and listening if there is an opportunity to do so. Negligence of a driver of a conveyance cannot be imputed to a passenger in the conveyance. Verdict for plaintiff not disturbed.

In an action of tort the plaintiff, a passenger in an automobile, recovered a verdict for injuries received in a collision at a highway crossing. Upon motion and exception by defendant it is,

Held:

1. It is settled law in this State that at grade crossings the traveler and the railroad company have concurrent rights and mutual obligations. Neither has an exclusive right but inasmuch as a railroad train runs on a fixed track and readily acquires a peculiar momentum it cannot be expected that when once in motion it will stop and give precedence to a team approaching on the highway. It cannot be required to do so except in cases of manifest danger where it is apparent that a collision could not otherwise be avoided.
2. If a railroad company negligently permits trees and bushes to grow within its location to such an extent that a traveler's view of approaching trains is so obstructed that they cannot be seen until the traveler is close to the track, it becomes the duty of the company to use extra precaution to avoid collision, as by a less amount of speed or by increased warnings; or if an unslackened speed is desirable, by keeping a watchman on duty or some other sufficient means of warning travelers.
3. Grouping all the facts in this case together on the question of the defendant's negligence, the obstructing trees, the possible failure to give warning, the unguarded crossing and the rate of speed, it is not clear that the conclusion of the jury was manifestly wrong.
4. On the question of the plaintiff's contributory negligence it is a positive rule of law in this State that it is negligence per se for the driver of a conveyance to attempt to cross a railroad track without first looking and listening if there is an opportunity to do so. If obstacles prevent his looking, the traveler should stop if there is room for doubt.
5. The plaintiff in this case was not the driver but a passenger, and even if the driver could be charged with a lack of due care, negligence on his part cannot be imputed to the plaintiff.

6. The plaintiff is responsible for his own conduct and is held to that degree of care which a reasonably prudent man would exercise under the same circumstances and conditions.
7. Measured by this test the finding of the jury that the plaintiff was in the exercise of due care should not be disturbed.

On motion and exception. This is an action on the case to recover for personal injuries sustained by the plaintiff resulting from a collision of an automobile in which plaintiff was a passenger, with a train of defendant company at the Western Avenue crossing, so called, in the town of Fairfield, on July 18, 1920. The cause was tried to a jury at the April Term, 1921, of the Supreme Judicial Court for the County of Somerset, and a verdict of $2,750 was returned for the plaintiff. The defendant filed a general motion for a new trial, and also took an exception to the refusal of the presiding Justice to direct a verdict for the defendant. Motion and exception overruled.

The case is fully stated in the opinion.

Andrews, Nelson & Gardiner, for plaintiff.

Carroll N. Perkins, and Thomas N. Weeks, for defendant.

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

CORNISH, C. J. The plaintiff was injured in a grade crossing collision at Western Avenue in the Village of Fairfield on Sunday, July 18, 1920. He recovered a verdict of $2,750. The case is before the Law Court on defendant's exception to the refusal of the presiding Justice to direct a verdict in its favor, and also upon a general motion to set aside the verdict rendered by the jury. The exception and motion therefore raise a single question, and that is the duty of the court to set aside the verdict under the evidence.

The locus may be briefly described as follows: Western Avenue runs east and west and crosses at grade the tracks of the defendant running north and south, on the Skowhegan branch, at about 1,400 feet northerly of the Fairfield station. The train, known as the paper train, left the station on its way to Skowhegan at 10:31 A. M., two minutes late. It was composed of a locomotive and four cars. It crossed Elm Street at a distance of 800 feet from the station and the next crossing was at Western Avenue, 600 feet further on. The speed of the train at Western Avenue is stated by the engineer as

fifteen miles per hour. The plaintiff, a man thirty-nine years of age and a resident of Fairfield, was a passenger in the automobile of his brother-in-law, Mr. Jones, a resident of Brooks, and was sitting on the front seat at the left of Mr. Jones who was driving. On the rear seat were Mrs. Jones, their two daughters and a young man named Works. The car had a top but the curtains were then off. On the forenoon in question the party left the plaintiff's house on Maple Street, northwest of the crossing, drove southerly to Western Avenue and then easterly to the Western Avenue crossing on their way to Main Street. The grade of the highway was slightly descending. The speed of the auto was given at not over eight miles at any time after they left the house and that decreased to four or five miles an hour as they approached the crossing. Newhall Street leads off to the south between Maple Street and the crossing and a house in the corner of Newhall Street and Western Avenue extends easterly to a point about forty or fifty feet from the railroad, shutting off the view to the south. Newhall Street is thickly populated, so that it is not claimed that any view of an approaching train could be had until after the corner house has been passed on the right. At a point about one hundred feet southerly of the crossing cherry trees and bushes had been allowed to grow within the railroad location and extended, as the photographs taken immediately after the accident show, from the westerly side of the location to a point sixteen feet from the westerly rail, and they were of such size, height and spread that when in full foliage as at that time the view of the railroad or of a train beyond this one hundred feet was practically shut off to the traveler approaching the crossing from the west. Had the trees and bushes been removed, as they afterwards were, a clear view for 375 feet from a point twenty or twenty-five feet from the crossing could have been obtained. So much for a brief description of the locus.

The accident was a serious one. The automobile was picked up by the engine and carried on the pilot a distance of about three hundred feet, in such a position that it could not be seen either by the engineer or the fireman. The plaintiff was thrown out toward the east at a point about sixty or seventy-five feet beyond the crossing. Mr. Works was killed. The engineer did not see the auto and knew nothing of the accident until he felt an impact which he thought at first was caused by a crossing plank.

1. NEGLIGENCE OF THE DEFENDANT.

It is settled law that at grade crossings the traveler and the railroad company have concurrent rights and mutual obligations. Neither has an exclusive right, "But inasmuch as a railroad train runs on a fixed track and readily acquires a peculiar momentum it cannot be expected that when once in motion it will stop and give precedence to a team approaching on the highway. It cannot be required to do so, except in cases of manifest danger where it is apparent that a collision could not be otherwise avoided. It is the duty of the traveler on the highway to wait for the train. The train has the preference and the right of way." *Smith* v. *Maine Cen. R. R. Co.*, 87 Maine, 337, 347; *Lesan* v. *Maine Cen. R. R. Co.*, 77 Maine, 85.

This rule imposes upon both parties the duty of exercising reasonable prudence in view of all the circumstances of the case. It is the common law rule applied to a somewhat modern situation, and it is both reasonable and salutary.

The plaintiff's first charge of dereliction of duty on the part of the defendant is in negligently permitting the trees and bushes to grow upon and within its location to such an extent as to obscure all vision of a train more than one hundred feet south of the crossing. This raises a question of novel impression in this State. The situation has heretofore been treated from another angle. The duty of a traveler in approaching a grade crossing when his view has been cut off by trees or structures or embankments has frequently been passed upon and the wise rule has been adopted that the more obstructed the view the greater the precaution incumbent on the traveler; the blinder the crossing, the more careful the one who attempts to cross. That rule still obtains in all its strictness.

But in the case at bar we are now considering not the plaintiff's contributory negligence, but the effect upon the defendant's care in the operation of its train when it has needlessly, and the plaintiff says negligently, allowed trees and bushes materially obstructing the traveler's vision to grow upon its own premises. That is another and different proposition. Some authorities have gone so far as to hold that such permission, such an act of omission in failing to remove the obstructions to the view from a public street crossing is negligence as a matter of law, and actionable per se. *Indianapolis &c. Ry. Co.* v. *Smith*, 78 Ill., 112; *Chicago &c. R. R. Co.*, 26 Ill. App., 362; *Terre Haute &c. R. R. Co.* v. *Barr*, 31 Ill., App. 57.

We think, however, the better rule is that the mere neglect to remove such trees and bushes is not actionable negligence per se, but the existence of such obstructions on its right of way is properly to be considered by the jury as one of the circumstances in determining the degree of vigilance which the company is bound to exercise in the running and management of its trains and in giving warning of their approach. When the company itself obstructs the vision and takes away the chance to see and perhaps diminishes the opportunity to hear on the part of the traveler should not the jury be permitted to decide whether the company must take additional precautions to inform him of the approach of the train by other means, or to reduce the speed? What seems to us to be the reasonable and logical rule is stated as follows:

"If a railroad company, in the management of its business, causes unusual peril to travelers, it must meet such peril with unusual precautions and failing in this is guilty of negligence. This rule is particularly applicable where the traveler's view of approaching trains at a crossing is so obstructed that they cannot be seen until close to the track. In such a case it becomes the duty of the railroad company to use extra caution to avoid collision as by a less amount of speed, or by increased warnings or otherwise; or if an unslackened speed is desirable, by keeping a watchman on duty or some other sufficient means of warning travelers." 22 R. C. L. 990; see also *Cowles* v. *N. Y., N. H. & H. R. R. Co.*, 80 Conn., 48, and notes 12 L. R. A., N. S., 1067, 10 A. & E. Ann. Cas., 481; *Danskin* v. *Penn. R. R. Co.*, 76 N. J., 660 and notes, 22 L. R. A., N. S. 232 and cases cited. This rule is fair to the traveler and imposes no injustice upon the railroad company, because it is always within the power of the railroad company to remove the source of danger which its own inattention has created.

In view of this accepted principle were the jury justified in holding that the defendant in the present case was not meeting its full measure of duty? There is no pretense of any extra precautions being taken because of the obstruction on the right of way, and the plaintiff contended that even the ordinary signals were lacking, that neither was whistle sounded nor bell rung on approaching Western Avenue. So far as the whistle was concerned, the statute did not then require it, but it is in evidence that at one time a whistling post stood at some point between the station and this crossing and that it had been removed prior to the accident, just when does not appear.

On the question of ringing the bell, the evidence is sharply conflicting. The locomotive was equipped with an automatic bell controlled by compressed air. The engineer testified that he started the bell just as he was leaving the station and that it rang unceasingly until after the accident. The fireman corroborates him. The conductor says it was ringing when they left the station and after the accident, but he cannot testify to the intervening time as he was taking tickets. Five other witnesses, not employees but located at different places, testify to hearing the bell.

On the other hand, the plaintiff and Mr. and Mrs. Jones who were watching, and whose minds were at the time intent upon the subject, testify positively that the bell did not ring, and they are corroborated by three disinterested witnesses located at different places who make the same statement that the bell did not ring, and in some measure by six others who testified that they heard no bell although they were in a position to have heard it had it rung. It is true that the starting of the bell on leaving a station becomes almost a second nature with an experienced engineer, and it is also true that on such a controverted fact as this, positive testimony has far greater probative force than negative.

Still in this state of the testimony we think it was a disputed fact for the jury to decide, and we do not feel that if in reaching their verdict they concluded that the statutory signal was not given, their finding was so manifestly wrong as to require reversal by this court. *Daniels* v. *N. Y., N. H. & H. R. R. Co.*, 183 Mass., 393-396; *McDonald* v. *N. Y. Cen. R. R.*, 186 Mass., 474; *Borders* v. *B. & M. R. R.*, 115 Maine, 207, 210.

In this connection may be considered the absence of a flagman or automatic signal at the crossing itself. Neither had been ordered by the Public Utilities Commission under Public Laws 1917, Chapter 50, 1919, Chapter 116, yet this too was properly a fact for the consideration of the jury. Not all such crossings require a flagman or an automatic signal, and yet because of the obstructed view, the necessity of the one or the other as matter of ordinary prudence was within the consideration of the jury. The engineer is reported to have said at the time that this was the blindest crossing on the road.

The remaining point is the speed at which the train was moving. This is not strenuously urged by the plaintiff. The engineer states that it was at the rate of fifteen miles per hour. Prior to 1917 the

statute prohibited the running of trains across a highway near the compact part of a town at a greater rate than six miles per hour. R. S., 1916, Chap. 57, Sec. 79. This was repealed by Public Laws, 1917, Chapter 174, and the matter was left with the Public Utilities Commission to fix a maximum speed limit at any grade crossing. None had been fixed at Western Avenue, but the duty still devolved upon the defendant to run its trains over this crossing at a reasonable rate in view of the other determining elements in the problem.

Grouping all the facts on the question of defendant's negligence, the obstructing trees, the possible failure to give warning, the unguarded crossing and the rate of speed, we do not feel justified in saying that the conclusion of the jury was clearly unsupportable.

2. CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF.

Another positive rule in connection with grade crossing accidents was announced long since in this State and has been consistently and insistently followed, viz.: that it is negligence per se for the driver of a conveyance to attempt to cross a railroad track without first looking and listening if there is an opportunity to do so. If obstacles prevent his looking, the traveler should stop if there is room for doubt. *State* v. *Maine Central R. R. Co.*, 76 Maine, 357; *Borders* v. *B. & M. R. R.*, 115 Maine, 207, 211. This rule, so firmly established, we do not relax in the slightest degree. It is sound in theory and salutary in practice.

At the outset it must be remembered that the plaintiff was not the driver of the automobile but a passenger, and even if the driver could be charged with a lack of due care, a point which it is unnecessary to decide in this case, negligence on his part could not be imputed to the plaintiff under the established doctrine in Maine. *State* v. *B. & M. R. R.*, 80 Maine, 430.

If not responsible for the conduct of the driver the passenger is, however, responsible for his own conduct and is held to that degree of care which a reasonably prudent man would exercise under the same circumstances and conditions. We think the plaintiff fully met this test. What took place at the critical moment is described by him as follows:

"Q. Will you state what happened after you turned into Western Avenue?

A. Why, as the car drove down to the crossing I was listening and had been listening. There was no noise going on and I was listening for any new noise there was.

Q. How near did you drive to the crossing?

A. Twenty or twenty-five feet and the car slowed up.

Q. Did it stop?

A. No, sir.

Q. How slow were you going?

A. Oh, I should say four or five miles an hour when the car slowed up.

Q. And did you look and listen?

A. Yes, sir.

Q. Did Mr. Jones look and listen?

A. Mr. Jones and I started to look down the track and was looking at that time.

Q. That is in looking down the track do you mean looking down by these bushes?

A. Yes, looking towards the station.

Q. And as you stopped there and looked down the track was there any train in sight?

A. No, sir.

Q. Was your automobile making a noise so that you couldn't hear?

A. No, sir.

Q. Was it quiet?

A. It was quiet.

Q. And was there anything in the automobile to prevent your hearing the approaching train?

A. No, sir.

. . . . . .

Q. What was the condition of the bushes on the track there?

A. They obstructed our view.

Q. And what were these bushes?

A. They were cherry, cherry bushes and cherry trees.

Q. As you stopped there some twenty feet from the track or as you slowed down there and listened could you hear any train coming?

A. No, sir.

Q. Was there any bell ringing?

A. No, sir.
Q. Was any whistle blowing?
A. No, sir.
Q. Was there anything to apprise you of the approach of the train?
A. No, sir, not anything.
Q. Did this man sitting on the right of you interfere in any way with your view?
A. Yes.
Q. What did you do in order to guard yourself?
A. I started to look down the track, and I noticed he was leaning forward and I straightened back and looked over his back.
Q. Which way was he looking?
A. He was looking down the track at the same time.

. . . . . .

Q. And then after you had looked to the right side sitting as you did on the left of Mr. Jones, what did you do next?
A. I looked back up the track.
Q. And as you looked back up the track was the car started?
A. Yes, sir.
Q. Then what happened?
A. As I was looking up the track and listening for any sound or anything I felt this dreadful jump, or something jump quick, a quick motion and I turned around to look quick and there was the engine.
Q. Where was the engine?
A. Right by the sidewalk crossing.
Q. Was it making a noise?
A. I didn't hear any noise then.
Q. Was any bell ringing?
A. No, sir.
Q. Did you hear that train until you turned and saw it almost on the sidewalk crossing?
A. I never heard the train at all."

In this testimony as to his own conduct the plaintiff is contradicted by no one and is corroborated both by Mr. Jones the driver and by Mrs. Jones who called her husband's attention to the crossing as they approached it. The distance given by the plaintiff as a point twenty

or twenty-five feet from the crossing at which they went the slowest and looked in either direction is of course only a rough estimate because under such conditions men are not judging distances. In fact mathematical calculations based upon mere estimates either of time or distance are apt to be misleading as a slight variation in the postulate creates a vast change in the mathematical result.

We have quoted the plaintiff's testimony at unusual length in order to sharply differentiate this case from that long line of decisions where plaintiffs have properly failed of recovery because of their inattention and thoughtlessness in driving upon a crossing without looking and listening or attempting to ascertain whether a train was approaching, or, having seen the train, recklessly attempted to cross in front of it, of which *Chase* v. *Maine Central R. R. Co.*, 78 Maine, 346, *Smith* v. *Same*, 87 Maine, 339, *Day* v. *B. & M. R. R.*, 96 Maine, 207, and *Crosby* v. *Maine Central R. R. Co.*, 113 Maine, 270, are illustrations; and also from those cases where absolute reliance was placed upon open gates and the traveler exercised no care whatever, as in *Blanchard* v. *Maine Central R. R. Co.*, 116 Maine, 179. Nor does the testimony here bring the plaintiff's case within the oft recurring dilemma that either the traveler did not in fact look or listen, or if he did he must have seen the train and tried to cross in advance, in other words those cases where the plaintiff's story is inherently improbable, as in *Blumenthal* v. *B. & M. R. R.*, 97 Maine, 255, and *McCarthy* v. *B. & A. R. R.*, 112 Maine, 1.

The plaintiff's testimony here is neither inherently improbable nor incredible. The automobile was proceeding at less than the ten mile speed permitted within one hundred feet of the crossing. Public Laws 1917, Chap. 50, Sec. 3. He prudently looked for an approaching train as soon as there was an opportunity to look. He could see southerly about one hundred feet all clear. Further vision was barred by the trees and bushes for which the defendant alone was responsible. Had these been removed as they since have been, he could have seen a distance of about three hundred and fifty feet, and this unfortunate accident would doubtless have been avoided. He then with equal caution looked in the opposite direction because a train might be coming from the north. Nothing was seen. When he turned back the engine was right upon them, too late for escape, having traversed the one hundred feet in less than five seconds if the speed was correctly given as fifteen miles per hour.

It further appears that the loud noise that usually accompanies the passage of a train was wanting, and this is readily accounted for. It was a light train, made up of a locomotive and four cars. It was not moving at a high rate of speed. The engineer says he was running "with a light throttle and half stroke." The grade was slightly descending and some of the witnesses describe the movement as similar to coasting. "It was sliding right along just as there wasn't any noise, or no puffing sound" as Mr. Jones described it; "Glided along and caught us" as Mrs. Jones put it. In fact it came so quietly that several of the worshippers in a nearby church with its windows open testified that the train moved with much less noise than usual and did not interfere with the preaching as it had usually done.

It is therefore the opinion of the court that the jury were justified in finding that the plaintiff was watchful and attentive, that he looked and listened with senses alert, that he endeavored to seasonably ascertain the approach of the train and took all the precautions that a reasonably prudent man under like circumstances is held bound to take. Therefore he is not precluded from retaining his verdict.

No question as to excessive damages is raised.

Motion and exception overruled.

JOHN INGALLS *vs.* HERBERT L. MARSTON et als.

Washington. Opinion March 10, 1922.

Whether one be an irregular indorser under Section 64 of the Uniform Negotiable Instrument Act, Public Laws 1917, Chapter 257, or a regular indorser under Section 66 of said Act, he is entitled to have due demand made upon the maker and due notice of dishonor given to himself.

Prior to the enactment of the Uniform Negotiable Instrument Act, Public Laws 1917, Chapter 257, the law was firmly settled in this State by judicial decision that one who signed his name on the back of a note at its inception was a joint or joint and several maker with one who signed on the face, so far as the necessity for demand and notice of nonpayment was concerned. He was not regarded as an indorser.

Under Section 63 of the Negotiable Instrument Act, however, such signer becomes an indorser unless he indicated by appropriate words his intention to be bound in some other capacity. No such intention was indicated in the present case.

On exceptions by plaintiff. This is an action of assumpsit on the first instalment of a promissory note, against Herbert L. Marston and Almeda E. Marston, who signed on the face of the note, and Howard M. Smith and Walter H. Foss, who signed on the back of the note, all signatures being made at the inception of the note and before delivery to the plaintiff as payee. The presiding Justice ruled "that the defendants, Howard M. Smith and Walter H. Foss, were indorsers; and it being conceded that the payment of the first instalment was not demanded according to the tenor of the note and notice of non-payment not being given to them, they are not liable in this action," and directed judgment for the defendants, to which ruling plaintiff excepted. Exceptions overruled.

Case is fully stated in the opinion.

Frederick Bogue, for plaintiff.

O. H. Dunbar, for defendants.

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

CORNISH, C. J. This is an action of assumpsit on the first instalment of a promissory note dated August 1, 1919, against Herbert L. Marston, Almeda E. Martson, Howard M. Smith and Walter H. Foss. Herbert L. and Almeda E. Marston signed the note on its face. Howard M. Smith and Walter H. Foss placed their signatures on the back of the note at its inception and before delivery to the payee, the plaintiff. The payment of the first instalment was not demanded of the makers, Herbert L. and Almeda E. Marston, at maturity, and notice of dishonor was not given to Smith and Foss. The plaintiff seeks to maintain this action against all four on the ground that Smith and Foss were original promisors; while the defendants Smith and Foss claim to be merely indorsers and therefore free from liability because of want of demand and notice. The presiding Justice sustained the contention of Smith and Foss and directed judgment in their favor. The case is before the Law Court on plaintiff's exception to this ruling.

Prior to the enactment of the Uniform Negotiable Instrument Act, Public Laws 1917, Chapter 257, the law was firmly settled in this State, as it was in many others though not in all, by judicial decisions that one who signed his name on the back of a note at its inception was a joint or joint and several maker with one who signed on the face, so far as the necessity for demand and notice of nonpayment was concerned. He was not regarded as an indorser. *Adams* v. *Hardy*, 32 Maine, 339; *Stewart* v. *Oliver*, 110 Maine, 208.

The passage of the Negotiable Instrument Act abrogated this rule of commercial law. This act was designed to unify the law in regard to negotiable instruments in the various States adopting it and it has been enacted by at least forty-three of the States of the Union. In those States it has superseded all pre-existing contradictory rules. We must therefore look to the provisions of that act to determine the rights of the parties in the pending case, and we find that the issue raised here is fully covered. When a person is deemed an indorser is clearly set forth as follows in Section 63: "A person placing his signature upon an instrument otherwise than as a maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Smith and Foss placed their signatures, not on the face as makers,

but on the back, that is "otherwise than as makers," and they did not indicate by any words, appropriate or otherwise, any intention to be bound in some other capacity. Therefore they come within this definition.

But the plaintiff seeks to distinguish between the liability of regular and irregular indorsers in this respect and argues that while regular indorsers are entitled to have demand made upon the maker and due notice of dishonor given to them, irregular indorsers are not so entitled. This construction would leave the legal situation the same as before the enactment of the statute, which was designed to change it, and is not borne out by the language of the statute itself.

Section 64, defining the liability of an irregular indorser reads: "When a person not otherwise a party to an instrument places thereon his signature in blank, before delivery, he is liable as an indorser, in accordance with the following rules:

(1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties, etc."

In the pending case the note was made payable to the order of a third person and therefore this section applies, and these irregular indorsers were made liable to the payee Ingalls and to all subsequent parties; but liable in what capacity? As makers or joint promisors? Clearly not, but "as indorsers," as the section unequivocally provides. These words are significant. They have a well defined meaning as legal terms which cannot be ignored, and they necessarily imply, unless it is otherwise stated, the inherent elements of demand and notice of dishonor.

Section 66 prescribes the conditional liability of a general indorser and recites among other things his legal obligation in case of due presentment and dishonor. But such recital of the obligations of a general indorser in this section does not change the liability of an irregular indorser under Section 64 and deprive him of his rights and privileges "as an indorser."

In other words, whether one be an irregular indorser under Section 64 or a regular indorser under Section 66, he is entitled to have due demand made upon the maker and due notice of dishonor given to himself. The irregular indorser is no longer a joint maker or an original promisor, as he was prior to the passage of the Negotiable Instrument Act, but an indorser with all that that term implies.

The precise issue here presented has been determined by the courts of several other States, under identical provisions of the Negotiable Instrument Act, and without exception so far as has come to our attention, they sustain the conclusion reached in this case. *Rockfield* v. *First Nat. Bank of Springfield,* 77 Ohio St., 311; 14 L. R. A., N. S. 842, and note; *Bank of Montpelier* v. *Montpelier Lumber Co.,* 16 Idaho, 730; *Lightner* v. *Roach,* 126 Md., 474; *Grapes* v. *Willoughby,* 93 Vt., 458; *Deahy* v. *Choquet,* 28 R. I. 338; *Neosho Milling Co.* v. *Farmers Coop. Warehouse Stock Co.,* 130 La., 949; *Baumeister* v. *Kuntz,* 53 Fla., 340; *Williams* v. *Bank,* 143 Ky., 781; *Walker* v. *Dunham,* 135 Mo. App. 396; *Pharr* v. *Stevens,* 124 Tenn., 670; *Gibbs* v. *Guaraglia,* 75 N. J., Law, 168.

Exceptions overruled.

STATE OF MAINE

vs.

AUTOMOBILE; PACKARD MOTOR CAR COMPANY, Claimant.

Androscoggin. Opinion March 10, 1922.

The interests of a guilty party in a vehicle used by him in the illegal transportation of intoxicating liquor are subject to forfeiture and sale, but the rights of an innocent claimant therein are protected provided he establishes his claim in court. Public Laws 1917, Chapter 294.

Chapter 63 of the Public Laws of 1921, amended the Act of 1917, Chapter 294, by striking out this sentence: "Any claimant of any such boat, vessel or vehicle must allege and prove that the use of such boat, vessel or vehicle for the transportation of intoxicating liquors as aforesaid was without his knowledge and consent."

The sentence stricken out does not affect substantive rights but merely procedure and the introduction of evidence. While that sentence was in force the burden was thrown upon the claimant to prove that the illegal use of the vehicle was without his knowledge and consent. The repeal of that sentence has left the question open for proof like all other issues in the case.

The respective rights of the parties in the vehicle remain the same since the passage of the Act of 1921 as before, and are governed by the decision in case, *State* v. *Paige Touring Car*, 120 Maine, 496.

On agreed statement. This case comes from the Superior Court of Androscoggin County upon an agreed statement of facts entered into before the decision by this court in the case, *State* v. *Paige Touring Car*, 120 Maine, 496. In the present case the automobile in question was seized at a garage in Lewiston, and at the time of the seizure twenty-five cans each containing one gallon of alcohol were found deposited in the car. It was admitted that the alcohol so found was intended for illegal sale within the State and that it had been transported in the seized car for that purpose. The car had been sold by Claimant, Packard Motor Car Company, to Benjamin Margie, one of the guilty parties in possession thereof at the time of the seizure, under a conditional sale, and it was agreed that claimant had no knowledge of the illegal use to which the car was put. The car was libelled and at the hearing on the libel, claimant appeared, filed and prosecuted its claim. The Judge of the Lewiston Municipal Court, before whom the hearing on the libel was had, decreed a forfeiture of the car, from which decree claimant appealed to the Superior Court of Androscoggin County, whence the case on an agreed statement was taken to the Law Court.

The case is fully stated in the opinion.

Benjamin L. Berman, for the State.

George S. McCarty, for claimant.

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

CORNISH, C. J. In *State* v. *Paige Touring Car*, 120 Maine, 496, announced November 16, 1921, this court held that under Chapter 294 of the Public Laws of 1917, the interests of a guilty party in a vehicle used by him in the illegal transportation of intoxicating liquor were subject to forfeiture and sale, but the rights of an innocent claimant therein were protected provided he established his claim in court. The legal rights of each are to be determined in proper legal process, and it matters not whether the interest of the offending party is that of a mortgagor or a purchaser under a conditional sale, lease or Holmes's note.

Precisely the same question arose in the instant case, and the presiding Justice ordered a forfeiture of the automobile. It is admitted that the Packard Motor Car Company had sold the car to Benjamin Margie, one of the guilty parties in possession thereof at the time of the seizure, under a conditional sale, that the purchase price was $3,535 and the purchaser had paid $2,200 thereon according to the contract, and that the Company had no knowledge of the illegal use to which the car was put. It should be added, however, that this ruling was made before the decision in the Paige case was announced.

The pending case is therefore the same in principle as the Paige case, except that the Legislature of 1921 amended the act of 1917 by striking out the last sentence, which was as follows: "Any claimant of any such boat, vessel or vehicle must allege and prove that the use of such boat, vessel or vehicle for the transportation of intoxicating liquors as aforesaid was without his knowledge and consent." Public Laws 1921, Chapter 63. This seizure was made after this amendment became effective, but the legal situation was not thereby changed.

This amendment did not affect the legal rights of the parties as to forfeiture. Those are determined by the rest of the Act of 1917, which remains unchanged, and by the interpretation of that act by the court as given in the Paige case. The sentence stricken out does not affect substantive rights, but merely procedure and the introduction of evidence. While that sentence was in force, the burden was thrown upon the claimant to prove that the illegal use of the vehicle was without his knowledge and consent. In the absence of any evidence on that point such use was prima facie presumed to be with his knowledge and consent. The repeal of that sentence has relieved the claimant from that presumption and has left the question open for proof like all other issues in the case. But it has had no other effect.

In the case at bar the innocence of the Company is admitted. Therefore the pecuniary rights of each party must be determined in the trial court and disposed of in accordance with the provisions of the statute and the opinion in *State of Maine* v. *Paige Touring Car*, 120 Maine, 496, supra.

As this case is before the court on an agreed statement of facts the entry will be:

Rights of Benjamin Margie in said Packard Touring Car on August 22, 1921, under the contract of conditional sale with the Packard Motor Car Company of Boston forfeited to the County of Androscoggin to be sold in accordance with the provisions of Chapter 294, Laws of 1917; subject, however, to the claim of the Packard Motor Car Company of Boston under said contract of sale.

FRANK L. PALMER, Bank Commissioner, In Equity

vs.

MUTUAL CONSTRUCTION COMPANY et al.

Androscoggin. Opinion March 10, 1922.

The Mutual Construction Company, a corporation incorporated in New Hampshire, but doing business in this State without a license found to be doing practically the same business, and substantially in the same manner, as that done by loan and building associations in this State, in violation of Sec. 120 of Chap. 52 of the R. S.

In a bill in equity asking for an injunction brought by the Bank Commissioner under Sec. 122 of Chap. 52 of the R. S. against a corporation incorporated in New Hampshire but doing business in this State without a license, and also, against its general agent, it is

Held:

1. That the principal object of a loan and building association is to create a loan fund for the benefit of its borrowing members, the underlying idea being that by means of the system of small periodical payments people of limited means will be enabled to become the owners of homes, and thrift, economy and good citizenship will thereby be promoted.
2. In its dominant features, its purpose, its mutuality, membership, payments and loans, the defendant corporation is carrying on a business similar to that of a loan and building association in this State.
3. In some minor details of mechanism the company may differ somewhat from the ordinary loan and building association, but in the essentials it is carrying on a similar if not the same business. It is effecting the same purpose in substantially the same manner.

On report. This is a petition in equity, brought under the provisions of Secs. 120 and 122 of Chap. 52 of the R. S., in the name of the Bank Commissioner, against the Mutual Construction Company, a corporation organized in New Hampshire, and Emile J. Pelletier, its general agent in this State, for the purpose of enjoining the defendants from carrying on business in this State similar to that carried on by loan and building associations in this State, without complying with Sec. 120 of Chap. 52 of the R. S., by being incorporated under the laws of this State for that purpose. The cause was heard before a Justice, upon bill, answers and demurrers, inserted therein and replications and proof. At the conclusion of the testimony, by agreement of the parties, the cause was reported to the Law Court. Bill sustained with a single bill of costs. Permanent injunction to issue against both defendants as prayed for.

The case is stated in the opinion.

Fred F. Lawrence, for plaintiff.

Frank A. Morey, for defendants.

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

CORNISH, C. J. Sec. 120 of Chap. 52 of the R. S., provides as follows: "Except as hereinafter provided, no person, association or corporation shall carry on the business of accumulating and loaning or investing the savings of its members or of other persons in the

manner of loan and building associations or carry on any business similar thereto within this State, unless incorporated under the laws thereof for such purpose." Section 122 grants a remedy by injunction in case of violation of the statutory inhibition. The original act concerned itself with "the business of accumulating the savings of its members and loaning to them such accumulations in the manner of loan and building associations." R. S., 1903, Chap. 48, Sec. 76. This was expanded by Chapter 42 of the Public Laws of 1905 to include persons, associations or corporations that carry on any business similar to loan and building associations, and it is under this amended section, now R. S., Chap. 52, Sec. 120, that this petition is brought and this injunction is asked.

The single issue is whether the Mutual Construction Company, which was organized in New Hampshire and of which the defendant Pelletier was the general agent in Maine was carrying on any business similar to that of a loan and building association. This raises the initial inquiry as to the distinctive characteristics of a loan and building association.

These characteristics are not to be determined wholly from the existing statutes governing their organization and regulation. Loan and building associations have been in existence in this country for nearly a century and were known in Great Britain for some years before that. The general purpose has been expressed in varying terms, but the main features are the same. "The principal object of a building and loan association is to create a loan fund for the benefit of its borrowing members, the underlying idea being that by means of the system of small periodical payments provided, people of limited means will be enabled to become the owners of homes, and thrift, economy and good citizenship will thereby be promoted." 9 C. J. 920.

In *Pfeister* v. *Wheeling Building Association,* 19 W. Va., 676, this language was used by the court: "Before the passage of any act for the incorporation of building and homestead associations they could be formed and were formed as voluntary associations of parties desiring by concerted action to raise money by small payments and accumulate it till such time as enough had been accumulated to enable each member to build himself a dwelling house and thus acquire a home." See also 4 R. C. L. 343, and cases cited.

The dominant features of such an association, which pertain also to the defendant company, are as follows:

First, Purpose. This is stated by the company as follows: "The purpose of our corporation is to encourage the habit of economy principally among the young men and young women and to come to the aid of older persons in procuring a sure and easy means to each to be proprietor of his modest home or to better it." A loan and building association could not state its purpose more accurately.

Second, Mutuality. The members are associated on a cooperative basis, having equal privileges and liabilities and sharing equally in profits and losses. This feature of mutuality and cooperation is made prominent in the plan of the Mutual Construction Company and is emphasized in the advertising pamphlet distributed by the company.

Third, Membership. In loan and building associations membership is represented by a book stating the number of shares held by such member, and on this book all payments are credited. In this Mutual Construction Company membership is represented by a written contract, which answers the same purpose, the members being designated in the by-laws as "contract subscribers."

Fourth, Payments. In this corporation, as in loan and building associations, R. S., Chap. 52, Sec. 104, monthly payments are made by the individuals until an aggregate specified amount is reached. In loan and building associations the full paid up value of a share is two hundred dollars, and any person may hold any number of shares not exceeding fifty. Public Laws 1917, Chapter 208. In this corporation the contract of payment is completed, if we understand the somewhat vague provisions aright, when $1,150 has been paid, $1,000 of which is paid into the building fund so called, and $150 into the administration fund, the latter being designed to cover services and expenses of management. This fifteen per cent. commission for receiving and paying out money seems rather exorbitant, and in addition there is an entry fee of five dollars and fifty cents on each contract, but these figures affect the prudence and good faith with which the corporation is managed rather than the nature of the business which it is carrying on.

Fifth, Loan Fund. By means of these small periodical payments a so-called building fund is created in this corporation which corresponds to the loan fund in the loan and building association. The

term "building fund" is a misnomer. It is apparently used to carry out the idea of the word "construction" employed in the name of the corporation which is also a misnomer. Both are used with the evident design on the part of the managers to hold this corporation out to the world as some sort of a construction company, a company that actually is engaged in constructing or improving houses and intends to perform that work for its contract subscribers when the contracts are completed. But one looks in vain through the contract and by-laws for a single provision imposing such a duty upon the company. The idea is in the name alone. The contract provides for the payment of the entry fee and monthly instalments by the subscribers, and the payment of $1,150 to the subscriber when the required amount has been paid in, and the serial number is reached, the corporation taking a note with such security as it deems sufficient for the difference between the amount paid in and the amount loaned. The subscriber can take this money and build a home or improve one for himself. No work of that sort is done by the corporation. It aids in the construction and improvement of homes in the same way that a loan and building association does. It accumulates the means by which it can be done. The appellation does not change the character of the business. The general agent for Maine testified that while two thousand of these contracts had been issued in this State during the three years between 1918 and 1921, the corporation has never built any houses in this State, and, so far as his knowledge goes, had never built any in New Hampshire where the company was incorporated.

In view of these established facts, the purpose, mutuality, membership, method of payments, and building fund accumulated from and loaned to its members on security, we have no hesitation in holding that the general business carried on by the Mutual Construction Company is similar to that of loan and building associations, and for the protection of the people of this State, and especially of those of small means unacquainted with business affairs and with investments, it should come under the control and regulation of the Bank Commissioner. Justice to our people demands it. Under R. S., Chap. 52, Sec. 121, the Bank Commissioner has full control over foreign corporations attempting to do a loan and building association business in this State. He can examine into their affairs, grant or withhold authority, and if they are authorized can order them to

deposit at least $25,000 with the State Treasurer for the protection of citizens of this State with whom they may transact business. From an examination of the contract, by-laws and other exhibits in this case, we think it would be wise and salutary to require that this company be subject to such control and supervision.

There are, of course, many minor details in which the mechanism of this company differs from a loan and building association. Perhaps they were devised in the hope that thereby it might be considered as of a different nature and might escape such control and regulation. But the hope must fade. In the essentials it is carrying on a similar, if not the same, business. It is effecting the same purpose in substantially the same manner, and that is the test. *State* v. *Standard Real Estate Co.*, 80 Kan., 694, 103 Pac. 1006; *State ex rel Standard Home Co.* v. *State Corporation Commission*, 18 N. M. 166, 135 Pac., 75.

This corporation has been before this court on the charge of carrying on a banking business in violation of law. The court then held that the company was not engaged in the business of banking, but also said, possibly by way of dictum, that in important respects the business conducted by it resembled that of a loan and building association and that if any statute was violated it was Section 120 of Chapter 52. *State* v. *Pelletier*, 118 Maine, 257. Further investigation upon proper proceeding brought confirms the truth of this suggestion.

Bill sustained with a single bill of costs.

Permanent injunction to issue against both defendants as prayed for.

HARRIET MAY TRIPP *vs.* ANNIE MCCURDY.

Androscoggin. Opinion March 10, 1922.

The legal delivery of a deed requires both a manual transfer and an accompanying intent to pass title. Delivery to a third person for the grantee without any reservation by the grantor of a right to recall is sufficient if the reception of the deed has been authorized by grantee, and when prior authority has not been given by the grantee to receive the deed, it is sufficient when grantee subsequently assents, and as the deed is for the benefit of the grantee such assent will be prima facie presumed.

Whether or not delivery of a deed to a third person is absolute and irrevocable or qualified and revocable depends in the first instance upon the intention of the grantor, and that is to be gleaned from his words and acts at the time, the attendant circumstances and from his subsequent conduct.

Every word and act of the grantor, who has since died, in the instant case, are consistent with an absolute and unqualified delivery.

The fact that the third party was the attorney who drew the deed and had previously drafted certain wills for the grantor does not change the situation. If the grantor desired him to hold the deed for the use and benefit of the grantee and to deliver it to her as requested, there is no rule of law to prevent. That he did so desire is abundantly proved.

On report. This is a real action to determine title to certain real estate in Lewiston formerly owned by Edwin B. Holbrook, now deceased. On July 28th, 1920, said Edwin B. Holbrook executed a deed of said real estate wherein the plaintiff was grantee, and delivered the deed to Fred O. Watson, an attorney who drafted it, with instructions to deliver the same to grantee. On August 9th, following, said Edwin B. Holbrook executed a will naming therein the defendant as residuary legatee and devisee. The plaintiff was a resident of Massachusetts and not in Maine when the deed was executed. Mr. Holbrook died soon after the execution of the will and a few days before the deed was actually received by the plaintiff named as grantee therein. Plaintiff claims title under the deed. Defendant contends that inasmuch as the deed was not actually received by the plaintiff into her own possession before the death of Mr. Holbrook, title did not pass to her, and that Mr. Holbrook still owned said real

estate at his death title to which passed to defendant under the residuary clause in the will. The plaintiff contended that there was a legal delivery of the deed. At the close of the testimony by agreement of the parties, the case was reported to the Law Court upon so much of the evidence as was legally competent. Judgment for plaintiff.

The case is fully stated in the opinion.

Tascus Atwood, for plaintiff.

Pattangall & Locke, and Frank T. Powers, for defendant.

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

CORNISH, C. J. Real action. Both parties claim title from Edwin B. Holbrook, the plaintiff as grantee under a deed dated July 28, 1920, the defendant as residuary devisee under a will dated August 9, 1920. The date of Mr. Holbrook's death does not appear in the case but evidently was shortly after the will was made.

The determining factor in the case is the delivery of the deed. If the delivery is held to be complete the plaintiff is entitled to recover, otherwise not. This deed was drafted by Mr. Fred O. Watson, an attorney of many years practice at the bar. He had previously made three wills for Mr. Holbrook and on July 28, 1920, made a fourth will and this deed. The grantee, Mrs. Tripp, was not present, her home being in Melrose, Massachusetts. What took place in Mr. Watson's office is described by him as follows: "At the time that I made the deed Mrs. Tripp was not there to receive the delivery. I explained to him that it was an important part that the deed must be delivered; and he said to me, 'Why can't you deliver it to Mrs. Tripp?' I told him that he could do so if he wished and that I would do as he requested."

"Q. What if anything was said about his notifying her?

A. He told me that he would write her a letter that I had the deed, and for me to deliver it to her.

Q. Were there any limitations or qualifications to your instructions to deliver the deed?

A. None whatever."

Did title thereby pass to Mrs. Tripp? The plaintiff claims that it did, while the defendant contends that as Mr. Watson had acted as attorney for the grantor in drawing the wills and this deed, he was in

law the agent of the grantor, his possession was therefore the grantor's possession, and as Mr. Watson did not deliver the deed to Mrs. Tripp until after the grantor's death, it was void because his agency had been revoked by the death. No question of escrow is involved.

The generally accepted principles applicable to this case, deduced from a large number of cited cases, are stated thus: "Delivery to a third person for the grantee without any reservation by the grantor of a right to recall it, is sufficient in law and effects a complete transfer of the title to the property. . . . . But when the deed is placed in the hands of a third person as the agent, servant, friend or bailee of the grantor, for safe keeping only and not for delivery to the grantee, such transfer does not constitute a delivery, and the instrument fails for want of execution; and the same applies where the delivery is to the grantor's attorney to be delivered to the grantee on payment of the balance of the purchase money. Nor can the agent or attorney make valid delivery after the grantor's death." 8 R. C. L., Page 991; *Mather* v. *Corliss*, 103 Mass., 568. It is also settled that the delivery of a deed to a third person may be sufficient, although no prior authority had been given by the grantee to receive the deed, where the grantee subsequently assents, and as the deed is for the benefit of the grantee "such assent will be prima facie presumed." 18 C. J., 205; *Church* v. *Gilman*, 15 Wend., 656; *Hatch* v. *Hatch*, 9 Mass., 307; *Timothy* v. *Wright*, 8 Gray, 522.

The sharp and clean cut line that runs through the decisions, on the one side or the other of which the cases have fallen, is the intent of the grantor. That is the controlling factor. The question of legal delivery depends upon two facts, the act done and the purpose with which it is done. *O'Kelly* v. *O'Kelly*, 8 Met., 436. Delivery ordinarily comprises both. There may be a manual transfer without intending to pass the title, the act without the intent, as in *Rhodes* v. *School District*, 30 Maine, 110, or there may be an intention to pass the title without a manual transfer, the intent never being consummated, as in *Dwinal* v. *Holmes*, 33 Maine, 172. Each is futile. It is equally futile if the delivery to a third party is accompanied by a reservation which retains in the grantor the right to withdraw the deed from the third party, as in *Brown* v. *Brown*, 66 Maine, 316. In the present case the act was done when the grantor left the deed with Mr. Watson. The questions for solution then are, with what intent

was that done, and in what capacity did Mr. Watson receive the deed?

Whether or not delivery to a third person is absolute and irrevocable or qualified and revocable depends in the first instance upon the intention of the grantor, and that is to be gleaned from his words and acts at the time, the attendant circumstances and from his subsequent conduct.

Following this guide in the case at bar, we find that the necessity of a legal delivery was brought to the attention of the grantor at the time by Mr. Watson, and the grantor inquired why he could not leave the deed with the scrivener to be delivered by him to the grantee. Mr. Watson replied that this could be done and he would do as requested. The fair interpretation of this conversation is that Mr. Holbrook unreservedly delivered the deed to Mr. Watson for the sole use and benefit of Mrs. Tripp and for no other purpose, and Mr. Watson accepted the trust and promised to fulfill it. The grantor thereby relinquished all control over the document and thenceforth regarded the deed as Mrs. Tripp's deed and the property as her property.

Confirming this view is the further statement made by the grantor at the time, that he would notify Mrs. Tripp of the transaction, which he did by letter dated August 1, so that the grantee was advised by the grantor of the conveyance before the grantor's death, and of the fact that Mr. Watson was holding the deed for her. Three days later, on August 4, he wrote her again, saying that after further reflection he doubted if he had disposed of his property as he should and in order to make a more just division perhaps he should give her only one half of the real estate and the other half to another relative and readjust the legacies to others. But he adds these significant words: "I have not been over to see Watson. I don't know as he will give me back the deed unless you tell him to. Now if you think I am trying to do right I wish you would write me soon and put in a note for him telling him to give me back the deed." This is conclusive evidence of Mr. Holbrook's view of the situation. In his mind he had put the deed beyond recall, and it could only be given back to him by Mr. Watson on an order from the grantee. It would have been a surprise to him to know that he was at liberty to go to Mr. Watson at any time and take back the instrument.

It further appears that Mrs. Tripp, after she was apprised of the conveyance by the letter of August 1, and of Mr. Holbrook's changed desires by his letter of August 4, wrote to him complying with his request and enclosing the suggested note to Mr. Watson, in which she gave him these directions: "Will you please transfer back to Mr. E. B. Holbrook any deed of property in which my name may be mentioned and if any legal papers are necessary for me to sign please send them and I will gladly sign them." This note arrived after Mr. Holbrook's death, so that no reconveyance was made or attempted. Nothing, however, can be clearer than that in the mind of all the parties the first conveyance was completed and only a reconveyance could get the title back into Mr. Holbrook.

Finally, when Mr. Holbrook made and executed his last will and testament on August 9th, no retransfer having been made, he made no mention whatever of this real estate, apparently recognizing that he had already conveyed it by deed. Nor did he mention Mrs. Tripp among the objects of his bounty, although she was a distant relative by marriage, apparently feeling that he had provided for her by this conveyance. In short, every word and act of the grantor, both at the time of the execution and delivery of the deed to Mr. Watson and subsequent thereto, are consistent with an absolute, unqualified and irrevocable delivery carrying with it the title to the property and are inconsistent with any other theory.

It remains to consider the question of agency. The mere fact that Mr. Watson drafted this deed and had drawn four wills for the grantor at various times did not per se disqualify him from receiving and holding this deed as any other third party might. Mr. Watson was in reality a scrivener rather than an attorney. Any Justice of the Peace could have drawn the instrument and he would not thereby be regarded as attorney of the grantor. But even if Mr. Watson be regarded as Mr. Holbrook's attorney, the legal situation remains unchanged. Agency is a question of fact. Such scrivener or attorney might be the agent of the grantor, or he might be created by the grantor a trustee or depositary for the grantee. The facts of each case must determine the question, and here, as we have already seen, there was no evidence of agency. If the grantor desired Mr. Watson to hold the deed for the use and benefit of the grantee and deliver it to her as requested, there is no rule of law which prevents, simply

because Mr. Watson drafted the deed itself. That he did so desire is abundantly proved.

It is the opinion of the court that the deed was legally delivered, that title to the premises passed thereby to the grantee, and the entry must be,

Judgment for plaintiff.

R. P. HAZZARD COMPANY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion March 10, 1922.

The stipulation contained in a bill of lading that as a condition precedent to recovery for non-delivery of interstate shipment of goods, claims in writing must be made to the originating or delivering carrier within six months after a reasonable time for delivery has elapsed, has been determined by the Federal Court as valid. A reasonable time for performing a given act is such time as is necessary conveniently to do what the contract requires to be done, and in any given case is a question of fact.

The evidence in the instant case proves that two or three days was a reasonable time in which to conveniently transport these goods from Gardiner, Maine, to Boston, Massachusetts, and therefore the reasonable time for delay expired on May 18, 1918.

The six months after the reasonable time, therefore expired on November 18, 1918, and as the first written claim was made on December 14, 1918, it was nearly a month subsequent to the period allowed by the stipulation and eleven days even beyond the request for a tracer. Such delay on the part of the plaintiff constitutes a bar and precludes recovery.

On report. This is an action for the non-delivery of a portion of an interstate shipment of goods, under the provisions of the Carmack Amendment to the Interstate Commerce Act. By agreement of the parties after the testimony was closed, the case was reported to the

Law Court for final determination on agreed facts and so much of the evidence as was legally admissible. Judgment for defendant.

The case is fully stated in the opinion.

George W. Heselton, for plaintiff.

Carroll N. Perkins, for defendant.

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

CORNISH, C. J. This action is for the non-delivery of a portion of an interstate shipment of goods, under the provisions of the Carmack Amendment to the Interstate Commerce Act, U. S. Comp. St. 1916, Volume 8, Section 8604a, the defendant being the initial carrier.

The facts, which are not in dispute, may be thus stated: On May 13, 1918, the plaintiff delivered to the defendant at Gardiner, Maine, twenty-five cases of shoes consigned to F. L. Moore & Co. of Boston, Massachusetts, forwarding agents, fourteen cases being intended for reshipment to the Beck Shoe Company of New York City, and being plainly stenciled with the name and address of the last named company. The shipment arrived in Boston on May 15, 1918, at 10:45 A. M., having been en route two days, but it was two cases short, only twelve of the fourteen Beck Shoe Company cases being delivered. The consignee receipted for the twelve cases only. The missing goods were never delivered and no reason is disclosed for such non-delivery. On November 25, 1918, the plaintiff was advised of the shortage by the Beck Shoe Company. The attention of the defendant's station agent at Gardiner was called to the fact by the plaintiff on the next day, November 26, and on November 27 the plaintiff claims to have sent the following letter to the defendant at Gardiner:

"Referring to our shipment of May 13th of 14 cases shoes numbers 3683-84 and 8774-8785 inclusive to the Beck Shoe Co., New York, care of F. L. Moore & Co. that Mr. Lasalle had up with you yesterday relative to there being two cases short, numbers 8778 and 8780.

We trust you can locate the same at once with wire tracer as suggested."

On December 14, 1918, a claim was presented to the defendant in the form of an invoice for the two missing cases, giving their value to be $141 and stating that this shipment of May 13 was short that amount on arrival at Boston.

The shipment was under a bill of lading of the uniform type and contained the following stipulation and condition:

"Section 3 . . . As conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within six months after delivery of the property . . . . or, in case of failure to make delivery, then within six months . . . after a reasonable time for delivery has elapsed."

The defense is that written claim of loss was not made to the carrier within the prescribed time and therefore the action cannot be maintained.

1. The validity of this stipulation in the bill of lading has been settled by the Federal Court. *Georgia F. & A. Ry. Co.* v. *Blish Milling Co.*, 241 U. S., 190; *St. Louis &c. Ry. Co.* v. *Starbird*, 243 U. S., 592.

2. Written claim within the meaning of this stipulation was not made upon the company until December 14, 1918.

The letter of November 27, assuming that it was sent and received as the plaintiff contends, did not constitute a claim and did not purport to make demand for compensation. It was simply an expression of hope that the defendant would be able to locate the goods by means of a wire tracer as suggested in the interview on the preceding day. It stated a desire to have the goods themselves and not the value thereof nor pay therefor. It made no demand for remuneration.

Such claim need not be phrased in any particular form, but it must possess the characteristics of a claim and should either amount to a demand for compensation or contain evidence of an intention to claim remuneration for loss suffered. *St. Louis &c. Ry. Co.* v. *Starbird*, 243 U. S., 592, 605, *Bronstein* v. *Payne, Director General*, Md. , 113 At., 648. The distinction between the nature of this letter of November 27 and the written claim of December 14 is recognized by the plaintiff itself. Under date of December 12, 1918, it wrote to the Beck Shoe Company that it had taken the matter up with the local agent of the defendant in Gardiner and he had advised that he was unable to locate the two missing cases, "Therefore we will enter claim at this end and trust the same will be satisfactory." The claim was entered two days later. Again under date of October 30, 1919, the plaintiff wrote the defendant, "Will you kindly refer to claim No. 260847, our claim of Dec. 14, 1918, amount $141 and return to us all papers &c." This was the first and only claim the plaintiff intended to make.

The distinction is also noted by the courts. In a very recent case in Maryland the court say:

"This prayer submits the proposition that the letter referred to in the evidence as a 'tracer' sent by Leibowitz & Co. to the Baltimore and Ohio Railroad Company with the bill of lading and paid freight bill together constituted a written claim for the loss and as such complied with that provision of the bill of lading which required a written claim to be filed within a certain limited time. This proposition we are unable to approve because the tracer possessed none of the characteristics of a 'claim' as that expression is ordinarily understood. The tracer was a mere request made by the shipper of the carrier to locate certain goods which had not been received. Whereas the claim that should have been filed in accordance with the terms of the bill of lading could mean nothing less than a demand for the value of the goods which had been lost." *Bronstein* v. *Payne, Director General,* Md. , 113 Atl., 648, (1921). See also *Cudahy Packing Co.* v. *Bixby,* 199 Mo. App., 589. In the case at bar not even the bill of lading accompanied the letter.

3. This claim made on December 14 was far beyond the limit allowed by the condition precedent in the bill of lading. The claim should have been made "within six months after a reasonable time for delivery has elapsed." What is meant by "a reasonable time for delivery"? When does that time cease and the six months period begin? The plaintiff argues that as this is a claim for entire failure of delivery and naturally cannot be made in good faith until after the expiration of such a period as would indicate a strong probability that the goods would never in fact be delivered, in other words until after it is found that they had been lost beyond a reasonable probability of tracing them, therefore the six months' period should not begin until all that preliminary time has expired. This construction ignores the plain words and obvious meaning and purpose of the stipulation. It would postpone the beginning of the six months' period until not a reasonable but an unreasonable time for delivery had passed, that is, until the expiration of all conceivable delays in transportation and all hope of delivery had been abandoned. This view we cannot accept. The words of the condition forbid it.

A reasonable time for performing a given act has been defined by this court to be, "Such time as is necessary conveniently to do what the contract requires should be done." *Hollis* v. *Libby,* 101 Maine,

302, 309. This definition can be readily applied here. A reasonable time for delivery of goods transported by rail from Gardiner to Boston is the time required conveniently to make such transportation and delivery in the ordinary course of business, taking into consideration all the circumstances, the distance, the season of the year, weather conditions, labor conditions and other accompanying elements. It is a fact to be determined in each particular case. What this reasonable time was in the case at bar is shown by the evidence of witnesses both of the plaintiff and defendant to be from two to three days, two days in a through car, three if the car is broken at Portland. The distance is less than one hundred and seventy-five miles. The season was the Spring. There is no evidence of labor troubles. This statement of the witnesses as to the reasonable time for delivery is confirmed by the fact that the delivery of the other cases in this particular shipment was in fact made within two days, the goods having left Gardiner on May 13th and reached Boston at 10:45 A. M. on May 15th. If we allow three days, May 16 would mark the end of the reasonable time for delivery and the beginning of the six months' period under the facts of this case. The six months' period ended on November 16, 1918. The claim of December 14 was therefore twenty-eight days in excess of the specified limitation, and eleven days beyond the letter of November 27 even if that could be regarded as a written claim. Such delay on the part of the plaintiff constitutes a bar and precludes recovery. *Bronstein* v. *Payne, Director General*, supra; *Old Dominion S. S. Co.* v. *Flanary & Co.*, 111 Va. 816, 69 S. E., 1107.

Other questions were raised in argument but their consideration is rendered unnecessary by the conclusion here reached.

Judgment for defendant.

HOMER N. CHASE & CO. *vs.* NEWMAN R. DOYLE.

Androscoggin. Opinion March 15, 1922.

The seller's remedy for refusal to accept goods ordered is not a suit for the price, but a special action for breach of the implied contract to receive and accept.

The law is well settled in this State that when goods are ordered, and shipped to the one giving the order, but were never accepted by the one giving the order, the seller's remedy is not a suit for the price, but a special action for breach of the implied contract to receive and accept. To maintain an action for the price actual acceptance must be shown.

On exceptions by plaintiff. This is an action of assumpsit to recover the price of certain nursery stock alleged to be sold and delivered. The defendant gave to the plaintiff a written order for the goods, at the prices claimed, and the goods were shipped in accordance therewith to the station at Caribou, Maine, but defendant refused to accept them. The defendant asserts that an action for the price of goods sold and delivered cannot be maintained until delivery be proved; that actual delivery and acceptance must appear.

The case was heard by the court without a jury and judgment for defendant was rendered and plaintiff took exceptions. Exceptions overruled.

The case is stated in the opinion.

Tascus Atwood, for plaintiff.

Cyrus F. Small, for defendant.

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

PHILBROOK, J. On the sixth of August, 1920, the defendant signed an order, directed to the plaintiff, for the delivery of certain nursery stock, for which defendant agreed to pay two hundred dollars on delivery of said stock for the defendant at Caribou freight station any time during April or May, 1921. The order stipulated that it was not subject to countermand but in the latter part of August,

1920, the defendant wrote the plaintiff that he would not take the stock and notified plaintiff not to ship it. Nevertheless the stock was shipped to the freight station from which place defendant refused to take it. Thereupon one Foss, acting as agent for plaintiff, took the stock from the station, carried it to the defendant's residence and left it by the roadside in front of that residence. At some time thereafter, the defendant removed the stock to a place across the road, where it remained, so far as the evidence discloses, until the date of the writ, each party claiming it to be the property of the other.

The plaintiff then brought this action of assumpsit to recover the price of the stock which it says was sold and delivered to the defendant. The case was heard by a Justice of the court to which the writ was returnable, without jury, and in vacation as of term time. Upon the facts, as thus briefly stated, the Justice ruled as matter of law as follows:

1. That by his explicit refusal to fulfill the contract in August, 1920, and notice to plaintiff, the defendant precluded the plaintiff from asserting his rights to deliver and recover as for goods sold and delivered, and subjected himself only to such damages as would compensate the plaintiff for being deprived of the benefits of his contract.

2. That delivery at the station at Caribou after notice as above stated that defendant would refuse to perform the contract would not entitle the plaintiff to maintain this action for the price of the goods without acceptance by defendant.

3. That delivery at the Caribou Station, while evidence of acceptance upon which the plaintiff might rely as sufficient, would not preclude the defendant from refusal to accept and that the defendant in this case, in view of the entire history of the transaction, had actually refused to accept.

4. That if the delivery at the Caribou Station was primarily sufficient, the authorized act of the plaintiff's agent, Foss, in taking possession and undertaking to make a further and different delivery would preclude the plaintiff from recovering on the delivery at the Caribou Station.

Judgment for defendant with right of exception reserved.

The case comes before us upon plaintiff's exceptions and the real contest is upon the question whether it may recover in this action of assumpsit for goods sold and delivered, or whether it should have

brought an action to recover damages for breach of contract by the defendant.

We consider the law as well settled in this State that where goods are ordered, and shipped to the one giving the order, but were never accepted by the one giving the order, the seller's remedy is not a suit for the price, but a special action for breach of the implied contract to receive and accept. To maintain an action for the price, actual acceptance must be shown. *Bixler* v. *Wright*, 116 Maine, 133; *Tufts* v. *Grewer*, 83 Maine, 407; *Greenleaf* v. *Gallagher*, 93 Maine, 549; *Atwood* v. *Lucas*, 53 Maine, 508; *Moody* v. *Brown*, 34 Maine, 107.

The plaintiff lays much stress upon the fact that the order contains the provision that it is not subject to countermand. These words add nothing to the legal force and effect of the order, for in the absence of such provision in terms the law would supply an implied provision that the order should not be countermanded except for legally sufficient reasons, and in the absence of those reasons the seller who countermanded his order would be liable for the breach of contract when called to answer in a proper action whether there were, or not, a specific provision against countermanding.

Exceptions overruled.

L. W. FALES *vs.* HARLAN WILSON AND M. L. WINSLOW.

Androscoggin. Opinion March 15, 1922.

A marginal memorandum "and interest" on a note which is in conflict with the note itself, does not constitute a variance, and such note is admissible, it having been declared upon as without interest, as in the body of the note no interest is mentioned.

In the instant case the only question is, were the words "and interest" a part of the note, a part of the contract, and included in the promise of the maker. The maker was bound by his promise. He promised to pay one hundred dollars, no more, and no less. The marginal memorandum contradicts the note, contradicts the promise to pay. Which shall govern, the deliberate, signed promise to pay, or a memorandum which may have been made by a person not a party to the note? It is the opinion of the court that the note should govern, and not the marginal memorandum or notation.

On exceptions by defendant. This is an action of assumpsit on a promissory note declared on as without interest. The admission of the note in suit when presented as evidence was objected to by defendant on the ground that it had a marginal memorandum of "and interest" on it, which constituted a variance.

The court overruled the objection and admitted the note, and defendant excepted. Exceptions overruled.

The case is stated in the opinion.

Fales & Fales, for plaintiff.

Frank T. Powers, for defendant.

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

HANSON, J. This is an action of assumpsit on a promissory note, and is before the court on exceptions by defendant, M. L. Winslow, endorser, the bankruptcy of Harland Wilson having been suggested on the record. The case was heard by the Justice of the Superior Court for the County of Androscoggin, without a jury.

The declaration is as follows: "In a plea of the case, for that the said defendants at Lewiston on the tenth day of April, A. D. 1921, by their promissory note of that date by them signed, for value received, promised the Lewiston Trust Company to pay it or order the sum of one hundred dollars two months after date at the Lewiston Trust Company, Lewiston, Maine. And the said Lewiston Trust Company thereafterwards, to wit, on the same day, endorsed and delivered the said note to the plaintiff, by reason and in consideration whereof the said defendants became liable and then and there promised the plaintiff to pay him the same sum according to the tenor of said note. And the plaintiff avers that said time of payment has long since elapsed."

The pleadings were the general issue, duly joined.

The plaintiff offered in evidence supporting said declaration a certain promissory note described as follows:

"$100.00 and interest. Lewiston, Maine, April 10, 1921. Two months after date I promise to pay to the order of Lewiston Trust Company one hundred dollars at the Lewiston Trust Company, Lewiston, Maine. Value Received. No. 20186A. Signed by Harlan Wilson, and endorsed by M. L. Winslow, waiving demand, notice and protest." Endorsed on the back of said note the following: "Jun. 22, 1921, Int. pd. to June 10, 1921." Also the following endorsement "Without recourse Lewiston Trust Company, By Geo. W. Lane, Jr., Treas."

The defendant seasonably objected to the admission of said note on the grounds that the plaintiff did not declare on a note bearing interest, and that the note offered in evidence was an interest-bearing note, which constituted a variance between the declaration and the proof. The court overruled the objection and admitted the note in evidence, and to the admission thereof the defendant seasonably excepted.

No further evidence was offered by the plaintiff or defendant.

The Justice ordered judgment for the plaintiff in the sum of one hundred ($100.00) dollars and interest from June 10, 1921, to which order the defendant excepted.

The contention of the defendant is that a note bearing interest is not admissible in a suit on a note when the declaration describes a note without interest, and urges that the note declared on is a note for one hundred dollars, while the note offered in evidence is a note

for one hundred and one dollars, and that there is a fatal variance between the declaration and the proof. This is claimed because in the upper left hand corner of the note, after the figures representing one hundred dollars,—thus $100.00, were written the words "and interest." The words are blurred as though an attempt had been made to erase with ink.

The case does not show when the words were placed on the note, or by whom written. Other marginal figures and words have been added to the face of the note, evidently for the convenience of bank officials. The only question is, were the words "and interest" a part of the note, a part of the contract, and included in the promise of the maker? We think they were not. The maker was bound by his promise. He promised to pay one hundred dollars, no more, and no less. Suppose by mistake in this same note the figures in the upper left hand corner had been $90 and interest! Could it be successfully claimed by the maker that he should pay but $90, and interest at maturity? Assuredly not. The same reasoning is good here. The marginal memorandum contradicts the note, contradicts the signed promise to pay. Which shall govern, the deliberate, signed promise to pay, or a memorandum which may have been made by a person not a party to the note? It is the opinion of the court that the note should govern, and not a marginal memorandum or notation, which is not shown to be a part of the note, and included in the actual agreement between the parties. In other words, the note once made cannot be altered without the consent of the maker.

The rule stated in *Alden* v. *Machine Company*, 107 Maine, 510, that a note is to be construed from all that appears within its four corners, does not comprehend the condition existing in the instant case. That rule has its exceptions, as when memoranda were placed outside the note proper. *Becker* v. *Hoffsommer*, 186 Ill. App., 553. As to date of maturity: *Fisk* v. *McNeal*, 23 Neb. 726; 8 Am. St. Rep. 162; *Danforth* v. *Sterman*, 145 N. W. 485; *Dark* v. *Middlebrook*, 45 S. W. 963. Memorandum of amount: *Coolbroth* v. *Purington*, 29 Maine, 469; *Sweetser* v. *French*, 13 Met., 262; See *Nat. Bank Rockiville* v. *Soc. Bank of Lafayette*, 69 Ind. 485; *Corgan* v. *Freu*, 39 Ill. 31; *Hollen* v. *Davis*, 59 Iowa, 444. And it will be found that when memoranda were admitted, they did not contradict or add to the provisions of the note, but related to the kind of money payable, the place of payment, extension of time, or change in manner of payment.

Jones v. *Fales*, 4 Mass., 252; *Tuckerman* v. *Hartwell*, 3 Maine, 147; *Franklin Savings Inst.* v. *Reed*, 125 Mass., 365; *Heywood* v. *Perrin*, 10 Pick. 228; *Cushing* v. *Field*, 70 Maine, 54. See Negotiable Inst. Law, 1917, Chap. 257, Sec. 17, and note in Crawford on Negotiable Inst. Law, Page 47.

The note in suit as between the original parties was a note for one hundred dollars, and neither the promisor, nor promisee is bound by changes by way of memoranda made without his consent.

The note was legally admissible as against the original promisor, and the defendant as indorser has no greater right than the maker of the note, and can take nothing by his exceptions.

Exceptions overruled.

STATE *vs.* OSCAR HOROWICH.

Cumberland. Opinion March 15, 1922.

It is permissible for the State in establishing the intoxicating character of liquor, on an indictment charging respondent with unlawful possession of intoxicating liquor, to admit testimony of persons who have used a part of the liquors involved in the inquiry as to its effect upon them. A sale of the liquor involved may be shown as bearing on the question of unlawful possession.

This is an indictment charging the respondent with unlawful possession of intoxicating liquor. The jury returned a verdict of guilty and the case is before the court on exceptions.

Held:

1. The State had the burden of proving that the liquor in question was intoxicating liquor. This was a question of fact for the jury. While there may be other means of establishing the intoxicating character of liquor, we think the most satisfactory testimony on the subject is that of persons who have used part of the liquors involved in the inquiry. This course was pursued in the instant case, and properly.
2. The State had the further burden of showing the respondent's possession of intoxicating liquors to be unlawful. Philip W. Wheeler, a deputy sheriff, was permitted to testify that while in respondent's store he saw the respond-

ent sell to cumtomers Florida water and witch hazel. This testimony was admissible with the other testimony in the case on the question of unlawful possession, and the intent accompanying such possession. What respondent's intention was would be fairly indicated by what he did with the liquors; what he did with the liquors may be shown by a witness who saw him dispose of them. The testimony was properly submitted to the jury.

On exceptions. The respondent was indicted for unlawful possession of intoxicating liquors, tried and found guilty, and seasonably took exceptions to the admission of certain testimony introduced at the trial. Exceptions overruled. Case remanded for execution of sentence.

The case is fully stated in the opinion.

Clement F. Robinson, and Ralph M. Ingalls, for the State.

William A. Connellan, and Max L. Pinansky, for respondent.

HANSON, J. This is an indictment charging the respondent with unlawful possession of intoxicating liquor. The jury returned a verdict of guilty and the case is before the court on exceptions.

The exceptions state that, "the respondent was the proprietor of a drug store at the corner of Oxford and Myrtle Streets in the city of Portland. On the fifteenth day of August, 1920, the Sheriff of the County of Cumberland, accompanied by some of his deputies, visited the premises. They found on the premises, in the possession of the respondent, a certain quantity of witch hazel, Florida water, Beef, Iron and Wine, and extracts. These liquids were seized by the officers, and were subsequently analyzed by a chemist, who found that the Florida water contained alcoholic contents of 50 per cent. He also found that the witch hazel contained alcoholic contents varying around 50 per cent. He also found that the Beef, Iron and Wine contained alcoholic contents varying around 40 or 50 per cent.; and also that the extract of lemon contained around 82 per cent. of alcohol.

One Edgar Williams was called on behalf of the State. He was permitted, against the objection of the respondent, to testify that subsequent to the seizure of these liquids, he was called to the Sheriff's office; that there he was given about one half a glass of the beef, iron and wine. He was permitted to testify as to the effect the liquid had upon him. He was permitted to testify that he felt it rising to his head and it made him dizzy; that this feeling came on in about

fifteen minutes; that it lasted about an hour. This testimony was offered by the State to prove that the liquid produced intoxication. To all of which the respondent seasonably objected and exceptions were seasonably taken and allowed.

The State offered the testimony of Philip W. Wheeler, a deputy sheriff, who testified that he was in the respondent's place of business on said day. He was permitted to testify, against the respondent's objection, that while in the store a customer purchased from the respondent a bottle of Florida water. He was further permitted to testify that another man came into the store and purchased from the respondent a bottle of witch hazel.

This testimony was offered by the State as evidence to support the allegations in the indictment that the respondent was guilty of unlawful possession of intoxicating liquors. The respondent seasonably objected to same and exceptions were seasonably taken and allowed.

There was other evidence in the case that would warrant the jury in finding the respondent guilty."

Notwithstanding the concluding sentence of the exceptions that "there was other evidence in the case that would warrant the jury in finding the respondent guilty," the exceptions will be considered in their order.

1. The testimony of Edgar Williams was admissible. The State had the burden of proving that the liquor in question was intoxicating liquor. This was a question of fact for the jury. While there may be other means of establishing the intoxicating character of liquor, we think the most satisfactory testimony on the subject is that of persons who have used part of the liquors involved in the inquiry. This course was pursued in the instant case, and properly. *State* v. *Intoxicating Liquors*, 118 Maine, 198, 4 A. L. R. 1128-1137; 23 Cyc. Page 267, Note 61.

2. The State had the further burden of showing the respondent's possession of intoxicating liquors to be unlawful. Philip W. Wheeler, a deputy sheriff, was permitted to testify that while in respondent's store he saw the respondent sell to customers, Florida water and witch hazel. This testimony was admissible with the other testimony in the case on the question of unlawful possession, and the intent accompanying such possession. What respondent's intention was would be fairly indicated by what he did with the liquors; what he did with the liquors may be shown by a witness who saw him

dispose of them. The testimony was properly submitted to the jury. *State* v. *O'Toole,* 118 Maine, 314; *Commonwealth* v. *Sinclair,* 138 Mass., 493.

Exceptions overruled.
Case remanded for execution of sentence.

HARRIET N. FENDERSON, Ex'x., In Equity

vs.

FRANKLIN LIGHT AND POWER COMPANY.

Franklin. Opinion March 17, 1922.

Equity practice and procedure under Equity Rule XXVIII.

On exceptions to a final decree entered by a single Justice after the Law Court has certified its decision upon an appeal or exceptions, it is

Held:

1. That such exceptions, under Equity Rule XXVIII must be taken within ten days from the filing of the decree and they must be filed in the office of the Clerk of Court in the County where the proceedings are pending, within that time.
2. That the exceptions in this case were not so filed and therefore must be dismissed as a matter of equity practice and procedure.
3. Disregarding this irregularity the plaintiff could take nothing by these exceptions. The only question to be determined by the court under this rule at this stage of the proceedings is whether the decree in form accords with the decision and certificate of the Law Court. If so it is sufficient. The merits of the controversy are no longer open.
4. The final decree in this case follows the mandate of the Law Court without attempting to modify, limit or enlarge it and therefore is unobjectionable.

On exceptions. This is a bill in equity brought under the minority stockholders act, R. S., Chap. 51, Sec. 60 et seq., by plaintiff as a minority stockholder to secure an appraisal of stock standing in the

name of A. L. Fenderson. A hearing was had and the Justice sitting filed his final decree sustaining the bill. The case then went to the Law Court upon appeal and also upon exceptions. By the Law Court the appeal was dismissed but exceptions sustained. A decree was signed and entered by a single Justice in accordance with the certificate and opinion of the Law Court, and plaintiff excepted. Exceptions dismissed with treble costs.

Case is stated in the opinion.

McLean, Fogg & Southard, for plaintiff.

Frank W. Butler, for defendant.

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

CORNISH, C. J. This bill in equity brought under the minority stockholders act, R. S. Chap. 51, Sec. 60 et seq., was duly heard by a sitting Justice who filed his final decree therein, dated June 21, 1920, sustaining the bill. The cause was then carried to the Law Court upon appeal and also upon exceptions to the ruling of the court overruling a motion to dismiss the bill. The decision of the Law Court was rendered on April 16, 1921, dismissing the appeal, but sustaining the exceptions. *Fenderson* v. *Franklin Light and Power Co.,* 120 Maine, 231. The mandate from the Law Court is as follows: "Appeal dismissed. Exceptions sustained. Decree below annulled. New decree to be executed in accordance with this opinion."

On December 15, 1921, a decree was signed and entered by a single Justice in accordance with the certificate and opinion of the Law Court as provided in R. S., Chap. 82, Sec. 22. This decree recited at length the various steps in the procedure, including the mandate of the Law Court, and concludes: "It is therefore in accordance with the said decision of said Law Court, ordered, adjudged and decreed as follows: Bill dismissed, but without costs to either party."

Under Equity Rule XXVIII "When the Law Court has certified its decision upon an appeal or exceptions from a final decree and a decree has been entered therein in accordance with the certificate and opinion of the Law Court, a party aggrieved by the form of such last named decree may within ten days take exceptions thereto. Such exceptions and the record connected therewith, including a copy of the opinion of the Court, shall be transmitted to the Chief

Justice and be argued in writing on both sides within thirty days thereafter, and they shall be considered and decided by the Justices as soon as may be. If the decision is adverse to the excepting party treble costs may be allowed to the prevailing party."

As a matter of practice and procedure these exceptions are not properly before the court. The rule just quoted requires that they must be taken within ten days from the filing of the decree, that means that they must be filed in the office of the Clerk of Court within ten days. There is no other place where the docket record can be kept so as to show whether the ten-day limitation has been complied with or not. There is no minute or certificate by the Clerk on the exceptions presented to the Law Court showing that they have ever been filed in the Clerk's office. Moreover, the equity docket of Franklin County in this case showed no filing of exceptions up to December 28, 1921. The last entry was: "December 15, A. D. 1921, final decree filed and notice given to McLean, Fogg and Southard." It is only after the exceptions have been filed that they "and the record connected therewith," that is the docket entry showing the filing and the date thereof, can be properly transmitted to the Chief Justice. They are to be transmitted by the clerk after filing, not by counsel without filing.

Therefore these exceptions should be dismissed as irregularly before us.

But it should be added that, disregarding that irregularity, the plaintiff could take nothing by these exceptions. The only question to be determined by the court under this rule and at this stage of the proceedings is the form of the decree. Is its form in accordance with the decision and certificate of the Law Court? Does it effectuate the mandate? If so, it is sufficient. The merits of the controversy and all previous questions are no longer open. The mandate of the Law Court was that the bill be dismissed without costs to either party. That, too, is the language of the decree. The one follows the other. True, the decree also recites the prior steps and to some extent the contentions, but that was unnecessary. It can be regarded as surplusage. It does not affect the force of the final word of dismissal. There is no affirmative relief granted, but a denial of relief. The cause is ended. The decree follows the mandate without

attempting to modify or limit or enlarge it, and therefore is unobjectionable. *Whitney* v. *Johnston*, 99 Maine, 220; *Farnsworth* v. *Whiting*, 106 Maine, 543.

Exceptions dismissed with treble costs.

GEORGE A. WARDWELL'S CASE.

Knox. Opinion March 25, 1922.

Workmen's Compensation Act. Sec. 17, Chap. 238, Public Laws, 1919, provides that notice of accident must be given to employer within thirty days, but Section 20, provides that proceedings not barred if failure to give notice is due to "accident, mistake or unforeseen cause." Unforeseen cause in this connection may be construed generally as one which could not have been reasonably foreseen as likely to arise or occur and yet is of such a nature as to have substantially interfered with the giving of the notice.

Sec. 20, Chap. 238, Public Laws, 1919, which provides that proceedings for compensation are not barred by failure to give notice of the accident within thirty days, if such failure is due to accident, mistake or unforeseen cause, is for the purpose of protecting the legal rights of parties in meritorious cases when the facts warrant it.

An unforeseen cause in general is one which could not have been reasonably foreseen as likely to arise or occur and yet is of such a nature as to have substantially interfered with the giving of the notice.

The facts in this case bring it within this definition and afford a reason for not giving the notice until twenty days after the expiration of the thirty-day limitation.

On appeal by defendant. The claimant on the 17th day of February, 1921, while in the employ of the Camden Anchor-Rockland Machine Company, as a moulder, received a personal injury alleged as arising out of and in the course of his employment, by receiving on his left knee a blow from a sledge hammer which he was using in dumping out a flask, and as a result of the injury an abscess formed, and claimant claimed that the attack of pneumonia which followed

was caused by the injury and the abscess. The notice of the accident to the employer to be given within thirty days from date of accident required under Sec. 17, Chap. 238, Public Laws 1919, was not given within that time. Twenty days after the expiration of the thirty days a notice was given. Claimant claimed that by reason of his condition and the circumstances of his case, he was not required to give the notice within the thirty days, but Section 20 of said chapter would apply to his case, which provides that proceedings for compensation are not barred by failure to give such notice within thirty days, if such failure to give such notice was due to accident, mistake or unforeseen cause. The chairman of the commission held that claimant's case came within the provisions of said Section 20, and granted compensation, and defendants appealed. Appeal dismissed with costs. Decree of sitting Justice affirmed.

The case is fully stated in the opinion.

Edward C. Payson, for petitioner.

Andrews, Nelson & Gardiner, for respondents.

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

CORNISH, C. J. Appeal from the decision of the Chairman of the Industrial Accident Commission awarding the claimant compensation. The principal contention of the respondents is that written notice of the accident as required by the Workmen's Compensation Act, Public Laws 1919, Chap. 238, Secs. 17 to 20, was not given to the employer within the required time, and therefore these proceedings for compensation cannot be maintained.

Section 17 provides: "No proceedings for compensation for an injury under this act shall be maintained unless a notice of the accident shall have been given to the employer within thirty days after the happening thereof." The accident in this case happened on February 17, 1921. The written notice to the employer was given on April 8, 1921, twenty days after the expiration of the statutory period. This is admitted. But Section 20 provides among other things: "Want of notice shall not be a bar to proceedings under this act, if it be shown that the employer or his agent had knowledge of the injury, or that failure to give such notice was due to accident, mistake or unforeseen cause." It is not shown that the employer or its agent had knowledge of the injury, apart from this notice of April 8, and

therefore the contention is narrowed to this, whether under the facts of this case the failure to give the notice was due to "accident, mistake or unforeseen cause."

The facts connected with the accident and the events subsequent thereto may be summarized as follows: On Thursday, February 17, the claimant while in the employ of the Camden Anchor-Rockland Machine Company struck his left knee with a sledge hammer weighing between six and ten pounds, while "dumping out a flask," a mechanical process in the foundry. The blow caused a discloration and a slight abrasion of the skin but the injury was not regarded by him as serious. He continued at work on Friday, on Saturday forenoon and on Monday, during which time he was suffering some pain and was treating the knee when at home with liniment. On Monday, although still at work, he felt sick in other ways, as he expresses it, and on reaching home that night went at once to bed. On Tuesday morning, February 22d, Dr. Bartlett, the family physician, was called. Pneumonia soon developed and on the following Sunday, February 27, Mr. Wardwell became delirious. His illness progressed and after a consultation of physicians he was taken on March second to Dr. Silsby's hospital. The next day he was examined by Dr. Crockett who was called by Dr. Bartlett in consultation. He was still suffering from pneumonia, had a high fever, rapid pulse, was spitting blood and was unconscious. In addition, Dr. Crockett found that his left knee was infected and a large abscess was forming. Two days later the abscess was lanced by Dr. Silsby and not less than ten ounces of pus removed. His convalescence was slow, and he was not removed from the hospital to his home until April 4th. Three days later, on April 7, the claimant's wife notified the manager of the employer corporation by telephone of the injury to her husband's knee and on April 8th gave him written notice of the same accompanied by statements of Dr. Bartlett, the attending physician, and of Dr. Silsby in whose hospital he had been treated. At the time of the hearing before the Chairman of the Industrial Commission on July 21st he was still incapacitated from labor.

From the foregoing evidence the chairman very properly found that the claimant received a personal injury by accident arising out of and in the course of his employment, and no objection to this is now taken by the defendants. He further found on the question of notice as follows: "In view of the physical condition of Mr. Ward-

well following the attack of pneumonia and continued by reason of the serious condition of the abscess from March 1st for many days, it is found that seasonable knowledge of the injury was properly communicated to the employer." This evidently refers to the last sentence in Section 20 of the Workmen's Compensation Act, and in effect the decision holds that the failure to give the written notice within thirty days was due to accident, mistake or unforeseen cause. In that sense the chairman held that notice was seasonably filed.

In case of controverted facts which would tend to excuse a failure to notify within thirty days, it is the province of the chairman to determine those facts like any other issue of fact before him and his finding is final provided there is some competent evidence to support it. *Westman's Case,* 118 Maine, 133; *Mailman's Case,* 118 Maine, 172. But upon facts undisputed, or upon facts found by the chairman in compliance with this rule, the question whether the written notice has been given to the employer within the time allowed by the Legislature is one of law. It is similar to the question of reasonable time within which the right of rescission of a contract may be exercised. *Hotchkiss* v. *Bon Air Coal Co.,* 108 Maine, 34; *Getchell* v. *Kirkby,* 113 Maine, 91, 94; *Dutch* v. *Gamage,* 120 Maine, 305, 309. The finding of facts by the chairman on this branch of the case is therefore conclusive, but his ruling of law thereon is subject to review. In this case his conclusion of law should also be upheld.

The Legislature inserted this provision as to excuse for failure to comply with the strict thirty-day limit with a definite purpose, and that purpose was the protection of the legal rights of the parties in meritorious cases when the facts should warrant it. It employed comprehensive and elastic terms to accomplish that purpose, and to enable the court to grant relief from hardship or misfortune. "Accident, mistake or unforeseen cause" cover a wide range, especially the words "unforeseen cause," which are confidently invoked here by the claimant. An unforeseen cause in this connection may be defined in general as one which could not have been reasonably foreseen as likely to arise or occur and yet is of such a nature as to have substantially interfered with the giving of the notice. That definition fits here. The claimant's injury at first seemed to him comparatively insignificant. He did not even speak to his fellow workmen about it. He continued his work for two or three days. Then unexpected complications arose. Pneumonia at first set in and later an ugly abscess

developed, with the consequent suffering, weakness and natural inability or disinclination to give thought to business matters, all of which certainly bring the situation within the purview of the term unforeseen cause. In his petition the claimant alleges that he gave notice as soon as he was able to do so, that is, as soon as he was reasonably able to do so. Other things were upon his mind. The thirty days expired on March 19, right in the midst of his stay in the hospital. Was the door then shut against him? If not, when was it afterward closed, as he did not leave the hospital until April 4, and within four days thereafter sent the written notice? The relief clause was enacted to meet just such a case as this. It is a remedial provision and it is the duty of the court to apply it in a broad and reasonable way to the facts of each case that may call for its consideration. No more definite rule can be laid down. The decision must be left to the sound judgment and wise discretion of the court in each instance.

The Industrial Accident Commission, as we have had occasion to remark before, is a creature of the statute. No jurisdiction is conferred except as the statute confers it. *Maguire's Case*, 120 Maine, 398; *Conner's Case*, 121 Maine, 37. Explicit limitations must be observed. *Lemelin's Case*, 121 Maine, 72. When, however, the granted powers are discretionary within reasonable limits, as in the section under consideration, then the provision of Section 37, that in interpreting the act a liberal construction shall be given with a view to carrying out its general purpose, applies with full force.

The Workmen's Compensation Act of Rhode Island employs precisely the same language as to justifiable excuse for delay in giving notice, "accident, mistake or unforeseen cause." The Supreme Court of that State has had occasion to interpret and apply the words "unforeseen cause" in a recent case involving facts quite similar to these at bar. If a precedent were needed the exhaustive opinion in that case furnishes an admirable one. *Donahue* v. *Sherman's Sons Co.*, 39 R. I., 373.

Appeal dismissed with costs.
Decree of sitting Justice affirmed.

GEORGE A. MACHATTON *vs.* ALEXES DUFRESNE.

Sagadahoc. Opinion March 27, 1922.

If the purchaser of coal neglects to request the seller to have the coal weighed by a sworn weigher at the time the coal is sold and delivered he waives his right to have it weighed, and the price of the coal may be collected.

In the absence of a request by the purchaser for coal to be weighed by a sworn weigher made at or before the time the coal is sold and delivered, the seller may collect his bill for the price of coal shown to be sold and delivered.

The failure to so seasonably make request for weight by a sworn weigher, is a waiver by the buyer of his right to have the coal so weighed.

On exceptions by defendant. This is an action of assumpsit upon account annexed to recover the price of certain coal sold and delivered by the plaintiff to defendant. Defendant pleaded the general issue, and under a brief statement alleged that plaintiff was not entitled to recover inasmuch as he had not had the coal weighed by a sworn weigher as provided in the R. S., Chap. 46, Secs. 11 and 12; also Public Laws 1919, Chap. 74, Sec. 3. It was admitted that the purchaser did not request the plaintiff to have the coal weighed and a certificate of weight given to him until long after the delivery of the coal. After the close of the testimony the presiding Justice ordered judgment to be entered for the plaintiff for the amount sued for, and the defendant excepted.

Exceptions overruled.

The case is stated in the opinion.

J. H. Rousseau for plaintiff.

Clarence E. Sawyer, and Walter S. Glidden for defendant.

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

PHILBROOK, J. This is an action of assumpsit upon an account annexed to recover the price of coal sold and delivered by the plain-

tiff to the defendant. After hearing the evidence and the legal contentions of the parties the presiding Justice ordered judgment to be entered for the plaintiff for the amount sued for, with costs of court. To this ruling the defendant filed exceptions which were duly allowed and the case is before us upon those exceptions.

It is conceded that coal was sold and delivered as above stated. The parties do not agree upon the exact weight of the coal. It appears that the plaintiff weighed the coal but that he was not a sworn weigher. The defendant admitted that no weigh bill was demanded when the coal was delivered, but testified that subsequent to the delivery of the last of the coal he requested a weigh bill which was not furnished by the plaintiff. This request was denied by the plaintiff. According to the defendant's own testimony the last coal was bought on the eleventh of February and a weigh bill was not demanded until some time in March, at which time the coal had been consumed. The plaintiff's brief says "The difficulty between the parties arises from the fact that the coal, although sold by weight and having been weighed by the plaintiff, he, the plaintiff, was not then a sworn weigher, and no certificate of weight was delivered to the defendant." The defendant's brief says "the real issue is one of statutory construction."

The statutes which the parties desire to have interpreted, so far as they affect this case, are R. S., Chap. 46, Secs. 11 and 12, and Public Laws 1919, Chap. 74, Sec. 3.

R. S., Chap. 46, Sec. 11, as it appears in the revision of 1916, reads "the municipal officers of towns shall annually appoint weighers of such coal, who shall receive such fees as said officers may establish, to be paid by the buyer." Public Laws 1919, Chap. 74, Sec. 3, amended said Section 11 by striking out all of said section and inserting in place thereof the following: "The municipal officers shall annually appoint weighers of coal. Weighers must give slips either in writing or printing to every purchaser of coal when not in bags or packages showing the gross, tare and net weight for each and every load so delivered. For each violation of this act there shall be a fine of not less than ten nor more than twenty dollars." Plainly the only effect of the amendment upon Section 11 was to relieve the buyer from paying the weigher's fees, and making the failure on the part of the sworn weigher to give the buyer a weigh bill, when coal was thus weighed, a misdemeanor punishable by a small

fine. The seller is not penalized by this amendment nor is he forbidden thereby to sell coal unless weighed by a sworn weigher.

Sec. 12, of R. S., Chap. 46, read before the amendment of Section 11, and still reads thus: "Unless coal is sold by the cargo, the seller shall, on request of the purchaser, cause it to be weighed by a sworn weigher, who shall make a certificate of the weight; and he shall deliver such certificate to the buyer before commencing a suit against him for the price of such coal." The defendant claims that since Secs. 11 and 12 of R. S., Chap. 46 relate to the same subject matter an amendment to one section in terms must carry an implied amendment to the other. In other words he claims, since failure on the part of the sworn surveyor to furnish a weigh bill to the buyer is made a misdemeanor, that it must follow in every case, except sales by cargo, that any sale of coal by weight is forbidden, unless weighed by a sworn weigher, under the doctrine that where a statute imposes a penalty for a failure to comply with its provisions it shall be construed as prohibitive, and that contracts made in direct contravention of its requirements are unlawful and void. We agree with the principle contained in the doctrine but cannot concede that the doctrine applies to the case at bar. These statutory restraints upon the sale of coal are in derogation of the common law, and it is too well settled to need the citation of authorities that such statutes are to be strictly construed.

We cannot discover anything in the act of 1919 which amends, alters or repeals Sec. 12 of R. S., Chap. 46. That section, designed to protect the public, affords ample protection by declaring that "on request of the purchaser" the seller of coal shall cause it to be weighed by a sworn surveyor, who shall make a certificate of the weight, and the seller must deliver this certificate to the purchaser before commencing suit for the price of the coal. As we have already said, Sec. 11 of R. S., Chap. 46, as amended, does not deny the right to sell coal by weight unless weighed by a sworn surveyor, nor does Section 12 deny that right. Indeed, by plain implication such sales may be made because it is only "on request of the purchaser" that the services of a sworn weigher are required. When the purchaser of coal has confidence in the integrity of the seller, and buys without calling for the services of a sworn surveyor, we cannot see how such sale is illegal any more than the purchase of sugar or tea would be. On the other hand when the purchaser of

coal, for any reason, desires that the coal which he is buying shall be weighed by a sworn weigher he has only the necessity of demanding such weight, and by so doing he has all necessary protection and the seller, should he refuse or neglect to comply with his customer's demand, brings down upon his own head the disability to collect his coal bill. But reason and common sense would compel the purchaser to request the sworn weight before, or at the time, the coal is purchased. To buy and consume the coal, and then demand sworn weight, would be little less than an absurdity. To purchase the coal without seasonably requesting sworn weight would be the voluntary relinquishment of a known right, benefit or advantage, and which, except for such waiver, the party otherwise would have enjoyed. In other words, waiting until the coal is consumed before asking for sworn weight would be a waiver of the right to have such weight. The defendant says there can be no waiver in such case because the amendment of 1919 has penalized a sworn surveyor for not giving the purchaser of coal a certificate of weight. But the purchaser is not waiving the duty of the delivery of a weigh bill by a sworn weigher, he is waiving the right to have a sworn weigher weigh the coal when it is bought. The two things are entirely different.

We should not overlook defendant's reliance upon *Smith* v. *Campbell*, 68 Maine, 268, a Per Curiam opinion which holds that R. S., Chap. 41, Sec. 13, providing that the seller of coal shall not maintain a suit for the price thereof unless he has caused the same to be weighed by a sworn weigher and a certificate of the weight delivered to the buyer, is not complied with when the weigher is either the owner of the coal or sells it on commission. That opinion was announced in 1878 when the statute provided "unless the parties otherwise agree, or the coal is sold by the cargo, the seller shall cause the same to be weighed by a sworn weigher, who shall make a certificate of the weight thereof; and the seller shall not maintain a suit for the price of such coal unless he had delivered such certificate to the buyer before its commencement." Under the same statute was decided the case *James* v. *Josselyn*, 65 Maine, 138, in 1876, where it did not appear in evidence that the parties did "otherwise agree" and the court said "We cannot be expected to aid in thus nullifying a statute of this state." But immediately after the decision was announced in *Smith* v. *Campbell*, supra, the legislature

amended the statute by enacting Public Laws 1879, Chap. 142, which provided "unless the coal is sold by the cargo, the seller shall, on request of the purchaser, cause the same to be weighed by a sworn weigher, who shall make a certificate of the weight thereof; and the seller shall not maintain a suit for the price of such coal unless he had delivered such certificate to the buyer before its commencement." With slight verbal changes only, the act of 1879 still prevails and has become Section 12 of Chapter 46 of the revision of R. S. 1916. This amendment of 1879 made such a radical change in the then existing statute that *Smith* v. *Campbell*, supra, and *James* v. *Josselyn*; supra, have no application to the present statute.

We hold (1) that in the absence of a request by the purchaser for coal to be weighed by a sworn weigher, the seller may collect his bill for the price of coal shown to be sold and delivered; (2) that such request must be made at or before the time the coal is sold and delivered; (3) that failure to so seasonably make request for sworn weight is a waiver by the buyer of his right to have his coal so weighed.

Exceptions overruled.

ROY N. L. BROWN *vs.* LEVI G. DUREPO.

Aroostook. Opinion March 29, 1922.

A wife in order to be entitled to the credit of her husband even for necessaries must be justified in leaving a home the husband provided for her. Yet in obtaining goods if she does not exercise that right, but obtains them on her own credit, the husband is not liable. If husband and wife are living apart through some fault of the husband, there is a presumption in case of necessaries that she pledged the husband's credit, and not her own, unless the husband has otherwise made reasonable provisions for her support, even though the goods be charged to her, unless by her express direction.

In order to take with her the credit of her husband even for "necessaries" the wife must be justified in leaving the home the husband provided for her.

Not only must she take with her the right, but in case of obtaining credit, she must exercise that right. If it was her intent to obtain the goods on her own credit, it will not render the husband liable.

Where husband and wife are living apart through some fault of the husband, the presumption is in case of "necessaries," unless it be shown that the husband has otherwise made reasonable provisions for her support, that she has pledged the husband's credit, and not her own; and even though the goods be charged to her, unless by her express direction, still the husband will be liable and she, not.

Where, however, husband and wife are living apart even though through the fault of the husband, but the wife in the purchase of "necessaries" on credit expressly directs that the goods be charged to herself and pays money on account, and the tradesman not only charges them to her on his books, but admits that he gave the credit to her and not to the husband, the presumption that they were bought on the husband's credit is overcome and no recovery can be had of the husband.

On motion by defendant for a new trial. This is an action upon an account annexed to recover for merchandise sold and delivered by the plaintiff to the defendant's wife. The defendant, at the age of nineteen years, was married July 17, 1918, and his wife was seventeen years of age. A few days after his marriage the defendant with his

wife went to live with his aunt, his father being dead. In September following he enlisted in the service of the United States and on leaving home to enter upon such service he made arrangements for his wife to remain at his aunt's home with the understanding that she was to have a home there and receive for assisting in the housework, her board, clothing and five dollars per week in cash. About a week after the husband left home his wife left his aunt's home and went to live with her sister in Caribou. The merchandise included in the account annexed was purchased by defendant's wife of plaintiff after she went to live with her sister. Plaintiff contended that the circumstances were such as to justify the wife in leaving the home which her husband had provided for her at his aunt's home, and defendant contended that she was not justified in leaving such home, and furthermore claimed that he was not liable for the reason that the goods were sold and delivered upon the credit of the wife. The case was tried to a jury and a verdict of sixty-eight dollars and eighty-four cents was returned for plaintiff, and defendant filed a general motion for a new trial. Motion sustained.

The case is fully stated in the opinion.

O. L. Keyes, for plaintiff.

Powers & Guild, for defendant.

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

WILSON, J. An action of assumpsit to recover for certain merchandise consisting of wearing apparel and material therefor delivered by the plaintiff to the defendant's wife. The jury found for the plaintiff, and the case comes before this court on the defendant's motion for a new trial on the usual grounds.

The defendant was married in July, 1918, and two weeks thereafter went with his wife to live with his aunt with whom he and his orphaned brother and sister had made their home prior to his marriage.

The defendant became of draft age and subject to the draft of 1918 and by arrangement with the proper officials he enlisted and was transferred to the Students Army Training Corps at Tufts College. He left home to take up this work September 13th, 1918, leaving his wife at his aunt's with the understanding that she was to remain there and have a home and receive for assisting in the housework her board, clothing and the sum of five dollars per week. Later she

received from the government the regular allotment for her husband's pay, viz.: fifteen dollars per month.

At the end of a week after his departure, dissatisfied, as she says, with her treatment, but without notifying her husband, she left the aunt's and went to her sister's home in another town to live. The first of the goods sued for in this action were purchased by her within a few days after leaving the home her husband had provided.

The jury under instructions of the court to which no exceptions were taken must have found that the defendant's wife was warranted in leaving the home he had provided for her during his absence. Otherwise she would not take with her the right to pledge his credit even for necessaries. *Steinfield* v. *Girrard*, 103 Maine, 151. The jury must also have found that it was her intent when she purchased the goods to obtain them on his credit and not on her own.

We have grave doubts as to whether there is sufficient evidence in favor of the plaintiff on the first point on which the verdict may rest. The period during which this liability was incurred was one requiring great personal sacrifices not only by the husbands who were called to service, but by the wives who were left at home. The defendant's wife when she married knew his financial condition and his family relations and that his country might at any time demand his services, in which case the amount she would receive from his pay would be small. The arrangements for her support made by the husband when he left appear to have been suitable and adequate.

The seemingly slight differences between her and the aunt, and the slurs and insults, which may have been more imagined than real and born of a desire on her part to be free of the restraint she felt in the new home and under the new responsibilities, were, even if her testimony be taken at its full value, insufficient we think to justify her leaving the home the husband had provided without notifying him. But even if a verdict founded upon the testimony on this branch of the case were not so manifestly wrong as to justify this court in interfering, and she must be held to have taken with her the right to pledge her husband's credit, it is clear from her testimony and that of the plaintiff that she did not undertake to exercise that right when she purchased the goods sued for, but purchased them on her own credit, which under the statutes of this State she had a right to do. *Yates* v. *Lurvey*, 65 Maine, 221; R. S., Chap. 66, Sec. 4.

It is true that at common law the wife, while living with the husband, in purchasing of tradesmen in the ordinary course for family use is presumed to be acting as the agent of her husband, and even though the tradesman charged the goods so purchased to her, it would not render her liable or relieve her husband of liability. *Emmett* v. *Norton*, 8 Car & P., 506; *Furlong* v. *Hysom*, 35 Maine, 332; *Baker* v. *Carter*, 83 Maine, 132. And even where they are living apart through some fault of the husband, the presumption still is in the case of the purchase on credit of "necessaries," unless it be shown that the husband has otherwise made reasonable provisions for her support, that she has pledged the husband's credit and not her own, and even though the goods be charged to her, unless by her express direction, still the husband would be liable and she, not. *Beaudette* v. *Martin*, 113 Maine, 310.

There must, however, be the intent on her part at the time of the purchase to pledge the husband's credit. If arising merely from the presumption by reason of their marital relations, it, of course, may be overcome. The statutes of this state long since have permitted her to contract and purchase upon her own credit, and whenever it appears she has done so, she, and not the husband, is liable. Williston on Contracts, Vol. 1, Sec. 270, Page 520; *Hirshfield* v. *Waldron*, 83 Mich., 116; *In re DeSpelders Est.*, 181 Mich., 153; *Hill* v. *Goodrich*, 46 N. H., 41; *Caldwell* v. *Blanchard*, 191 Mass., 489.

In the case at bar the plaintiff not only charged the goods to the wife on his books, though this may not be controlling, *Beaudette* v. *Martin*, supra, but he frankly admits he gave the credit to her. The wife on her part does not pretend that at the time of purchase she disclosed or had any intention of pledging her husband's credit, on the contrary she admits that she directed them to be charged to herself and at the time paid a sum on account thereof. There is not the slightest evidence that she then considered herself the agent of her husband and was purchasing "necessaries" on his account, but on the contrary the evidence clearly establishes, we think, that she purchased on her own credit.

Why she afterward instructed the plaintiff to look to her husband does not clearly appear, though from the evidence it, perhaps, may be fairly inferred that in the meantime some friction had arisen over her leaving the aunt's and going to live with her sister, due in part at least, to alleged attentions paid to her by a brother of her sister's husband.

We think the jury clearly erred in finding upon the evidence that the goods sued for were purchased on the credit of the husband. The motion must therefore be sustained.

Entry will be:

Motion sustained.

E. W. JUDKINS *vs.* R. M. CHASE.

E. W. JUDKINS *vs.* H. F. JONES.

E. W. JUDKINS *vs.* H. L. ABBOTT.

Piscataquis. Opinion April 4, 1922.

In an action on a note if the plaintiff "is not a bona fide holder for value" all defenses may be raised that could be made as between the original parties. Total failure of consideration may be shown under the general issue, but partial failure must be specially pleaded. Fraud is never presumed, but must be clearly proved, and whether it exists or not is an issue of fact, and vitiates a contract whatever its language, and no contractual limitation of remedy can oust the courts of jurisdiction. The issue of fraud should be submitted to the jury unless it is proved so clear and manifest as to justify the court in deciding that it is established as a matter of law.

An allegation of fraud presents an issue of fact to be submitted to a jury unless fraud is so clearly proved that honest and fair-minded men can only reach one conclusion, so manifest that a jury verdict negativing fraud would be set aside.

Total failure of consideration need not be specially pleaded. It traverses an essential allegation in the declaration. But partial failure depends upon a different principle. It is allowed to avoid circuity of action. It must be specially pleaded. Therefore, warranty as a defense requires a special plea.

On exceptions and motion for new trial by plaintiff. These are actions of assumpsit founded upon joint and several notes signed by defendants and five others, on which defendants were sued severally by the endorsee, the notes being for $900 each, dated August

7, 1918, one payable in one year and the other in two years, each bearing an indorsement of $200. The notes were given in payment of the purchase price of a Percheron Norman stallion bought of one R. I. James, the payee of the notes, who endorsed the notes before maturity to the plaintiff. The defendant pleaded the general issue, and for a brief statement of special matter of defense alleged; that the consideration for the notes had wholly failed, and that the plaintiff was chargeable with notice of such failure of consideration and was not a bona fide holder for value without notice; that there was fraud and misrepresentation in the procurement of the notes, of which the plaintiff had knowledge which avoided them. At the conclusion of the evidence the presiding Justice submitted to the jury two interrogatories, and upon receiving the answers thereto, directed a general verdict for the defendant, and plaintiff excepted, and also filed a general motion for a new trial. Motion sustained. New trial granted.

The case is fully stated in the opinion.

C. W. & H. M. Hayes for plaintiff.

Harry Manser for defendants.

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

MORRILL, WILSON, JJ., concur in result.

DEASY, J. Eight men associated under the name "Percheron Breeders Society of Maine" bought a stallion of one R. I. James making payment by two joint and several promissory notes for nine hundred dollars each signed by all the purchasers. The payee indorsed and transferred the notes before maturity to E. W. Judkins the plaintiff. The three suits now under consideration are brought on these notes, against three of the makers.

The plea in each case is the general issue with a brief statement that the plaintiff "is not a bona fide holder for value" and also setting up total failure of consideration and fraud.

The jury by special verdict found that the plaintiff was not a bona fide holder for value. This finding was abundantly justified. The suits, therefore, are open to all defenses that could be made as between the original parties.

Besides the special interrogatory above referred to, the jury were required to answer this question—"What was the difference if any between the market value of the stallion at the time of the sale and his market value if he had been in the condition guaranteed by Mr. James?" To this question the jury answered "Fifteen hundred dollars."

No other issue was submitted to the jury.

Upon receiving the answers to the two special interrogatories (it appearing that $400 had previously been endorsed on the notes) the presiding Justice directed a general verdict for the defendant. The plaintiff excepted. He also filed a motion for a new trial.

The directed verdict cannot be sustained on the ground of total failure of consideration. The defendants received title to and possession of a stallion. Their own testimony shows that the animal had a value of two hundred dollars. This was an inadequate consideration. But inadequacy is not failure of consideration. *Furber* v. *Fogler*, 97 Maine, 588.

The defenses of total failure and partial failure of consideration depend upon different principles.

The defendant who pleads total failure denies the consideration. His defense traverses an essential allegation in the declaration. It may, therefore, be shown under the general issue. *McCormick* v. *Sawyer*, 108 Maine, 407. But the defense of partial failure admits the contract. Its purpose is the avoidance of circuity of action. Its effect is the reduction of damages. *Hathorn* v. *Wheelwright*, 99 Maine, 354. Breach of warranty creates such partial failure. It, however, must be specially pleaded. This is true at common law. *McCormick* v. *Sawyer*, 108 Maine, 408. It is equally true under the Negotiable Instruments Act. *Indiana Flooring Co.* v. *Rudnisk*, 236 Mass., 92.

In these cases the defendants pleaded fraud, but we do not understand that a warranty is claimed. At all events it is not pleaded.

If the general verdict for the defendant was properly directed and rendered it was because of fraud. But whether fraud exists or not is an issue of fact. Fraud is never presumed. It must be clearly proved. *Grant* v. *Ward*, 64 Maine, 240; *Frost* v. *Walls*, 93 Maine, 412.

True, if fraud is so clearly proved that honest and fair-minded men could not reach a different conclusion; so manifest that a jury

ver dict negativing it would be set aside, then in such case it would be proper for and would be the duty of the court to direct a verdict. *Johnson* v. *Railroad Co.*, 111 Maine, 265. *Lindsey* v. *Spear*, 112 Maine, 233.

In the last analysis, therefore, the decision of these cases depends upon the answer to the question as to whether verdicts for the plaintiff would be set aside as manifestly erroneous.

Upon delivery of the stallion a written contract was signed and delivered by the parties. It granted to the Percheron Breeders Society of Maine "the following described stallion to wit: Charles pure bred stallion No. 117812 color black steel gray." The conditions of the contract are thus fairly summarized in the defendants' brief.

"It acknowledged receipt by the vendor of the sum of $1800. It provided that if the stallion in good health and with proper usage did not get with foal 50 per cent of mares regularly tried and bred to him between the first day of May and the first day of July, 191 , then upon return of the stallion during the first week in April next following, sound and in good health and condition, to the vendor at Foxcroft, Maine, then the stallion would be exchanged for one of equal quality as the stallion sold. The purchasers by the contract, as a condition precedent to the right of return were required to keep a tally sheet of the same form as that attached and send same to vendor at Foxcroft by registered mail not later than July 15, A. D. 191 ."

The contract was signed by R. I. James. Incorporated as a part of it was an agreement signed by all the purchasers reading thus:

"This foregoing Bill of Sale contains all the representations and all the terms of agreement of the purchase of the above named stallion. We hereby acknowledge having purchased the said stallion on the representation and on the terms herein set forth, and no other."

The evidence shows that the stallion sold, served, after such sale, fourteen mares, and that none of them were gotten with foal except one whose foal was born dead. The evidence also tends to prove that the stallion was worth about $200.

No misrepresentation of any specific fact is shown. The contract describes the stallion as pure bred. This is not disputed.

If there is a representation that the stallion would get with foal fifty per cent. of mares served, this is a promise to be performed in the future, which promise cannot be made the basis of an action for or claim of fraudulent misrepresentation. *Carter* v. *Orne,* 112 Maine, 367; *Lembeck* v. *Gerken,* 86 N. J. L. 111 90 At. 698; *Dawe* v. *Morris,* 149 Mass., 188; *Pile* v. *Bright,* 156 Mo. Ap., 301; 137 S. W., 1017; *Commonwealth Co.* v. *Barrington,* (Tex.), 180 S. W., 936.

The written contract ingeniously avoids specific representations. No oral representations are proved. Yet the whole transaction is questionable. Its very adroitness arouses suspicion. It subjects the purchasers to burdensome conditions. While literal construction was perhaps not contemplated such construction would limit the buyers' remedy to an exchange of a practically worthless stallion for another equally worthless. Fraud vitiates a contract whatever its language. If fraud is clearly proved no contractual limitation of remedy can oust the courts of jurisdiction.

Assuming that there is sufficient evidence of fraud to support a jury verdict for the defendant, is fraud so clear and manifest as to justify taking the case from the jury and deciding as a matter of law that fraud is established? If a jury seeing and hearing the parties should believe and determine that the contract was entered into in good faith by all parties, would such verdict necessarily be set aside? Is the written contract necessarily fraudulent in the absence of any testimony of fraudulent knowledge or intent except as found within it?

These questions we have to answer in the negative. Whether or not the transaction was fraudulent should be determined by a jury.

Motion sustained.
New trial granted.

Dissenting note, SPEAR, J.

Concurring, HANSON, J.

I concede that the report in this case presents a very close question, and I publish my note not so much as a dissent, as to furnish an analysis of the contract for the information of the public of the kind and nature of the schemes resorted to for the purpose of deceiving and defrauding the people.

In this case the stallion was bought for breeding purposes. The terms of the contract imply what the vendor well knew that he might fail in this regard. The vendees also knew it, and, as ordinary prudent men, would never have paid the large sum they did, without what they consider a guarantee, that in some way, they would receive full consideration for the money paid. The contract accordingly was a trick in phraseology devised and employed for the purpose of obtaining their money for a breeding stallion, and to avoid in the end responsibility for not furnishing one. The legal effect of the contract was to avoid the form of a direct guarantee, and at the same time allay suspicion of this real purpose, by the use of studied phraseology to hide the deceit and, to accomplish this, it provides, upon certain conditions, for the return and substitution of another of equal value.

In the end the contract in its entirety was a manifest scheme for the purpose of getting money without adequate consideration, and to avoid responsibility for the method of obtaining it. The contract itself, as evidenced by the internal evidence of its terms, was based upon a fraudulent purpose and should not receive the sanction of judicial approval.

Fraud vitiates every contract written or parol, *Manufacturing Company* v. *Brown*, 113 Maine, 53 states the rule thus:

"We do not overlook the fact that the defendant signed a written contract and, by the ordinary rules of law, is presumed to know its contents, whether read or not. But if shown that the contract, itself, was procured by fraud, the general rule does not apply. If it did, no written instrument could be avoided. But it is universally held that the most sacred instrument may be avoided for fraud. Accordingly, the question to determine, is not whether the contract was signed and entitled to the ordinary force of such an instrument, but whether it is entitled to any force as the contract of the defendant. 'Fraud has been defined to be any cunning, deception or artifice used to circumvent, cheat or deceive another'."

It will undoubtedly be conceded that a contract, honest and above board, if clearly expressed means just what it says, and needs not to be strengthened by a series of caveats. More than one half of the composition of the present contract is taken up with such warnings. So emphatic, extensive and varied are the expression as to how the vendees were required to interpret and understands

this contract that we quote them in full. After stating that if the first stallion fails they will furnish "another of equal quality," the contract proceeds to say:

(1) "And it is expressly understood between the parties hereto that the vendors shall not be responsible or accountable to said purchaser in any other way for the stallion hereby sold, failing to get the mares bred to him with foal.

(2) "It is further expressly understood and agreed that the said purchaser upon entering into this contract does not rely upon any representation made by the vendors, their agent or agents, or employees, or any or either of them, not expressed in this instrument.

(3) "That said vendors shall not in any way be liable for any claim, or demand that may hereby be made by any reason of any representation or agreement heretofore made by themselves, their agents or employees, or any or either of them, in making of the sale of the stallion hereby sold, except for such as are contained in this instrument.

(4) "No agent or employee of the vendors have any authority to make any changes or alterations in this contract.

(5) "It is expressly understood and agreed that time of performance of each act to be done as provided in this instrument shall be considered as the essence of this contract." The contract is then signed and sealed by the vendor, R. I. James. Not satisfied by the foregoing five it then adds the sixth caveat after the contract is executed so as to be sure to have all avenues of escape cover the entire contract.

(6) "This foregoing bill of sale contains all the representations and all the terms of agreement of the purchase of the above named stallion. We hereby acknowledge having purchased the said stallion on the representation and on the terms herein set forth, and no other."

This is signed by the eight purchasers.

The sole purpose and import of these six additions to the contract were to obtain an agreement from the vendees that they would consent to be bound by the terms of the contract, just as it read, even though it was conceived in fraud and obtained by deceit. The first caveat expressly states that the vendor shall be responsible upon failure of the stallion only by furnishing another of equal

quality. And that is the only obligation he assumed as will appear later. It is unnecessary to analyze these six provisions as they speak for themselves, and clearly demonstrate the purpose for which they were put into the contract, and are internal evidence that the vendors anticipated that the contract might be attacked for fraud, and endeavored by these provisions to bind the vendees against such an attack. But such attempt cannot succeed. *Manufacturing Company* v. *Brown*, 113 Maine, 51.

The fraudulent import of the contract is further proved by the conduct of the vendor. He endorsed and transferred the note before maturity. This was an act subsequent to the execution of the contract and was accordingly admissible to show the purpose of the endorsement and delivery. But the transfer was not made in good faith and so found by the jury. It was undoubtedly to forestall a defense, upon the ground that the note was in the hands of an innocent holder. This established fact has a bearing upon the intent and purpose of the contract as understood by the vendor, and may be considered as some evidence in giving an interpretation to that instrument.

Another fact is that the stallion was sold for eighteen hundred dollars ($1,800) and the jury found him to be worth fifteen hundred dollars ($1,500) less, or only of the value of three hundred dollars ($300) when sold. But it may be said that the diminished value was due to the failure of the stallion to get foals. True, but this deficiency was contemplated in the contract. And the contract undertakes to provide against this deficiency by artifice and design; going just far enough to mislead and deceive the vendees, but not far enough to give any form of legal redress. The contract, so contrived and expressed as to put ordinary careful and prudent men off their guard in such a manner as to induce them to pay eighteen hundred dollars ($1,800) for a three hundred dollar ($300) horse, furnishes some evidence of fraud in the disparity between the price paid and the value received.

But that alone is not sufficient to give them redress. But it is evidence bearing upon the fraudulent design of the contract. It is often held in equity that great deficiency in consideration is ground for relief. We have alluded to the internal evidence of fraud and the external evidence of fraud and now we come to the fraud itself, although cunningly concealed.

The fraudulent intent of the contract in question is found in what appears to be an agreement to make good the contingent deficiency of the stallion, which, of course, would make good the consideration, when as a matter of law no such agreement is to be found, and this is where the fraudulent purpose appears. An analysis of this part of the contract will show it to be a studied and cunning device calculated to deceive. It does not guarantee that the stallion will get with foal fifty per cent. of the mares served, for that clause in the end might mean something; but that if he does not get fifty per cent. they may return him and exchange him for another of "equal quality as the stallion sold."

And that is all the provision there is in this contract by which the vendees were to be protected against the loss of fifteen hundred dollars ($1,500). If the language of the contract had been clear they could find no fault, but redress was undoubtedly what the phraseology intended to carry to their minds, and deceitfully did so.

At this juncture what are the relative rights of the parties under this phase of the contract? If the second stallion proved like the first, then one of two constructions must appear, to give the vendees any redress.

(1) A guarantee that the second stallion should get fifty per cent. or over of foals.

(2) That the first one proved worthless; that the second one proved worthless; hence was of equal quality. There is no claim of a guarantee. The meaning then is, if the second stallion proved to be worthless, that was the end of any contractual obligation on the part of the vendor, and that the vendees have no further redress although lead to believe they were protected. The anticipated effect of that contract resulted not in theory but in the actual fact that the vendees kept one worthless stallion a year, exchanged him for another equally worthless, and have paid the vendor eighteen hundred dollars ($1,800) besides the keeping, and there the contract ends.

That is just what caveat Number One provides, as a reference to it will prove, namely that "the vendors shall not be responsible in any other way" except by return and exchange of a stallion of "equal quality." In the last analysis no other construction can be placed upon the ingenious phraseology employed to give expression to this contract. If there is, we are unable to discover it.

In my opinion the contract in question was a cunningly devised scheme calculated to deceive would-be purchasers of high-bred stallions for breeding purposes, by leading them to believe that in the end, at least, they would receive a stallion of the quality desired, when as a matter of law if the second stallion proved worthless he would technically be within the language of the contract, and there is no further provision.

In other words, the final construction of this contract is expressed by the syllogism; the first stallion proved worthless; the second stallion proved worthless; hence the second one was of "equal quality" with the first one.

A contract that results in such legal conclusions is unconscionable, unfair, deceitful, and should not receive the sanction of the court. I am persuaded that the ruling of the Chief Justice was right and that the exceptions should be overruled.

THOMAS M. HOYT *vs.* ASA H. TAPLEY.

Aroostook. Opinion April 7, 1922.

The question of the meaning of a written contract is ordinarily one of law and not of fact. If the place of delivery of articles contracted for is not stipulated in the contract, the seller must ascertain where buyer will receive them. In absence of any agreement or direction as to how goods are to be sent or shipped, the seller should deliver them in good condition to a common carrier in the usual and common course of business. In case of a breach of the contract, the market value of the goods on the last day on which delivery may be made under the contract is admissible. When a contract can be substantially executed, and its essential purpose accomplished, performance is not excused.

In the instant case, what the meaning, intention and understanding of the parties was, was not a question of fact to be determined by the jury, but a question of law for the court. The question of the meaning of a written contract is ordinarily one of law for the court and not one of fact for the jury.

If no place is appointed for delivery of articles contracted for, the debtor must ascertain where the creditor will receive them. Readiness to deliver is not sufficient. And if there has been no direction or agreement as to the mode or manner in which the goods are to be sent, then the seller should deliver the same in good condition to a common carrier in the usual and common course of business.

The defendant under the contract had the whole month of January, and the entire month of February, in which to deliver the potatoes agreed to be delivered in those months, and there could be no breach of the contract for January deliveries until the last day of January. The market value on that day was admissible and important; the market value in the early days of January was unimportant and inadmissible.

The rule that if a thing becomes physically impossible by the act of God, performance is excused, does not prevail, when the essential purpose of the contract may be accomplished. If the intention of the parties can be substantially, though not literally, executed, performance is not excused.

On exceptions and motion. This is an action to recover damages resulting from an alleged breach of a written contract, wherein it was stipulated that defendant sold and agreed to deliver to plaintiff forty-five hundred barrels of Spaulding Rose potatoes, and forty-five hundred barrels of Green Mountain potatoes, thirty cars in all, fifteen cars of both kinds to be shipped in each of the months of January, 1920, and February, 1920, for which plaintiff was to pay $2.65 per hundred weight, delivered. At the time of the execution of the contract, plaintiff paid defendant three thousand dollars as stipulated in the contract.

No potatoes were ever delivered under the contract and the plaintiff in this action seeks to recover the difference between the contract price and the market value on the last day of January of such potatoes as were to be delivered in January, and also the difference between the contract price and the market value on the last day of February of such potatoes as were to be delivered in February, and the three thousand dollars advanced on the purchase price at time of execution of the contract. Defendant pleaded the general issue, and the case was tried to a jury, and a verdict for $18,300 was returned for the plaintiff. Defendant took exceptions to certain rulings, instructions, and refusal to instruct of the presiding Justice, and also filed a motion for a new trial. Motion overruled. Exceptions overruled.

The case is fully stated in the opinion.

Powers & Guild for plaintiff.

C. F. Small, A. F. Cook and A. S. Crawford, Jr., for defendant.

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

HANSON, J. This is an action on the case to recover damages growing out of an alleged breach of a written contract for the sale and delivery of nine thousand barrels of potatoes.

The jury returned a verdict for the plaintiff in the sum of $18,300 and the case is before the court on general motion and exceptions by the defendant.

The contract reads as follows: "MEMORANDUM OF AGREEMENT made and entered into this Seventeenth day of October, 1919, by and between A. H. Tapley of Fort Fairfield in the state of Maine of the first part and T. M. Hoyt of Presque Isle, in the state of Maine of the second part:

"Party of the first part sells and agrees to deliver to party of the second part 4500 barrels Spaulding Rose and 4500 barrels Green Mountain, all to be U. S. Grade No. 1, said potatoes to be put up in two-bushel sacks.

"Party of the second part agrees to accept said potatoes and pay the sum of $2.65 hundred weight delivered Boston rate of freight, which is to be paid in the manner following: $100.00 per car as a deposit upon the signing of this contract, balance upon receipt of arrival draft attached to bill of lading.

"It is further agreed that the deposit of $100.00 per car shall be equally applied to each car when loaded.

"Party of the first part is to ship said potatoes in shipments equally distributed, fifteen cars of both varieties during the month of January, 1920, and fifteen cars of both varieties during the month of February, 1920.

"The obligation of the party of the first part to deliver is contingent upon strikes, embargoes, unavoidable accidents and weather conditions beyond his control.

"In witness whereof the said parties have hereunto set their hands and seals the day and year above written.

A. H. TAPLEY
T. M. HOYT."

An assignment and reassignment of the agreement follow:

"For one dollar and other valuable considerations, I hereby assign all rights and interest in above contract to T. E. Holt.

T. M. HOYT.

Dated Dec. 15, 1919.

"Fort Fairfield, Maine, January 20, 1920.

For valuable consideration this day received by me, the receipt of which is hereby acknowledged, I hereby assign and convey all my right, title and interest in and to the above contract to T. M. Hoyt.

T. E. HOLT."

It was admitted that the plaintiff had paid the defendant $3,000 on account of the purchase price of the potatoes, and that the defendant had retained possession of that sum, and had delivered no part of the potatoes bargained for by the plaintiff.

THE EXCEPTIONS.

Exception 1. The defendant sought to show by cross-examination of the plaintiff, and the direct examination of the defendant, that F. W. Higgins, who made the contract as the agent of the plaintiff, prior to reducing the contract to writing had agreed with the defendant that the plaintiff would furnish the cars in which the potatoes were to be shipped. The testimony was properly excluded. When the parties reduce their contract to writing the law presumes that the writing contains the whole agreement. *Chaplin* v. *Gerald,* 104 Maine, 187. In *Vumbaca* v. *West,* 107 Maine, 130, cited by the defendant, the agreement was on its face incomplete. An essential stipulation was omitted. The evidence did not contradict the writing. It merely supplied the omission, and the court held that it fell within the exception to the parol evidence rule, and within the doctrine stated in *Neal* v. *Flint,* 88 Maine, 83, and *Gould* v. *Boston Excelsior Co.,* infra.

These exceptions serve to emphasize the rule that the law presumes that the writing contains the whole agreement between the parties.

Exception 2. The defendant contended that it was for the jury to determine, as a question of fact, what the parties meant, understood and intended by the clause in the contract which provided:

"Party of the first part is to ship said potatoes in shipments equally distributed, fifteen cars of both varieties during the month of January, 1920, and fifteen cars of both varieties during the month of February, 1920." Defendant also objected to the admission of testimony as to the market value of potatoes at the end of the month of January, and objected to the exclusion of testimony of the market value of potatoes during the early days of January.

As to the first objection. What the meaning, intention and understanding of the parties was, was not a question of fact to be determined by the jury, but a question of law for the court. The question of the meaning of a written contract is ordinarily one of law for the court and not one of fact for the jury. 9 Cyc., 591; *Guptil* v. *Damon*, 42 Maine, 271; *Woodman* v. *Chesley*, 39 Maine, 45. Whenever a paper can be understood from its own words, its interpretation is a question of law for the court. Wills, deeds and other contracts usually fall under this classification. In such cases, the meaning of the instrument, the promise it makes, the duty or obligation it imposes, is a question of law for the court. *State* v. *Patterson*, 68 Maine, 473; *Cocheco Bank* v. *Berry*, 52 Maine, 302; *Herbert* v. *Ford*, 33 Maine, 93; *Nash* v. *Drisko*, 51 Maine, 418. The agreement speaks for itself. It was complete in itself, and expressed the full duty and liability of each party thereto. There was an agreement to sell and deliver the potatoes to the plaintiff by defendant. The plaintiff agreed to receive and pay for the same. The contention of the defendant that the plaintiff was bound to furnish cars, is negatived by the agreement. The manner of delivery, the choice of days of delivery and the performance in good faith by the defendant of his part of the agreement being left, within the limitations of the contract as to time, in the defendant's discretion. The agreement includes another term of striking significance, viz.:—Party of the first part "is to ship said potatoes." He agreed to act, not to await action of the plaintiff. If there had been an honest doubt as to the time, place, or fact of delivery, the defendant was charged with the duty of solving the same by communicating with the plaintiff. But having many opportunities he failed to mention the same to the plaintiff. If no place is appointed for delivery of articles contracted for, the debtor must ascertain where the creditor will receive. Readiness to deliver is not sufficient. *Lincoln* v. *Gallagher*, 79 Maine, 190. And if there has been

no direction or agreement as to the mode or manner in which the goods are to be sent, then the seller should deliver the same in good condition to a common carrier in the usual and common course of business. Benjamin on Sales, Vol. 2, 687; *Maxwell* v. *Brown*, 39 Maine, 98. In *Hiram Curtiss* v. *Theodore P. Howell*, Applt., 39 N. Y., 211, it was held that a contract to deliver a thousand tons of bark per year for five years, commencing on the first day of September, 1854, is performed by delivering a thousand tons within each year, that is, the contractor has the entire year within which to furnish the one thousand tons, and further, "where, from the language of the contract, there can be no uncertainty as to the true meaning of its terms, it is not competent to give evidence to show that a different meaning was intended."

There is no testimony in the case from any witness that the defendant ever claimed before the trial that the plaintiff was to furnish cars. There were several demands made by the plaintiff and Mr. Holt, the assignee, for delivery of the potatoes, and conversations are given by and between the parties during the continuance of the agreement, relating to the delivery, but the defendant did not at any time raise the question, or ask the plaintiff to provide cars. He gave another reason for not delivering, which was that he "didn't have the potatoes and couldn't afford to buy them." As to the admission of testimony relating to the market value of potatoes at the end of the month of January and the exclusion of testimony covering the early days of January upon the same subject, we are of opinion that both rulings were correct. The law is well settled supporting the rulings. The defendant under the contract had the whole month of January, and the entire month of February, in which to deliver the potatoes agreed to be delivered in those months, and there could be no breach of the contract for January deliveries until the last day of January. The market value on that day was admissible and important; the market value in the early days of January was unimportant and inadmissible. *Varney* v. *McCluskey*, 114 Maine, 205, 207. Moreover, its exclusion was not, and could not be, prejudicial to defendant's rights. Benjamin on Sales, 7th Ed. Par. 685; Williston on Contracts, Par. 857; 13 C. J., 682; *Curtiss* v. *Howell*, 39 N. Y., 211. As to the assignment to Mr. Holt, it is clear for the reasons already stated that the assignment and reassignment having

occurred before the breach of the agreement, the relative rights of the parties did not change, but were the same as of the date of the agreement.

Exception 3, raised the same question as Exception 2, as to the market price of potatoes in the first part of January.

Exception 4. E. W. Russ, a witness for the defendant, was asked in cross-examination, "if it would be reasonably possible to go out and buy 4500 barrels of potatoes within two or three days, the last two or three days in January, or the first two or three days of February." He answered, under defendant's objection: "I should say it would be possible to buy them, but not get them delivered within that time." This answer was in harmony with other similar testimony given without objection or exception, and it is not perceived where the defendant is prejudiced thereby.

Exception 5 related to the assignment by the plaintiff to Mr. Holt, the defendant requesting instructions as to the rights of Mr. Holt in view of a finding by the jury that a breach occurred while Mr. Holt held the agreement. The presiding Justice very properly refused so to instruct, holding as heretofore mentioned that the breach in the case occurred on the last day of the months in question, Mr. Holt's reassignment being on January 20th, 1920.

Exception 6. The defendant excepted to the following instruction of the court in his charge to the jury:

"Now, so far as the contract is concerned, as to what the contract means, that, gentlemen, is a question of law; the construction of the contract is for the court; so whatever I instruct you as to the meaning of the terms of this contract you must accept from the court as final." The law thus stated is too well settled for the defendant to take anything by this exception.

Exception 7 may be stated from the bill:

"The court instructed the jury as follows:

'Neither can I instruct you that the failure to deliver during the first part of January, up to the 20th even, was a breach of the contract as to the number of cars that were to be delivered during the month of January. The defendant in this case would have fulfilled his contract if he had delivered to the plaintiff the 4500 barrels of potatoes after the assignment back, or the re-assignment of this contract back to the plaintiff. If he had delivered them between that time and the first of February I instruct you it would have

been a sufficient compliance with the terms of the contract so he would not have been liable for damages for failure to deliver during the early part of January'." Defendant's counsel in his brief says: "To this unqualified instruction, the defendant seasonably excepted, because inconsistent with his theory that the construction of the contract, in respect to time of delivery of the potatoes, was a question for the jury to determine upon all the evidence in the case." As has been seen, the theory of the defendant is not in harmony with the settled law; the instruction excepted to, states the law.

Exception 8. The defendant excepted to the following instruction: "But the defendant says further that even though he was bound to deliver under the contract, that by reason of the excessive weather conditions that existed, particularly during the month of February of last year, that he should be relieved from a part of the damages, or such part as might have been due to an inability to obtain cars during that month. And upon that point, gentlemen, I instruct you that in entering into the contract and making this stipulation in it, it does not mean that he would be excused from delivery by reason of ordinary weather conditions that he might have reasonably expected would occur, because in entering into a contract he must take into account the ordinary conditions that might exist during the winter season. But it would be true that under such provisions, if there came such an excessive fall of snow or any other weather conditions, whether rain or snow, as to entirely stop railroad traffic during the month of February, as an illustration, and for that reason he was unable to obtain cars, or even get them out through the inability of the railroad to function at all by reason of the weather conditions, why, that would be an excuse because that is an unusual condition, and it would be weather conditions he could not anticipate and over which he would have no control. But it is a question of fact, gentlemen, for you to determine whether, from the conditions that existed in this case, the defendant was prevented, by reason of any weather conditions that existed, such as you have heard them described here during the month of February last, from the shipment of cars. Of course, if the defendant had decided that he would not undertake to fulfill the contract for any other reason, because of the excessive price of potatoes, that he could not fulfill it, then there is no preventing the fulfilling of it by reason of any weather conditions. But if

you should find that there were excessive weather conditions such as I have related to you, and that they accounted in part for the failure to fulfill it, which he would have otherwise made, you may properly deduct those from the damages which the plaintiff has suffered."

The instruction was correct and the defendant can take nothing by this exception.

Exception 9. Defendant excepted to an instruction as to the assessment of damages for the January breach of the contract. The presiding Justice, on the announcement that defendant desired to save his exception, modified the instruction, and exception was not taken thereto. In any event, neither the original instruction nor the modification was harmful to the defendant.

The motion. In view of the payment of $3,000 mentioned, the verdict must necessarily have been for the plaintiff. Is the verdict against the law, the evidence, and weight of evidence, and are the damages excessive? The questions raised are substantially the same as those already considered under the exceptions. The defendant contended that he was not liable under his agreement, (1) because the plaintiff would not furnish cars; (2) because of weather conditions, and in his brief contends further in support of his motion that the damages are excessive, and not based upon the true market value.

As to the first contention, the record clearly shows that it was his duty and not the duty of the plaintiff to furnish cars. The last provision in the agreement makes this clear. "The obligation of the party of the first part to deliver," was "contingent upon strikes, embargoes, unavoidable accidents and weather conditions beyond his control," and not upon the plaintiff's liability to furnish cars. It is clear, too, that the weather conditions were not such as to materially interfere with the performance of the contract on the part of the defendant, and the fact that he made no attempt to deliver the potatoes in either month disposes of any claim that the weather conditions excused performance. It appears that he shipped twenty or more carloads to other parties notwithstanding the weather. The jury would be justified in finding that weather conditions were not such as to justify or excuse performance under the circumstances of this case. The rule that if a thing becomes physically impossible by the act of God, performance is excused,

does not prevail, when the essential purpose of the contract may be accomplished. If the intention of the parties can be substantially, though not literally, executed, performance is not excused. *White* v. *Adeline H. Mann,* Executrix, 26 Maine, 361.

There was much testimony as to market value of potatoes, and nearly every witness gave expert testimony on the subject, as they were potato dealers and competent to testify. The defendant testified at length as to market value, and computation discloses that the verdict of the jury is based upon the defendant's testimony as to the market value of potatoes. A careful examination of the testimony discloses this, and that the testimony is overwhelming in favor of the plaintiff's contention.

Motion overruled.
Exceptions overruled.

ANNIE M. RUSSELL

vs.

GRANITE STATE FIRE INSURANCE COMPANY.

Penobscot. Opinion April 7, 1922.

In an action on an insurance policy under Sec. 38, Chap. 87, R. S., if the defendant relies upon the breach of any conditions of the policy by the plaintiff as a defense, it must be specially pleaded, or set up under a brief statement, at election of defendant; otherwise the breach of all conditions known to defendant shall be deemed to be complied with by plaintiff.

This case comes up on motion and exceptions. The motion raises an issue of fact upon the question of waiver; the exceptions, issues of law upon the question of pleading.

There is no controversy that the premises were unoccupied for more than thirty days, but the plaintiff denies that they were vacant by removal for thirty days or more. The exceptions involve what may be denominated the "vacancy"

and "non-occupancy" clauses of the policy. The first reads as follows: "If the dwelling be or become vacant or unoccupied, except in accordance with the conditions of this policy, the entire policy is void." The second reads as follows: "If the premises hereby insured shall become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without such assent, the policy shall be void."

The same section of the statute which permits this form of action prescribes the form and limits the scope of the defendant's pleading as follows: If the defendant relies upon the breach of any conditions of the policy by the plaintiff, as a defense, it shall set the same up by brief statement or special plea, and at its election; and all conditions, the breach of which is known to the defendant and not so specially pleaded shall be deemed to be complied with by the plaintiff.

The plea was the general issue, with a brief statement declaring "that the policy of insurance declared on by the plaintiff provides that said policy shall be void if the premises thereby insured shall become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without the assent in writing or in print of the insurance company."

Two questions are raised by the brief statement. First, is it broad and comprehensive enough to cover both clauses; second, if not, is the word "unoccupied" in the first clause synonymous with the words "vacant by removal of the owner or occupant" in the second, so that the plea embraces defenses to both upon this ground. The court were of the opinion that both questions must be answered in the negative.

On motion and exceptions by defendant. This is an action upon an insurance policy under Sec. 38, Chap. 87, of the R. S. to recover the sum of five hundred dollars, the amount of the policy, and interest, being the amount of insurance on the personal property of plaintiff, which was totally destroyed by fire on April 15, 1919, at Hampden, Maine. Defendant filed the general issue, and a brief statement alleging that the premises where the personal property was located had been vacated by the plaintiff, owner and occupant, and remained vacant for more than thirty days thus avoiding the policy. The cause was tried to a jury and a verdict for the full amount and interest claimed was returned for plaintiff. Defendant filed a general motion for a new trial, and also excepted to the refusal of the presiding Justice to grant certain requested instructions, and also to parts of the charge to the jury. Exceptions overruled. Motion overruled.

The case is fully stated in the opinion.

H. J. Chapman and C. C. Stevens, for plaintiff.

W. R. Pattangall and Thomas Leigh, for defendant.

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

SPEAR, J. This case comes up on motion and exceptions. The motion raises an issue of fact upon the question of waiver; the exceptions, issues of law upon the question of pleading.

The plaintiff was the owner of a dwelling-house and additions situated in the town of Hampden, Maine. She was a graduate nurse and was employed much of her time in her profession. This house, she says, was her permanent home.

Located in this house, at the time of the fire, was certain personal property the quality and value of which are not questioned. On this personal property, she held a policy of insurance, of the standard form, in the defendant company for five hundred dollars; for all of which it is admitted the defendant is liable, if liable at all.

A fire occurred on April 15, 1919 which consumed the dwelling together with all the insured personal property situated therein.

She admits that she had not occupied this house, for the purposes of a home, for more than thirty days previous to the fire. She had visited the house the day of the fire. This is an action of assumpsit, on that policy, brought by special authority of Sec. 38 of Chap. 87, R. S., to recover the amount due thereon for the loss of the personal property insured therein. The same section permitting this form of action, also prescribes the form, and limits the scope, of the defendant's pleadings, as follows:

"If the defendant relies upon the breach of any conditions of the policy by the plaintiff, as a defense, it shall set the same up by brief statement or special plea, at its election; and all conditions the breach of which is known to the defendant and not so specifically pleaded shall be deemed to be complied with by the plaintiff."

The plea was the general issue with the following brief statement:

"That the policy of insurance declared on by the plaintiff provides that said policy shall be void if the premises thereby insured shall become vacant *by the removal* of the owner or occupant, and so remain vacant for more than thirty days without the assent in writing or in print of the insurance company. And the defendant avers that after the execution of the said policy and before the alleged loss or damage by the plaintiff declared on, the said premises were

vacated by the plaintiff, the owner and occupant, and so remained vacant for more than thirty days; to wit: for approximately ninety days, without the assent of the defendant company in writing or in print, and said premises were vacant without the assent of the defendant company at the time of the alleged loss or damage."

There is no controversy that the premises were unoccupied for more than thirty days, but the plaintiff denies that they were vacant by removal for thirty days or more. The exceptions involve what may be denominated the "vacancy" and "non-occupancy" clauses of the policy. The first is found in the body of the policy under the caption, Vacancy, and reads as follows:

"If the dwelling be or become vacant or unoccupied, except in accordance with the conditions of this policy, the entire policy is void."

The second is found in a rider attached to the policy and reads as follows:

"If the premises hereby insured shall become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without such assent, the policy shall be void."

Two questions are raised by the brief statement. First. Is it broad and comprehensive enough to cover both clauses?

Second. If not, is the word, "unoccupied" in the first clause synonymous with the words "vacant by removal of the owner or occupant" in the second, so that the plea embraces defenses to both upon this ground?

We are of the opinion that both questions must be answered in the negative. Concerning the first question the statute provides that any defense to a breach of the policy shall be made by a brief statement or special plea, and every breach not so specifically pleaded shall be deemed to be complied with by the plaintiff. This rule of pleading is too plain for interpretation and too positive to admit of the exercise of discretion. It was undoubtedly meant to be both restrictive and technical. The defendant, however, claims that the pleading required by the statute should be construed liberally and cites *Clark* v. *Holway*, 101 Maine, 391 in which it is said:

"The great object of the statute which provided for filing a brief statement of special matters of defense where special plea was before required was to do away with the technicalities and the strictness formerly required in special pleas in bar. To be sure the facts

relied upon must be stated so clearly and distinctly as to be understood by the party who is to answer them, by the jury and by the court."

The above construction, however, was made upon the statute abolishing special pleading, and substituting a brief statement therefor. But the legislature was not content to leave the general issue and brief statement, as they had been construed, as an adequate statement of the defense, in this particular form of action. Whether by brief statement or special plea the legislature limits and restricts the defendant to what it has traversed in its plea to what it has "so specifically pleaded." It enacted this statute for this specific form of action and no other; and the brief statement cannot therefore be extended by construction, but must be confined to what is "so specifically pleaded."

Under this statute the defendant's pleading does not reach the first clause. It reads:

"That the policy of insurance declared on by the plaintiff provides that said policy shall be void if the premises thereby insured shall become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days, without the assent in writing or in print of the insurance company."

That is the exact language of the second clause, which is one of the several enumerated causes for vacating a policy. The rest of the plea is merely an averment descriptive of how the vacancy "by removal of the owner" was brought about, as a reference to the plea will reveal. This plea is, therefore, by the specific language used, confined to a defense of a breach arising under the second clause as found in the rider.

We come now to the second inquiry, whether the two clauses, one found in the body of the policy, and the other in the rider, are synonymous so that the plea applies to both? The defendant contends they are. To begin with it is evident that the company itself, did not so consider them, otherwise the second clause would be superfluous. It will be next observed that the two clauses are expressed in different phraseology, and are susceptible of, if they do not compel, different interpretations, as used in the policy.

"The conditions of an insurance policy should be considered liberally in favor of the insured." *Bartlett* v. *Union Fire Insurance Co.*, 46 Maine, 500. "A forfeiture is to be construed strictly. Its

enforcement is not to be favored." *North Berwick Co.* v. *New England Fire Insurance Co.*, 52 Maine, 336. In *Norman* v. *Missouri Town Mutual Insurance Co.*, 74 Neb. App., 456-459, it is declared:

"And if words of doubtful meaning are inserted in the contract of insurance, then that construction will be adopted which is most favorable to the policy holder." In view of the above rules of construing words, phrases, clauses and conditions of insurance policies, many jurisdictions hold that the word "unoccupied" is not synonymous with the word "vacant" as used in the present policy. In *Knowlton* v. *Insurance Co.*, 100 Maine, 486 the distinction is clearly stated. The provision in the policy in that case reads, "shall become vacant by the removal of the owner or occupant or *shall become personally unoccupied.*" The case was decided upon the effect of the latter condition. But the differentiation was made between the meaning of the words "vacant and unoccupied," as follows:

"It has been suggested that the two words vacant and unoccupied are synonymous, and there are doubtless conditions of a dwelling house when either word applied to it or both words applied to it, will express a like condition of it. But as stated by the court in *Herman* v. *Adriatic Fire Insurance Co.*, 85 N. Y., 162; 'A dwelling-house' is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it. So that, in the use of it, it is a place of deposit of things inanimate and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case with all inanimate things taken out, but with those animate still remaining in it, it would not be unoccupied, for it would still be used for shelter and repose. And it is because in our experience of the purpose and use of a dwelling house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it, that that word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the word 'vacant' as applied to a dwelling, carries the notion that there is no dweller therein; and we should not be sure always to get or convey the idea of an empty house, by the words 'vacant dwelling' applied to it. But when the phrase 'vacant' or 'unoccupied' is applied to a

dwelling house, plainly there is a purpose—an attempt to give a different statement of condition thereof; by the first word, as an empty house, by the second word, as one in which there is not habitually the presence of human beings."

Johnson v. *Norfolk Fire Insurance Co.*, 175 Mass., 529, is in point inasmuch as it gives an interpretation to phraseology identical in form and the same in purpose and intent, as the phraseology of the removal condition in the policy in the present case. The court say: "The policy in this case declares that it shall be void if without the assent of the insurance company, 'the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent.' The only question presented is whether on the evidence stated in the bill of exceptions the judge should have ruled, as matter of law, that, according to the terms of the policy, the plaintiff was not entitled to recover. We are of the opinion that the judge was right in refusing this ruling, and in submitting the question to the jury."

The corresponding condition in the policy in the present case reads: "That the policy shall be void if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant more than thirty days without such assent." The comparison shows that the two cases are identical.

Now the Massachusetts court interpret the phraseology found in each of these policies as follows:

"In the case at bar there is nothing said about occupancy, and no question arises as to whether the house was occupied or unoccupied. That which is provided for is the house becoming vacant by the removal of the owner or occupant. The words mean something more than a temporary absence for business or pleasure, and as is said in *Cummins* v. *Agricultural Ins. Co.*, 67 N. Y., 260, 263, 'they refer to a permanent removal and entire abandonment of the house.' See also *Chandler* v. *Commerce Ins. Co.*, 88 Penn. St., 223; *Franklin Ins. Co.* v. *Kepler*, 95 Penn. St., 492."

The importance of the Massachusetts case is that regardless of the facts, it interprets the identical language of the contracts.

That interpretation is fully affirmed by *Harris* v. *North American Ins. Co.*, 190 Mass., 361, at Page 369 where it is said: "The burden was on the defendant strictly to prove an avoidance of its liability

by showing that the acts of the plaintiff in connection with the insured property amounted to a removal from the house, and produced a forfeiture."

"No doubt there is a sound practical distinction recognized in the community between a house that becomes merely unoccupied for a longer or shorter period, though fitted and furnished as a domicil, and one that becomes vacant by the removal of the furniture and departure of the owner. *Herman* v. *Adriatic Ins. Co.*, 85 N. Y., 162. The words, 'become vacant by the removal of the owner or occupant,' on which the defendant so strongly relies, have received judicial construction by this court in *Johnson* v. *Norwalk Ins. Co.*, 175 Mass., 529, 531, where it is held that in accordance with this common understanding 'they refer to a permanent removal and entire abandonment of the house'."

In *Cummins Applt.* v. *Agricultural Ins. Co.*, 67 N. Y., App. 260, in construing the same phraseology, found in a policy, after discussing unoccupancy clauses the court say: "But in the present case the merely vacating the house or leaving it unoccupied was not declared in the policy to be sufficient to terminate the insurance. The condition was superadded that it must have been vacated by the removal of the owner or occupant. Some significance must be attached to these words, and we think that they refer to a permanent removal and entire abandonment of the house as a place of residence. So long as the occupant retained it as his place of abode, intending to return to it, and left his furniture and effects there, some degree of watchfulness and care on his part might reasonably be expected. He would continue to have an interest in its protection and preservation, and in common parlance he would not be said to have removed therefrom."

To the same effect is *Herman* v. *Adriatic Fire Ins.. Co.*, 85 N. Y., App. 162, already cited in *Knowlton* v. *Ins. Co.*, 100 Maine, 486.

It is evident that the above interpretation was based, not upon vacancy or non-occupancy alone, as stated in the body of the policy, but upon vacancy caused by the removal of the owner or occupant, as stated in the rider.

The defendant contends, however, and cites cases to show that a different interpretation, from that contained in the above-cited cases, has been placed upon identical phraseology. But we find no case cited, which does not couple some element or provision,

not permissible, in construing the phraseology in the present case. An examination of the whole paragraph, in which the language of the clause under consideration is found, shows twelve other conditions which may work an avoidance of the policy. But not one of the twelve can be considered in this case, as they are all waived by the plea which traverses only vacancy by removal. For instance, the increase of risk is one of the independent causes of forfeiture; but not being pleaded it is waived, and has no bearing upon the interpretation of the other twelve conditions. It is this special statute restricting the scope of the plea that imposes these limitations; and we doubt if a similar statute can be found in any other jurisdiction.

The defendant cites *Sleeper* v. *Insurance Co.*, 56 N. H., 40, and *Moore* v. *Ins. Co.*, 64 N. H., 140, upon the contention that the words occupancy and vacancy as used in the clause under consideration are synonymous. But it will be found upon an examination of these cases, as above suggested, that the court apparently was not restricted by any statute, but took into consideration the whole paragraph in giving its interpretation to a single condition. It is apparent that the court considered the increase of risk in each case. Whatever the court may have intended by its interpretation, as expressed in the two opinions above noted, it is quite evident that, in *Stone* v. *Ins. Co.*, 69 N. H., 441 in giving its interpretation to an identical condition, they intended to adopt the doctrine promulgated in the New York, Maine and Massachusetts cases as they cited, with approval, *Cummins* v. *Ins. Co.*, 67 N. Y., 26 and *Herman* v. *Ins. Co.*, 81 N. Y., 184. The facts in the case show that they did adopt those cases in their conclusion, as the premises under a condition identical with that in the present case, were vacant from May 20, 1897 to August 10, 1897 a period of nearly three months. Yet the court sustained the plaintiff saying: "The defendant's motion is denied. As a matter of law, the policy did not become inoperative through the temporary absence of Mrs. Rollins." With reference to the Sleeper case, 56 N. H., *supra*, and the Moore Case, 64 N. H., *supra* the court make this significant remark: "At this point and in this connection it may properly be observed that there is no real conflict of doctrine between the case in hand and *Sleeper* v. *Ins. Co.*, 56 N. H., 401, or *Moore* v. *Ins. Co.*, 64 N. H., 140. In the former, the

facts were essentially different, while in the latter, the controlling phrase, vacant by removal, was not in the condition, and the facts were almost the reverse of those before us."

The defendant's exceptions was the refusal of the presiding Justice to give to the jury the following requested instructions: "If the jury should find on the evidence in this case, that the plaintiff, Annie M. Russell, vacated the premises occupied and owned by her by removal or departure therefrom and the vacancy, so caused by her removal or departure continued for more than thirty days, no one living or dwelling in and upon said premises during said period, and during the life of the fire insurance policy issued by the Granite State Fire Insurance Company, then she cannot recover in this action."

It is our opinion that upon both authority and reason the plaintiff's contention with respect to the force of the exception should be sustained.

The motion has been alluded to as involving questions of fact under the doctrine of waiver, and is so discussed by both the plaintiff and the defendant. But as we read the evidence, while the doctrine of waiver may perhaps be invoked, we are yet of the opinion that the real theory upon which the motion should be determined is based upon the doctrine of waiver by estoppel. For a full discussion of waiver and estoppel in insurance cases see *Robinson* v. *Ins. Co.*, 90 Maine, 385. In *Bouchard* v. *Ins. Co.*, 113 Maine, 17, we find this statement: "The defendant also set up in its brief statement of defense the plaintiff's failure to furnish a proof of loss, but this point is not urged in argument. It is proper however to say that in view of the correspondence between the parties and of the fact that the defendant denied all liability, the jury might well have found that it had waived this requirement. Such waiver is a question of fact, *Robinson* v. *Ins. Co.*, 90 Maine, 385, and the court cannot say that under the evidence in this case the plaintiff is precluded from recovery on that ground."

It is, therefore, well settled in this state that, if an insurance company denies all liability, and the insured relying upon such denial, omits to file a proof of loss, although such proof is required by the terms of the policy, such company will be deemed to have waived such proof and will be estopped to plead and offer in defense evidence of the fact that no proof of loss had been filed. The defend-

ants in the present case do not deny the rule of law, but claim the facts do not bring the plaintiff's case within the rule.

The defendant claims there is not sufficient evidence in the case of a refusal on the part of the company to pay the loss, to warrant the verdict of the jury upon that issue. A careful examination of the record leads us to the opposite conclusion. The plaintiff's conversations and interviews by telephone with the accredited agent of the company, offered as evidence of the refusal of the company to pay her, confirm that conclusion. That the agent stood in the place of the company in these conversations and interviews is too well settled in this state to require discussion. From the very beginning the agent intimated that the fire was incendiary. At his first interview he said to her. "It was a mysterious fire and they were not going to pay until they investigated." Later, she said that she went to see him and asked him what she could do; if there was anything she could do, and he said, "No, it was strictly out of my hands." And she said, "Mr. McClure, you was willing to talk with me when I came to be insured." To which he replied, "It is in Augusta now, and if you want to talk, go there." He, therefore, at this time refused, as agent of the company to give her any information as to what to do. He did not even suggest a proof of loss. Having before intimated that the fire was incendiary, this conversation may have been somewhat significant to the jury as to the intention of the company with regard to their treatment of the loss. The abrupt refusal of the agent to give her any information, and the removal of the controversy to Augusta, may have impressed the jury with the view that these acts indicated, at least, a refusal on the part of the company to pay, yet these facts alone might not warrant the verdict. But when we take into consideration the attitude of the company, as to the origin of the fire and the indication based upon the above facts of a refusal to pay, supplemented by the flat-footed statement of McClure, the agent, "that the company refused to pay on that policy," as stated by the plaintiff, we are of the opinion that that evidence must be regarded as having sufficient probative force, if believed by the jury, to support their verdict upon that issue.

Exceptions overruled.
Motion overruled.

CHARLES P. WEBBER et al

vs.

BARKER LUMBER COMPANY AND HENRY BARKER.

Penobscot. Opinion April 8, 1922.

Acts of dominion relied upon in creating title by adverse possession are questions of law. Whether such acts were really done, and the circumstances under which they were done, raise questions of fact. Mental intent alone not sufficient to create a possession which would ripen into adverse possession, but must be based on the existence of physical facts which openly evince a purpose to hold dominion over the land in hostility to the title of the real owner, and such as will give notice of such hostile intent. Occasional trespasses in cutting wood or timber not sufficient, nor attempts to keep off trespassers. Doctrine of equitable estoppel not sustained.

The burden of proof is upon him who claims title by adverse possession.

If possession is claimed to be adverse the acts of the wrong-doer must be strictly construed and the character of the possession clearly shown, since there is every presumption that the occupancy is in subordination to the true title.

A substantial fence built around a parcel of land sought to be held by adverse possession, and for the purpose of showing an adverse claim to the part enclosed, may be an act of such notoriety as to afford notice to all concerned of the builder's assertion of right; but when a brush fence is erected for the simple convenience of the builder it can have no such significance.

The unrestricted meandering of cattle upon land of a neighbor is quite a different proposition from that of a deliberate intent of the owner of the cattle to pasture his stock upon his neighbor's land and by so doing, to claim the establishment of a right which would ripen into a title to that land by adverse possession. The test of the hostile or adverse character of possession is the intent of the disseizor.

A secret, mental intent alone, however, would not be sufficient to create a possession which would ripen into adverse possession. There must exist physical facts which openly evince a purpose to hold dominion over the land in hostility to the title of the real owner, and such as will give notice of such hostile intent.

The final clause of Sec. 10, Chap. 110, R. S., applies where disseizor occupies and uses a wood-lot in connection with a farm which he is also occupying and using

adversely, but does not apply to a wood-lot thus occupied and used by disseizor who has title to a farm by him used and occupied, even though such wood-lot may lie contiguous to the farm.

The characteristic element of abandonment is the voluntary relinquishment of ownership, whereby the thing so dealt with ceases to be the property of any person and becomes the subject of appropriation by the first taker. At common law a perfect legal title to a corporeal hereditament cannot be lost by abandonment. Its very essence is inconsistent with the attributes of real estate.

Equitable estoppel concludes one from denying his own acts or admissions which were expressly designed to influence the conduct of another and did so influence it, and when such denial will operate to the injury of another. It must be shown that the party estopped had some knowledge of the rights, interests, or intentions of the other party, or his relations to the thing to which his declarations or acts related, or that he had some intention of misleading the other party into some action that might be prejudicial to him.

On motion for new trial, and exceptions by plaintiffs. This is an action in trover for certain trees cut and removed by defendants on the south half of lot number 9, range 10, in the town of Greenfield, in the fall and winter of 1916. The defendants pleaded the general issue and estoppel by way of brief statement. Plaintiffs relied upon record title, and defendants claimed title by adverse possession of their grantors and predecessors in title. The case was tried before a jury who returned a verdict for defendants. Plaintiffs filed a general motion for a new trial, and also took exceptions to admission of certain testimony, and to refusal of the presiding Justice to give requested instructions in the charge to the jury. Verdict set aside. New trial granted. Exceptions not considered.

The case is fully stated in the opinion.

Ryder & Simpson, for plaintiffs.

William H. Powell and George H. Morse, for defendants.

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

PHILBROOK, J. This is an action in trover to recover the value of trees cut and removed by the defendants on and from land to which plaintiffs claim title. The defendants justified on the ground that their grantors of the stumpage had acquired title to the same land by adverse possession. The verdict was for the defendants

and the case is before us upon plaintiffs' motion for a new trial, based upon the customary grounds, also upon exceptions to admission of certain testimony, and refusal in the charge to the jury, to give instructions as requested by plaintiffs.

THE MOTION. The disputed tract of land is the south half of lot 9, range 10, in the town of Greenfield. According to field notes and plans introduced by the plaintiffs, this south half of lot 9, range 10, the north half of lot 9, range 10, and all of lot 10, range 10 was designated by Strong's survey, made in 1809, as lot 34. According to the same survey all of lot 9, range 10 was known as the west division of lot 34, and all of lot 10, range 10, was known as the east division of lot 34. These two divisions are of the same length running from north to south, but the east division, running from east to west, is broader than the west division. The two divisions make a rectangle which is bounded on the north by the Hallowell tract, on the east by lot 35, on the south by lots 46 and 45, and on the west by lot 33. Through a long line of conveyances, beginning with a grant from the Commonwealth of Massachusetts, the plaintiffs claim record title to this rectangular lot of land and we are of opinion that they have proved their record claim.

While the plaintiffs were thus substantiating their own record title they also introduced conveyances from the same original source showing that the south half of lot 33, lying next west of lot 34, in 1853 came by various deeds to George R. White who occupied said south half of lot 33, from the latter date until his death in 1885. He died intestate and the lot was then occupied by his widow and their son, G. H. White, who was generally known as Hollis White. In 1896 Hollis White, after his mother's death, obtained from the other heirs of his father a quit-claim deed of their interest in the said premises. Hollis White continued to occupy this half lot until his death on April 30, 1916. During this occupancy of the south half of lot 33 by George R. White, by his widow and Hollis, and lastly by Hollis, from 1853 to 1916, the defendants claim that by adverse possession the Whites also acquired title to the disputed tract, viz.: the south half of lot 9, range 10, which, as we have seen, is a rectangular piece of land carved out of the southwest corner of the larger rectangle known as lot 34 to which plaintiffs have record title.

About a year before his death Hollis sold the stumpage on the disputed tract to Henry L. Barker and John Costley, giving a

deed therefor, and later these grantees gave a verbal permit to the defendants to cut and remove this stumpage, which cutting and removal was done, resulting in the suit at bar.

The controversy between the parties, therefore, is whether the Whites did such acts upon the disputed tract, or otherwise exercised such occupancy and control thereover, as would give them a title by adverse possession which would outweigh the record title of the plaintiffs.

In the abstract what acts of dominion will result in creating title by adverse possession is a question of law. In this field the powers of the court are primary and plenary. Whether those acts were really done, and the circumstances under which they were done, raise questions of fact. In this field the powers of the jury, in the first instance, are primary and plenary. The results from the exercise of jury power should be reversed by the court only when the jury has plainly misunderstood the law applicable to the case, or when they have exercised their power in a manner which plainly shows that they have been moved upon by bias or prejudice.

The record, which includes a very large number of exhibits, is quite voluminous, and a complete analysis of the testimony would be of small interest to anyone except the parties. Only a portion of the charge to the jury is presented for our inspection. We must assume that the instructions of the presiding Justice which are not made the subject of exceptions, and hence not printed in the record, were correct statements of the law governing the case.

As usual, in cases of this kind, the parties differ not only as to the facts but also, if the facts are established, as to their effect upon the legal question of gaining title by adverse possession.

1. Maintaining Fences.

The plaintiffs claim that to make out adverse possession by maintaining fences the defendants must show a substantial enclosure; that it is not enough to show a fence made merely by lopping one tree upon another; that the enclosure must be completed on all sides of the disputed territory; must be definitely located; and must be maintained continuously for the full statutory period. The plaintiffs claim that these requirements have not been established. On the other hand the defendants claim that the disputed tract was fenced on the south by a rail fence, nearly across the lot,

while on the north and east there was a brush fence with gate and bars on the east. Thus they claim that they have met the requirements regarding fencing. Upon that issue the burden is upon the one claiming by adverse possession, in this case the defendants. *Magoon* v. *Davis*, 84 Maine, 178; *Batchelder* v. *Robbins*, 95 Maine, 59; *Webber* v. *McAvoy*, 117 Maine, 326. Moreover, there is every presumption that the occupancy is in subordination to the true title, and if the possession is claimed to be adverse the acts of the wrong-doer must be strictly construed and the character of the possession clearly shown. *Preble* v. *M. C. R. R. Co.*, 85 Maine, 260; *Roberts* v. *Richards* 84 Maine, 1; *Codman* v. *Winslow*, 10 Mass., 146; *Ricard* v. *Williams*, 7 Wheat., 59; *Huntington* v. *Whaley*, 29 Conn., 391; *Coburn* v. *Hollis*, 3 Met., 125; *Jackson* v. *Sharp*, 9 Johns., 163. Examining the testimony in the light of these legal requirements, and giving it the effect most favorable to the defendants, we discover that there was a stone and rail fence on the westerly portion of the south line, but from the easterly end of this stone and rail fence there extended easterly only a brush or hedge fence, commonly known as a lop and top fence, and even that did not extend fully to the southeast corner of the tract; that there was at some time a similar lop and top fence on practically all of the east and north sides. One witness described it in these words "brush was piled up there like it would be for a brush fence," and that it was so piled "probably three feet or such matter." Other witnesses admitted on cross-examination that for quite a period of time even these lop and top fences had ceased to exist. It plainly appears that the hedge fences, whenever built or however long maintained, were simply convenient means of keeping Mr. White's cattle from escaping from territory which he was using as a pasture. There is no evidence of any fence, at any time, on the west line.

"A substantial fence built round a parcel of land sought to be held by adverse possession, and for the purpose of showing an adverse claim to the part enclosed, may be an act of such notoriety as to afford notice to all concerned of the builder's assertion of right; but when a brush fence is erected for the simple convenience of the builder it can have no such significance." *Roberts* v. *Richards*, 84 Maine, at Page 12, and numerous cases there cited. Upon this element of the case, namely, gaining adverse possession by maintain-

ing fence, we are of opinion that the defendants have failed to sustain the burden which the law imposes upon them.

2. Pasturing Animals Upon the Disputed Tract.

In considering this element we must note the location of the disputed tract with reference to the south half of lot 33 which the Whites occupied, and of which they held a deed. The southwesterly portion of the south half of 33 was a field and used as such. A portion of the southeasterly parts consisted of and were used as a pasture. There does not appear to have been a fence between this pasture in 33 and the disputed tract lying next east of it. It does appear that the Whites turned their cattle into their own pasture, which covered a portion of the easterly side of lot 33, and since there was no fence to prevent they roamed over the disputed tract and were sometimes there found by the sound of the cow bell. This unrestricted meandering of cattle upon land of a neighbor is quite a different proposition from that of a deliberate intent of the owner of the cattle to pasture his stock upon his neighbor's land and by so doing to claim the establishment of a right which would ripen into a title to that land by adverse possession. The test of the hostile or adverse character of possession is the intent of the disseizor. *Preble* v. *M. C. R. R. Co.*, supra; *Martin* v. *M. C. R. R. Co.*, 83 Maine, 100; *Richardson* v. *Watts*, 94 Maine, 476; *Ricker* v. *Hibbard*, 73 Maine, 105; *Soper* v. *Lawrence*, 98 Maine, 268. *Phinney* v. *Gardner*, 121 Maine, 44, 115. Atlantic Reporter, 523.

We do not desire to be understood as saying that intent alone, a secret, mental intent, would be sufficient to create a possession which would ripen into adverse possession. In other words, constructive possession alone, will not avail. For adverse possession, to create title, does not consist alone of mental intentions but must also be based on the existence of physical facts which openly evince a purpose to hold dominion over the land in hostility to the title of the real owner, and such as will give notice of such hostile intent. *Tennis Coal Company* v. *Sackett*, 172 Ky., 729; 190 S. W., 130; Annoted cases, 1917 E., 629. In *Richmond Iron Works* v. *Wadhams*, 142 Mass., 569, we find a case very similar to the one at bar. Title by adverse possession was there claimed because the claimant's cattle, put upon his own land, had used that land, and

also adjacent land owned by one who had prior title, as a place upon which to run, feed and drink, without hindrance or objection made by anyone, for more than twenty years, but the Massachusetts court held that the claimant had not thus gained title to the adjacent land by adverse possession.

3. CUTTING WOOD AND TIMBER.

The defendants claim with much confidence that the Whites gained title by adverse possession because the latter had cut logs and firewood, and peeled bark, somewhere upon the disputed tract, which operations had been carried on with more or less regularity over a period of more than twenty years. But a careful examination of the testimony reveals such desultory and occasional acts, so far as log and bark operations are concerned, that they comport far more nearly with acts of mere trespass than of actual occupation and possession.

The occupation of woodland as a wood-lot, under certain circumstances and conditions, may work an adverse possession which will successfully bar the owner by a record title from recovering his land. R. S., Chap. 110, Sec. 10, reads as follows:

"To constitute a disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded with fences or rendered inaccessible by water; but is sufficient if the possession, occupation and improvement are open, notorious and comporting with the ordinary management of a farm; although that part of the same which comprises the woodland belonging to such farm, and used therewith as a woodlot, is not so enclosed."

But the Whites held lot 33 by deed, not by adverse possession. The disputed tract was contiguous to the east line of lot 33. Hence this case falls within the rule laid down in *Adams* v. *Clapp*, 87 Maine, 316, where the court construed the final clause of the statute just quoted, saying, "We think that the final clause of the section . . . . was made and intended to apply to a case where the disseizor was occupying and using a wood-lot in connection with land or a farm which he was also occupying and using adversely; and that it was not intended to apply to a case where a person enters upon land of which he holds title, and all his visible acts of ownership are done upon that land, and thereby acquire title to

a tract of wood-land although it may be contiguous to such land. It could not have been the intention of this statute to extend the doctrine of constructive disseizin thus far so as to acquire title to wood-land, or such as may be used as a wood-lot, unless it be a part of the farm which is occupied and used adversely. . . . . While the statute in question in terms obviates the necessity of fences, and provides what shall be deemed sufficient evidence of the adverse intent of the party holding it, it also extends this constructive disseizin or adverse character of the possession to that part of the land or farm which is 'a part of the same' and which 'composes the wood-land belonging to such farm and used therewith as a wood-lot' . . . . But the statute does not, either in express terms or by implication, extend this doctrine of constructive disseizin to wood-land unless it is a part of the farm thus adversely occupied and used in connection with it as a wood-lot." Plainly the statute gives no aid to the claim of title by adverse possession set up by the defendants.

The case from which we have just been quoting, *Adams* v. *Clapp*, supra, gives such a clear and concise statement of the common law rule applicable to the element which we are now discussing that we quote again. "Where it (the wood-lot) is no part of the farm adversely occupied, where the title to the farm is in the person occupying and in possession of it, then, although such wood-land may lie contiguous to it, in order to acquire title to such wood-land there must be such actual use and occupation of it, and of such unequivocal character, as will reasonably indicate to the owner visiting the premises during the statutory period, that instead of such use and occupation suggesting only occasional trespasses, they unmistakably indicate an asserted exclusive appropriation and ownership. The acts must be such as to leave no reason to inquire about intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse." See also *Roberts* v. *Richards*, supra; *Hooper* v. *Leavitt*, 109 Maine, 70.

The evidence in this case, when carefully and impartially studied, shows that during a long period of years there had been cutting of firewood by the Whites, but the cutting over this tract of forty or fifty acres was desultory, as shown by all the witnesses, and as one witness testified it was done "where the cutting was best." There is not sufficient evidence to show any definite location, extent or

boundary of the actual cutting. It was such cutting as would suggest trespass "to the owner visiting the premises during the statutory period" rather than an "asserted exclusive appropriation and ownership."

It is the opinion of the court that by common law, as well as by statute the defendants have failed to establish title through adverse possession by virtue of their cutting of wood and timber.

4. FORBIDDING OTHERS TO CUT UPON THIS TRACT.

The testimony shows that on two occasions the Whites had forbidden others from cutting on this tract, but in *Hudson* v. *Coe*, 79 Maine, 83, it was held that keeping off trespassers did not constitute such an act of ownership as would establish title by adverse possession.

5. BALDWIN SURVEY IN 1881.

It appears that lot 34 was formerly owned by Sprague and James Adams, whose trustees on September 14, 1900, deeded to the plaintiffs' lands in Springfield, which deed, so the plaintiffs say, included the disputed tract. It further appears that in the year 1881, S. & J. Adams employed Thomas W. Baldwin, a surveyor, to define the east line of lot 33 which separated the Adams land from the land of White. In so doing Baldwin located said east line in such manner as to leave a small strip, on the west side of the disputed tract, within the limits of the White farm, but by far the greater part of the disputed tract was found to be east of the east line which Baldwin was employed to define. Much controversy arose at the trial as to whether this was or was not a re-entry upon the disputed tract by S. & J. Adams also whether adverse possession had already been acquired by the Whites so that no re-entry could be effective because the adverse possession had ripened into title, and particularly whether or not Baldwin went there for the purpose of taking possession of the land on the easterly side of the line in behalf of his principals, S. & J. Adams. This purpose of taking possession and the intent of Baldwin, became and constituted one portion of the plaintiffs' bill of exceptions.

In view of our opinion that the Whites, up to 1881, had not gained title by adverse possession it must follow that the controversy

between the parties as to Baldwin's intent, at the time of the survey, disappears from the case.

6. LOBLEY SURVEY IN 1913.

The defendants lay stress on the fact that in 1913 the plaintiffs employed Joseph A. Lobley to survey the lines of their land in the township in which this disputed tract is located, and in doing so Lobley ran lines which excluded this disputed rectangular tract from the larger rectangle which included 9 range 10 and 10 range 10, or lot 34 as we have already seen. From this the defendants urge, first that the plaintiffs recognized the weakness of their title to the excluded rectangle, and second that the plaintiffs abandoned the excluded rectangle and are now equitably estopped from claiming it. To the first claim here made it is a sufficient answer that the defendants, upon whom rests the burden of proving title by adverse possession, as we have already stated, must rely upon the strength of their own title rather than the weakness of the plaintiffs' title. As to abandonment we may well say here, as was said in *Phinney* v. *Gardner*, supra, that there is no opportunity for the application of the doctrine of abandonment. As was said in that case "The characteristic element of abandonment is the voluntary relinquishment of ownership, whereby the thing so dealt with ceases to be the property of any person and becomes the subject of appropriation by the first taker"—After there discussing abandonment as used in connection with personal property, inchoate and equitable rights, and incorporeal hereditaments, the court well said "at common law a perfect legal title to a corporeal hereditament cannot, it would seem, be lost by abandonment. Its very essence is inconsistent with the attributes of real estate." See also *Smith, Admr.* v. *Booth Bros.* et al, 112 Maine, at Pages 305-6. Even if the defendants' claim of abandonment, whereby this disputed tract ceased to be the property of any person and became the subject of appropriation by the first taker, were to be more seriously considered, then the abandonment was at the time of the Lobley survey in 1913 and the period between that date and the date of the writ, December 2, 1916, was far too brief to afford the defendants' title by adverse possession.

But the defendants, relying upon the incidents of the Lobley survey in 1913, present in their brief statement a somewhat elab-

orate rehearsal of matters and things whereby they claim that the plaintiffs are equitably estopped from now claiming "any of said trees or stumpage by reason of their misconduct in misleading the said Barker and the said Costley and the said defendants in manner aforesaid." The misleading misconduct thus relied upon, stated briefly, consisted in the fact that when Lobley made the survey for the plaintiffs he marked corners and lines by peculiar symbols which were and had been used by the plaintiffs to mark their corners and lines, and that the corners and lines thus marked did not include this disputed tract. The defendants do not claim that the plaintiffs made any representations, or failed to make any such to the defendants at the time when they purchased the stumpage of Hollis White, but on the contrary they expressly state that White, who was then selling the stumpage to the defendants, on June 22, 1915, when no plaintiff was present and no one present representing the plaintiff, "took Henry L. Barker and John Costley upon the land upon which said trees stood and showed them the survey marks, spotted lines and the marks upon the corner stakes, with the word Webber upon them, and informed them that he was the owner of said premises and that the said plaintiff claimed no title to the same." From these representations and conditions the defendants say they were induced to buy, and claim, as we have already stated, that the plaintiffs are now equitably estopped from claiming the trees or stumpage.

Equitable estoppel, which is another expression for estoppel in pais, is so called to distinguish from estoppel by deed or record. The general rule of law in regard to equitable estoppel in England and this country is that "a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another and did so influence it, and when such denial will operate to the injury of another." *Piper* v. *Gilmore*, 49 Maine, 149. In the case from which we have just quoted the court further say: "In all the cases where an estoppel has been held to exist, it is believed that it will appear, upon examination, that there was some evidence tending to show that the party estopped had some knowledge of the rights, interest, or intentions of the other party, or of his relations to the thing to which his declarations or acts related, or that he had some intention of misleading the other

party into some action that might be prejudicial to him. In every case there will be found some degree of bad faith, either expressly designed or constructive."

The record in the case at bar fails to show that the plaintiffs had knowledge of the rights, interest, or intentions of the defendants, who now seek to invoke the law of equitable estoppel, or that they had some intention of misleading the defendants when they had the Lobley survey made. Nor does the record show bad faith, either expressly designed or constructive. It seems quite plain, from a careful study of the testimony and the rules of law applicable to the contention, that the doctrine of equitable estoppel cannot be successfully invoked by these defendants against the plaintiffs.

In view of the conclusions we have reached, it does not seem necessary to discuss the exceptions, for we are of opinion that the jury plainly misunderstood the law applicable to the case and that their verdict must not be allowed to stand. The mandate must accordingly be,

Verdict set aside.
New trial granted.
Exceptions not considered.

S. J. WYMAN *vs.* CARRABASSETT HARDWOOD LUMBER COMPANY.

A, by oral agreement only, agreed to sell certain real estate and personal property to B at a certain price agreed upon, and executed a deed of the real estate and a bill of sale of the personal property in accordance with the trade, and left them with C to be delivered to B upon payment of the purchase price. The purchase price was never paid or tendered and no title passed. B entered into an oral agreement with D to sell the personal property and to lease the real estate, and D went into possession of both the real estate and personal property, but failed to perform any of his agreements and used, consumed, and disposed of some of the personal property. A is entitled to recover of D the damages sustained.

The conclusion of the court is that the plaintiff is entitled to recover the value of his personal property delivered by him to the Timberland Company and delivered by the Timberland Company to the defendant company.

On report. This is an action in trover for the value of articles of personal property alleged to have been taken and converted by defendant. Plaintiff owned several farms and personal property on and about them in Franklin County, and agreed orally to sell the whole property both real estate and personal property to the Carrabassett Timberland Company for $10,500. The plaintiff executed a deed and bill of sale, in accordance with the trade, and left them with the First National Bank of Farmington for delivery to said Timberland Company upon payment of the purchase price. The money for the purchase price was never paid or tendered and no title passed. Subsequently the Timberland Company entered into negotiations with the Carrabassett Hardwood Lumber Company which agreed to purchase all the personal property and lease the real estate and execute stumpage permits of the Timberland Company. This agreement was an oral one only, and not enforcible, and the Hardwood Company failed to perform any of its agreements.

The Hardwood Company, however, through its president entered into possession of the farm and took into his custody various articles of personal property, and used, consumed and disposed of them as the property of his company. Judgment for plaintiff.

The case is fully stated in the opinion.

W. B. Skelton and S. P. Mills, for plaintiff.

F. W. Butler, for defendant.

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

SPEAR, J. This is an action of trover for the value of a long list of articles of personal property alleged to have been taken and converted by the defendant company.

The alleged cause of action came about as follows: The plaintiff owned certain farms in Franklin County with camps thereon, together with all the personal property claimed in his writ. Through a real estate agent he agreed to sell the farms and personal property for the sum of $10,000, net to himself.

Later, about September 20, 1920 the plaintiff and the Carrabassett Timberland Company were brought together and entered into an oral contract for the sale and purchase of the property at the price of $10,500. The plaintiff executed a deed and bill of sale, in accordance with the trade, which he left with the First National Bank of Farmington for delivery to his grantee upon payment of the purchase price. No other writings were made, the purchase money was not paid or tendered, and no title ever passed in pursuance of this agreement.

In the meantime and unknown to the plaintiff, the Timberland Company had entered into negotiations with the Carrabassett Hardwood Lumber Company, whereby the latter company agreed to purchase all the personal property, take a lease of the farm from the Timberland Company and execute certain stumpage permits.

The Hardwood Company failed to perform any of its agreements. Its agreement was oral, and not enforcible. The breach of agreement resulted in the neglect of the Timberland Company to take and pay for the farm and personal property as it, in the outset, had agreed to do, though not by an enforcible contract. Within a few days after the Timberland Company and the Hardwood Company had com-

pleted their agreement of supposed sale and purchase, the president of the Hardwood Company entered into possession of the farm and took into his custody the various articles of personal property, and used, consumed, and disposed of them as the property of his company.

Several weeks after the original understanding between the plaintiff and the Timberland Company, the president of the Hardwood Company made a check for $600, payable to the Timberland Company on account of the sale price of the personal property. This check was delivered to the attorney of the Timberland Company, but the plaintiff had nothing to do with it. Nothing further was ever done toward paying the plaintiff for his real and personal property.

Upon the farm when the defendant went into possession was live stock composed of team horses, cows, sheep, calves, pigs and hens.

All the personal property of the alleged conversion was attached on the plaintiff's writ, except what had been destroyed or lost.

The plea was the general issue with a brief statement: First, that the defendant was a tenant, and that trespass not trover was the plaintiff's form of remedy. Second, that the defendant while in the legal possession fed a large part of the hay to the stock of the plaintiff. Third, that the hay, grain and stock was delivered to the defendant by the plaintiff or with his consent, and that he is equitably estopped. Fourth, (consolidating several specifications), that the plaintiff had knowledge of the delivery of all of said personal property to it, by the Carrabassett Timberland Company, and made no objection to the defendant corporation receiving said property, using and improving it, or feeding the hay and grain to said stock, and that he has waived or is now equitably estopped from making any claim thereto.

The only specifications which it is necessary to consider in framing the issues involved are the general issue, which raises the questions of fact as to whether the plaintiff had notice of the taking, waived objection or was estopped.

The case comes up on report, thereby investing the court with jury powers in deciding all questions of fact.

It is conceded that no demand was made.

The case accordingly, is resolved into the following propositions: First, was the taking by the defendant tortious? Second, if not was it waived? Third, if not waived, was he estopped?

At the outset it cannot fail of note that the evidence shows that the equites in the case predominate strongly in favor of the plaintiff. Both the Timberland Company and the defendant company trifled with his rights. The sale was a cash transaction and neither company had a right to take possession of and use his property, until one or the other had paid for it, or by such possession and use, assumed a moral responsibility to pay for it, which the plaintiff had a right to respect and regard as a guarantee of payment. We are, therefore, of the opinion that the taking by the defendant was tortious, even if the plaintiff knew it, and knew the defendant's use of it. He had a right to assume and expect, under the trade he had made and the deposit of his deeds, that the purchaser would shortly pay for the property, and was justified in regarding the Timberland Company in the meantime, as the owner of it, with a right to do what it pleased with respect to it. He had no occasion to think that the purchaser, without notifying him that it was not going to pay for the property as it had agreed to, would put his property into the possession of another corporation, without making any arrangement whereby he was to be paid.

But it may be said the plaintiff was charged with knowledge that the Timberland Company was not legally bound to pay for the property. True, and the Timberland Company was equally charged and consequently had no legal right, under the guise of a contract which they did not intend to carry out, to give possession of his property to the defendant. The plaintiff had no privity of contract, whatever with the defendant. He relied and had a right to rely upon the word and action of the Timberland Company. It would be a distortion of justice to permit these two corporations to thus allure the unsuspecting plaintiff into substantial loss and then drop him because they were not legally bound by the agreement by means of which they had led him into the trap, nor does the law permit it.

The contention of the plaintiff is confirmed by his positive testimony as well as the overwhelming probabilities of the transaction. On cross-examination he said:

Q. "During that time (at a former hearing) were you asked this question: 'Did you object to Mr. Beedy turning it over to Newcomb?' and did you answer: 'After they had taken some of the stuff Beedy spoke to me about it, and I told him it was all right because Newcomb had bought the stuff of the Carrabassett Lumber

Company, who had bought the property from him (me) and I expected to get my pay for it in a few days'." He said he did.

This answer is made the backbone of the defense. It was, however, in exact harmony with what the plaintiff believed, and had a right to believe, was the fact in regard to his sale of and expected pay for his property. The plaintiff says that if he had received his check that is all there would have been to it. But he was looking all the time, and expecting the check from the Timberland Company. He says he never recognized the Hardwood Company in any way with respect to any responsibility upon it for payment for the property, nor is there any claim that he did. He regarded what was going on between the Timberland Company and the Hardwood Company as their affair and not his. He undoubtedly thought, as any reasonable man might, that these two companies would not sell, buy, take possession, and exercise dominion over his property, under color of an agreement to buy or pay him for it, unless his vendee was going to pay for it as it had agreed to.

He had no occasion to have either care or solicitude with reference to what the Hardwood Company might do with the property. His trade was with the Timberland Company.

No member or representative of the Timberland Company took the stand to contradict either the word or spirit of the plaintiff's contention. And only one witness, an employee of the defendant took the stand in defense, and the only effect of his testimony in its bearing upon the legal aspect of the case was, that he called the plaintiff up on the phone, and "told him the things on the Spring Farm we wanted to use and wanted to know what about them," and he says, "It is all right to use it." The object of this testimony was to show that the defendant before it exercised dominion over any of the personal property on the farm obtained permission of the plaintiff so to do. If it were so it would not change the legal status of the parties as the plaintiff was at that time acting upon the hypothesis that the property was not his, but sold to the Timberland Company, and there is no proof that he knew or had been notified to the contrary, at that time. The testimony of the defendant witness is flatly contradicted by Wyman as well as by all circumstances and probabilities in the case. The burden being on the defendant, we feel no hesitancy in determining as a matter of fact that, upon this issue, the defendant has failed to sustain it.

Under the above facts and circumstances was the taking by the defendant tortious? The vendee, the Timberland Company, was to receive title to the real and personal property upon payment to the plaintiff of the price agreed upon. It could convey no title until that price was paid. Hence, its negotiations with the Hardwood Company, were unauthorized, null and void, and made the delivery of the property by it to, and the reception of it by, the defendant Company, a tortious taking and possession.

In 26 R. C. L., Page 1122, Section 33, the rule of law, applicable to the facts in the present case, is stated as follows: "Thus it has been held that demand and refusal prior to the bringing the action in trover, need not be shown when an innocent purchaser of goods from one who had no title had sold the same, or has exercised ownership by letting the property, or when it appears that the defendant purchased the property of one who had no right to sell, and holds it to his own use." Under these principles are cited many cases, among which is *Crocker* v. *Gullifer*, 44 Maine, 491, in which it is held:

"The sale being conditional,—that no title shall pass till the vendee pay the price of the article sold and delivered, the vender, if guilty of no laches, may reclaim the property, even from a vendee in good faith and without notice, *Coggill* v. *New Haven Railroad Company*, 3 Gray, 545. The chattel in such case is in the constructive possession of the seller, and an action may be maintained without demand in case of a conversion by the purchase, *Hill* v. *Freeman*, 3 Cush., 257."

It is further said in *Galvin* v. *Bacon*, 11 Maine, 30:

"Whoever takes the property of another without his consent expressed or implied, or without the assent of some one authorized to act for him, in his behalf, takes in the eye of the law tortiously."

The defendant so took the plaintiff's property.

In *McPheters* v. *Page*, 83 Maine, 234 we find this principle:

"It is established as elementary law by well settled principles and a long line of decisions that any distinct act of dominion over property in denial of the owner's right, or inconsistent with it, amounts to a conversion." The use made of the plaintiff's personal property by the defendant was inconsistent with the plaintiff's rights and was therefore a conversion.

The foregoing rules of law must be regarded as decisive of the tortious taking and possession of the plaintiff's property by the

defendant as purchaser. The taking of possession under the circumstances of the present case, being tortious it follows that the conversion was co-incident with the taking, and establishes the plaintiff's right of action as accrued at that time. Consequently no demand was necessary as a condition precedent to his right of action.

We are, therefore, of the opinion that the evidence amply proves that the taking of the plaintiff's property by the defendant was tortious.

The case might stop here were it not that the questions of waiver and estopped are raised.

The undisputed facts, as stated by the attorney for the Timberland Company proves that the company in the language of the attorney, "did not care to own any personal property and did not care to have the control of any of the buildings there, and they did not wish to enter into any contract with Mr. Wyman unless they could consummate the trade with the Hardwood Lumber Company by which the personal property should be taken from their hands and the buildings leased." Not a word of this ex-parte intention was communicated to the plaintiff. But when the Hardwood Company failed to pay, the Timberland Company refused to pay and, although it had sold and delivered Wyman's property according to its secret plan, it left him to the financial mercies of a corporation of which it did not receive its pay and to which it would not give credit.

Under the statement of the attorney, the neglect to give notice of its secret purpose, and its subsequent acts, the Timberland Company never had, even the color of title, to the plaintiff's property.

Is it reasonable to suppose that Mr. Wyman, apparently as well situated to know of the financial condition of the Hardwood Company as the Timberland Company, would have been any more willing to waive, and to subrogate, the credit of the former company for that of the latter, than the latter was to give credit? It was not probable nor did he do so. Wyman had no knowledge of any secret agreement, whereby the Timberland Company was going to exploit his property to its advantage if it could, and turn him over to a company it would not trust for $2,000 if it couldn't.

Upon the point of Wyman's knowledge of this secret deal, and waiver claimed to be based thereon, the attorney, who represented the Timberland Company in a part of the negotiations testifies:

Q. (By the Court). "Very true, but so far as you are familiar or were familiar with the transaction, whatever dealing there may have been between the Timberland Company on the one side and the Hardwood Company on the other part, may have been entirely independent of any knowledge of such transaction on the part of Mr. Wyman, or any relation on his part to that particular transaction?"

A. "I don't, I wouldn't, I don't know."

Q. "By same, that is what I supposed."

A. "Yes."

Following this, upon recall immediately after the attorney had testified, Mr. Wyman took the stand and said:

Q. "Did you know anything about any proposed arrangement between the Timberland Company and the Hardwood Lumber Company?"

A. "I did not know anything about any arrangement they had made, whatever." And the only reason why the Timberland Company did not stand by its trade with Mr. Wyman was the failure of the execution of its mental reservation with the Hardwood Company as stated by its attorney.

Q. "Was the failure of the Timberland Company to take the deed, (which Wyman had left at the bank) and pay the purchase price, (to Wyman) due to anything except the failure of the Hardwood Company to carry out its part?"

A. "That is all. I had the funds in my possession to pay the whole thing."

We have thus fully commented upon this connection of the Timberland Company with this transaction to show that the ex parte purpose of the company, in buying the property, was not in any way communicated to the plaintiff; that the plaintiff acted in the dark with respect to the mental reservation of the Timberland Company in its apparent sale to the defendant company, and consequently made no objections to what the defendant was doing with the property, upon the reasonable belief that, since the Timberland Company had delivered all the personal property to the defendant, it had sold it in good faith, and in due time, would pay the bank the money and take its deeds. For in order to get its title it was not necessary to see or confer with Wyman. He, therefore, was justified in waiting, without suspicion of anything wrong, expecting to receive his pay.

Accordingly, as the undisputed evidence proves, whatever was known and done by the plaintiff, between the time of the apparent sale and the discovery by him that the Timberland Company had delivered his property to the defendant upon a conditional sale; and that it did not intend to pay him for his property; the plaintiff was acting in good faith; and whatever he did by silence, knowledge, or consent, was based upon the hypothesis that the property belonged to the defendant by right of purchase from the Timberland Company. In the meantime, he did not know or claim he had any rights to waive. He was led to believe until too late, to his sorrow, that this property was not his; that it was the property of the Timberland Company or its grantees. By the obvious exercise of their dominion he had a right to believe this. In fact, under his agreement, and in view of the deposit of his deeds, ready for delivery, it is not easy to see how he could have thought anything else. But it may be said the deeds had not been accepted and the price paid. True, but he was perfectly willing to trust the Timberland Company as the evidence shows. He says:

"I thought it was all right for him to take some of the personal property, because I expected a check from the Carrabassett Timberland Company to pay for the real and personal estate and personal property." What reasonable man would have expected anything else?

In fine the situation, itself, speaks louder than any evidence could upon the question of waiver. Is it supposible for a moment that the plaintiff, had he known that the Timberland Company was going to make its agreement and never pay him for his property, would have voluntarily relinquished the use, control and custody of this property to the defendant company?

Reading between the lines will amply disclose that the reason that influenced the Timberland Company to refuse the credit of the defendant, would have equally actuated the plaintiff to follow the same course. The evidence upon the question of waiver does not show, on the part of the plaintiff, the voluntary relinquishment of a known right. Nor were there any acts of estoppel. The defendant contends that the plaintiff after the defendant went into possession took $600 from it in part payment for his personal property. We find no evidence to support that contention, but just the contrary. The check was payable to the attorney for the Timberland Company who testified on cross-examination as follows:

Q. "Follow that right along. How do you understand the check came about to be brought to you for the $600?"

A. "I think that check was brought to me because of the delay in consummating the trade and the fact that the Hardwood Lumber Company was using up some personal property and it was desired for the protection of Mr. Wyman."

Q. "Mr. Wyman's agent procured it of Mr. Newcomb and brought it to you?"

A. "He brought it to me."

Note that the answer was not yes. The attorney as will in a moment appear would not say that A. P. Richards was Mr. Wyman's agent.

THE COURT.

"A. P. Richards brought it to him. From what source he got it, he didn't know."

Q. "He brought you the check for the Hardwood Lumber Company?"

A. "He did."

BY THE COURT.

Q. "And Mr. Richards was acting all the while as I understood him for the Timberland Company?"

A. "Yes, your Honor."

This answer proves whose agent A. P. Richards was in procuring the check.

Again he testified.

Q. "What was the check given you for?"

A. "It was to be ultimately applied in part payment of the personal property which the Hardwood Lumber Company was to receive from the Timberland Company."

The foregoing questions and answers tell the whole story of this case. The last answer shows conclusively that the Timberland Company understood that it had delivered to the Hardwood Company the personal property it had agreed to buy of the plaintiff, and that the defendant was using it up, and obtained, rather than merely took, the check in part payment. This check transaction was the business of the Timberland Company not of the plaintiff, Wyman.

Another statement in this testimony is very significant:

"I think that the check was brought to me because of the delay in consummating the trade." What trade? Between itself and the Hardwood Company. There was no other trade.

This evidence alone, throws a flood of light upon the whole transaction, and proves that these two companies were negotiating and exercising dominion over this personal property without the slightest regard to Wyman's interest, because at that time the only difficulty between them was the delay.

The check transaction was sometime after the defendant had taken over and was using the personal property. The two companies had not even at this time abandoned the transaction. It was apparently in the process of consummation. As was testified by A. P. Richards who says he was a "go between" for these companies in regard to the check transaction as follows:

"After talking with him (Mr. Newcomb) up there he decided that their price was all right and that he would take it at their figure and sign the lease which he had agreed to do before, but had failed to do it, and on the strength of that he gave me this check of $600."

It is perfectly obvious that Wyman's connection with the $600 check affords no evidence whatever of an estoppel, unless it be upon the defendant. On the contrary the delivery of this check in part payment for the personal property stamps the contention of the defendant, that it did not claim the property as its own, but was using it by the consent of the plaintiff, as absurd, and inconsistent with the workings of a sane mind in the transaction of business. Six hundred dollars is a substantial sum of money to be paid on a twenty-five hundred dollar account, as this sum was understood to be paid by Newcomb, as shown by the above testimony of A. P. Richards.

We find no evidence of estoppel. Our conclusion accordingly is that the plaintiff is entitled to recover the value of his personal property delivered by him to the Timberland Company and delivered by the Timberland Company to the defendant company.

But the case shows that the plaintiff has presented a list of articles, which he claims were converted by defendant; he divides them into three classes: (1) Articles "entirely used up"; the value of these except the crops not harvested, he is entitled to recover; (2) Articles "left in a damaged and depreciated condition"; (3) Articles "not materially injured." The plaintiff has been in possession of the farm and the articles of personal property embraced in classes (2) and (3) since January 1, 1921. He disclaims any injury to the articles embraced in class (3). He testifies as to the depreciated values of articles embraced in class (2), and refers to both classes of articles as taken back.

Accordingly he is not entitled to recover anything for the uninjured articles of the third class; he does not claim any injury to them. As to the articles of the second class, their value at the time the plaintiff retook them should be allowed in mitigation of damages. The title to the articles in both second and third classes is still in the plaintiff; he has never lost it, and the articles are now in his possession.

Judgment for the plaintiff for the value of the articles, except the crops not harvested, listed in classes (1) and (2), after allowing in mitigation of damages the value of the articles of the second class at the time plaintiff retook them.

Case remanded to nisi prius for assessment of damages only, in accordance with this opinion.

BALLOU'S CASE.

Somerset. Opinion April 8, 1922.

The findings on questions of fact by the chairman of the Industrial Accident Commission, in absence of fraud, and also provided that there is some legal evidence supporting such findings, are final.

In this class of cases it must be borne in mind that the Appellate Court is working under a statute which provides that the decision of the Chairman of the Industrial Accident Commission, in the absence of fraud, upon all questions of fact, shall be final.

In the instant case there was some legal evidence in support of the finding of the chairman.

On appeal. This is a proceeding by petition under the Workmen's Compensation Act by Fannie E. Ballou, for compensation as dependent widow of Joseph Ballou, who, on November 17, 1919, was an employee of the Jackman Lumber Company in its sawmill at Jackman

as a sawyer. Soon after the crew began to work in the afternoon on said date, fire broke out in the mill and decedent was trapped in the mill and had to escape through a window.

On April 3, 1920 the husband of claimant died with influenza or pneumonia. Claimant alleged that her husband, the deceased, in escaping through fire and smoke from the mill, inhaled flame, smoke and gas, which produced in the lungs a condition which later resulted in pneumonia and death. A hearing was had upon the petition before the Chairman of the Industrial Accident Commission, who found in favor of the petitioner and granted compensation.

From a decree of the Supreme Judicial Court in accordance with such finding by the chairman, an appeal was taken by the Jackman Lumber Company and the Aetna Life Insurance Company.

Appeal dismissed. Decree below affirmed with additional costs.

The case is stated in the opinion.

Merrill & Merrill, for appellee.

Andrews, Nelson & Gardiner, for appellants.

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

SPEAR, J. This case arises under the Workmen's Compensation Act, and comes to this court upon an appeal from a finding of the Industrial Accident Commission in favor of the petitioner. In this class of cases it must be borne in mind that the Appellate Court is working under a statute which provides that the decision of the chairman "in the absence of fraud, upon all questions of fact shall be final." "It has been again and again 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 that for such finding there be any legal evidence." *Gray's Case,* 120 Maine, 81, 113 Atl., 32. Therefore, the only question presented in this case is whether there was any legal evidence upon which the decision of the chairman could be based. Unfortunately, in this case much clearly inadmissible testimony was admitted. We do not hesitate to suggest that this practice is unsatisfactory, improper and to be avoided. We have, however, in order to protect the interest of parties seeking relief under this act, held that, if it has appeared that the commissioner did not take into consideration the evidence illegally

admitted, and that there is sufficient evidence outside the illegal testimony to sustain his finding of fact, that the appeal should be denied upon that ground. But decisions based upon such testimony are unsatisfactory, both to the court and the respondent.

This criticism does not apply to the admission of testimony, upon the admissibility of which a debatable controversy might arise, but to the admission of testimony so clearly in violation of the rules of evidence, as to be so evident, that he who runs may read.

In a decision alleged by a magistrate to have been made upon the legal testimony, which has to be sifted from the illegal testimony, the question always arises whether he has made a proper differentiation, or whether he has coupled a part of the illegal with the legal evidence. Furthermore, both the court and the respondent are obliged, under such circumstances, to accept the declaration of the magistrate, without any possible knowledge of the operation of his mind, as to what is legal, or as to how far his judgment may have been influenced by the illegal testimony before him.

If decisions were given in these cases upon evidence contemplated by the statute and the law, it is the opinion of the court that appeals might be materially diminished, and the interest of all parties better subserved.

Upon a careful examination of the report in this case, and a separation of the legal from the illegal evidence we are inclined to the opinion that the decision may be sustained. Several legal points are raised in the argument of the defendant, and while they applied theoretically to several phases of fact raised by the evidence we are, nevertheless, of the opinion that the question of fact, whether the burns received by the decedent were the direct cause of his death can be answered in the affirmative. The chairman of the commission found the following facts:

"About one o'clock on the afternoon of the 17th of November 1919 the mill in which Mr. Ballou was working for the Jackman Lumber Company burned. In escaping from the burning building Mr. Ballou received severe burns about the mouth, face, neck, hands and forearms. The burns about the face were quite severe, particularly about the nose, right cheek, lips and chin. His lips were so badly burned that a part of the skin and some of the flesh was blackened. His tongue was burned and blackened and the lining of his mouth blistered. For several days after the fire his tongue was

so badly swollen because of the burns he could not speak. He was unable to eat solid foods for several weeks after the fire. He developed a severe cough immediately after the fire and when coughing he raised a brownish sputum. This continued from the day of the fire until the day of his death."

"No question is raised in the case as to whether the accident to Mr. Ballou arose out of and in the course of his employment."

"Mr. Ballou died on the third day of April, 1920, leaving surviving him Fannie E. Ballou, the petitioner, his widow."

"From the time of the fire to the date of his death Mr. Ballou gradually lost weight and strength. For more than a month after the fire he could eat no solid food because of the burns in his mouth. His cough, which developed after the fire accompanied by the raising of a dark brownish sputum continued with increasing intensity until he died. He tried three or more kinds of work between the 7th of January and the middle of March and failed at all on account of his physical condition. Altogether he worked only a few days from the time of the fire in Jackman until he died."

"Prior to the accident for a period of a year or more Mr. Ballou had lost no time from his work on account of sickness and he appeared to be a strong, robust man."

"It is therefore found as a matter of fact that the death of Joseph Ballou on April 3, 1920 was due directly as a result of the injuries received by him at the fire in Jackman November 17, 1919, and that, therefore, his widow, Fannie E. Ballou, is entitled to compensation as a dependent of the said Joseph Ballou."

If the death can be traced, even though the paths of the evidence be devious, directly to the accident, and as a result of the injuries, there received, it will undoubtedly be conceded that collateral issues of law or fact become immaterial. Because if the death can be so traced, it brings the case, regardless of other facts, within the purview of Section 12 of the statute. It would be useless as well as burdensome to undertake a separation of the legal from the illegal evidence found in the record of this case, or to analyze the legal evidence tending to support the decision of the chairman. The evidence, if believed, tends to show a causal relation between the injuries and the death; and the credibility of the evidence under our statute and decisions is absolutely within the judgment and decision of the commission or

its chairman. If the Appellate Court finds any legal evidence in the record that supports the decision it has fulfilled its line of inquiry in that regard.

While the conclusion to which we arrive is unquestionably doubtful, nevertheless, under the express language of our statute, that this compensation act shall be liberally construed in favor of the petitioner we think the doubt should be solved in favor of the petitioner. The evidence shows a line of symptoms, never before present, which continued to afflict the decedent to a greater or less degree from the time of the fire until his death by pneumonia. The defendant's physician answered the following hypothetical question as follows:

Q. "Assuming, Doctor, a man went through a fire and going through received such injuries, either by inhaling smoke, flame or gas, that he received burns to the 3rd degree on the outside of his face, nose, chin, and the inside of his mouth so that a few hours after the fire he could not talk, his tongue was blackened and swollen so,—don't you think burns of that nature would have something to do with the lungs?"

A. "If that was true—yes—must have been."

There is evidence to support the facts embraced in the hypothetical question. Therefore, the answer of the physician is important as tending to show that there was a direct causal relation between the fire and the death of the decedent. Other testimony tends to show that a cough, which developed after the fire, was accompanied by the raising of a dark brownish sputum, which continued with increasing intensity until the decedent died.

Upon the foregoing conclusions, based upon a consideration of the facts, we find no occasion for a discussion of the legal issues raised in the briefs.

Appeal dismissed.
Decree below affirmed with additional costs.

STERNS LUMBER COMPANY

vs.

PENOBSCOT BAY ELECTRIC COMPANY.

Penobscot. Opinion April 13, 1922.

If under its charter a corporation created for the purpose of constructing a dam to store and retain water for driving purposes is authorized to charge tolls, it is under a reciprocal duty and obligation to store and retain an adequate supply of water for driving purposes. Loss of profits, if shown with reasonable certainty, and proven to be the proximate result of defendant's wrong, may be recovered.

In the instant case under the original Charter of 1899, specified rates of toll were established by the Legislature and the right to charge tolls imposed the corresponding obligation to store and retain an adequate supply of water for driving purposes. The right and the duty were reciprocal.

Under this charter the right of the log owner was made paramount. He was given the priority.

The amendment of 1903 enlarged the rights of the corporation as to the use of the water when not needed for log-driving purposes, but under the proviso in that act the prior and superior rights of the log owner were preserved intact. The duty continued to be imposed upon the corporation to accumulate and store, as well as to discharge when stored, the requisite amount of water for driving purposes.

The defendant is subject to the same obligations in these respects as was the original company. All the duties as to driving devolving upon the Wilson Stream Dam Company before the mergers were assumed in the mergers and now rest upon the defendant.

Therefore the plaintiff's rights in the case at bar are paramount to the defendant's, and it was the duty of the defendant to accumulate and retain as well as to store and discharge an adequate supply of water for plaintiff's use.

The referees found as a fact that neither in 1917 nor in 1918 at the beginning of nor during the driving season was there stored an adequate head for driving purposes, so that liability is fixed and the only remaining question is that of damages.

Damages in 1917 have been fixed by the referees at $3,000. This finding is final

Damages in 1918 comprise two elements, first, the plaintiff's loss caused by delay and additional expense in driving due to an insufficient head, and this was fixed by the referees at $5,000. This also is final.

The second element is loss of profits. If this loss is proven to be the proximate result of the defendant's wrong and the profits can be shown with reasonable certainty, then they can be recovered.

In this case both these necessary elements are found by the referees as facts in their report, and these findings leave no question of law open for the court. They fixed the damage through loss of profits at $12,000.

The conclusion, therefore, is that the defendant is liable for $3,000 damages in 1917 and $17,000 in 1918.

On report on questions of law. This is an action to recover damages sustained by plaintiff because of the alleged nonfeasance and misfeasance of the defendant in the storage and use of water in the Wilson Stream Dam in the years 1917 and 1918. The plaintiff owned and operated a lumber mill on the Penobscot River at Hampden, and during said years carried on lumbering operations on and near Wilson Stream in Piscataquis County to obtain logs for its mill, and Wilson Stream was the only route for driving its logs to Sebec Lake and thence to the Penobscot River. The defendant corporation is a public service corporation, owning dams, penstock, power station and transmission lines on Wilson Stream. The Wilson Stream Dam Company was incorporated by Chapter 64 of the Private and Special Acts of 1899 for the benefit of log owners, but not to store and hold back and retain any water except during such times as it was required for driving purposes. The powers of the company were enlarged by subsequent legislation giving it authority to store and hold water at all seasons and for practically all commercial purposes, but with the proviso that "the water stored in said dam shall be used at all times so far as necessary for log driving purposes on Wilson Stream." In 1909 the Greenville Light and Power Company succeeded to the rights and duties of the Wilson Stream Dam Company, and in 1915 defendant corporation acquired all the property, rights, privileges and franchises of the Greenville Light and Power Company. Under the original charter of the Wilson Stream Dam Company specified rates of toll were established. During the seasons of 1917 and 1918 plaintiff alleges that defendant did not store and retain an adequate supply of water for driving purposes, as it was under obligation to do as a reciprocal duty to its right to

charge toll, and as a result it sustained damages caused by delay and additional expenses in driving due to an insufficient head of water, and that it also suffered loss of profits resulting therefrom. Defendant pleaded the general issue and a brief statement alleging among other things that the shortage of water was due to the unprecedented and unexpected drought upon the watershed of Wilson Stream and tributaries.

The case was referred to two Justices of the Supreme Judicial Court who found the facts and reported certain questions of law to the Law Court under Rule XLV. In the report of the referees which was accepted the damage in 1917 was fixed at $3,000, and in 1918 at $5,000, and the damage through loss of profits at $12,000. By agreement of the parties the case was reported for the decision of the Law Court upon the questions of law reported by the referees and upon their findings of fact in accordance with the legal rights of the parties. Judgment for plaintiff for $20,000 with interest from date of writ and costs.

The case is fully stated in the opinion.

Matthew Laughlin and Ryder & Simpson, for plaintiff.

Harvey D. Eaton, Merrill & Merrill and Everett Maxcy, for defendant.

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

CORNISH, C. J. This is an action on the case brought by the plaintiff, a log owner, to recover damages sustained because of the alleged nonfeasance and misfeasance of the defendant in the storage and use of water in the Wilson Stream Dam, so called, in the years 1917 and 1918. The case was referred to two Justices of this court who found the facts and reported certain questions of law to the Law Court under Rule XLV. By agreement of the parties the case was then reported to this court upon the questions of law reported by the referees and upon their findings of fact.

A summary of the general situation as determined by the referees may be briefly stated. The plaintiff owns and operates a lumber mill on the Penobscot River at Hampden. To obtain logs for its mill it was, in 1917 and 1918, carrying on lumbering operations on and near Wilson Stream in Piscataquis County. Its operations amounted to

something more than two million feet each year, and Wilson Stream provided the only route for driving the lumber to Sebec Lake and thence to the Penobscot River. In the same years the defendant, as the successor of the original Wilson Stream Dam Company and also by virtue of divers special statutes to be hereafter referred to, owned and operated a dam and power station on said Wilson Stream and supplied power and light to various corporations and communities. The case involves the respective rights of the parties in the waters of Wilson Pond and Stream, the plaintiff requiring water for log driving and the defendant for power. Which, if either, has the priority in use is the main issue.

Wilson Pond with an area of about two square miles has a watershed of 43.2 square miles. From Wilson Pond, Wilson Stream flows approximately twenty miles to Sebec Lake. This lake is twelve miles long, and Sebec Stream, its outlet, which is about ten miles long, flows into the Piscataquis River, a branch of the Penobscot. The plaintiff's mill at Hampden is about one hundred and fifteen miles below Wilson Pond.

In order to facilitate the driving of logs and lumber down Wilson Stream, the Wilson Stream Dam Company was incorporated by Chapter 64 of the Private and Special Acts of 1899. This is one of a large number of similar charters granted by the Legislature of Maine from very early days to enable log owners and log drivers to more readily get their logs to market along streams which in their nature and condition are floatable for boats, rafts or logs and therefore navigable under the definition adopted in this State and, as such, are deemed public highways and subject to the use of the public. *Veazie* v. *Dwinel*, 50 Maine, 479; *Smart* v. *Lumber Co.*, 103 Maine, 37.

The sole purpose of this charter was to benefit the log owner and to assist him in getting his logs out of the stream in the Spring season. A storage dam for that single object was contemplated and provided for, in order that water might be stored in advance and then let out to increase the volume in the stream while the actual driving was in progress. Specified rates of toll were established by the Legislature and the right to charge tolls imposed the corresponding obligation to store and retain an adequate supply for driving purposes. The right and the duty were reciprocal. *Weld* v. *Proprietors of Side Booms*, 6 Maine, 93; *Lewiston Steam Mill Co.* v. *Richardson Lake Dam Co.*, 77 Maine, 337.

Section 4 of this charter provides as follows: "Said corporation shall not hold back and retain any of the water of said Wilson Stream, except during such times as may be necessary for driving logs and lumber, as provided for in this Act." This section emphasizes the fact that the dam or dams constructed under this charter were not to be working dams or reservoir dams to be used in connection with working dams, but simply storage dams for log driving purposes. For these purposes, however, the rights of the log owner under this charter were made paramount to the rights of all others. He was given the priority. The Legislature deemed it a matter of so great importance to the public that the products of our vast forests should be utilized that the policy was early adopted in this State to grant this class of charters and confer these paramount rights upon the log owners. To the natural right of passage was added the right on the part of the toll-paying log owner to enjoy and the duty on the part of the toll-receiving corporation to furnish the necessary accumulated and retained water for driving purposes.

After this charter of 1899 was granted a log dam was built by the company at the outlet of Wilson Pond. It was used exclusively for the chartered purpose. The gates were usually shut down in the Fall and the dam constantly had a good head of water at the beginning of the log-driving season in the Spring. This continued for ten years. During the year 1909, the Greenville Light and Power Company, which we shall hereafter refer to as the Greenville Company for the sake of convenience, built a new concrete dam 350 feet further down the stream than the log dam of 1899, its top being on a level with the top of the old dam and therefore superseding it. About a quarter of a mile below the concrete storage dam a diverting dam was constructed and water is taken from the diverting dam to the defendant's power station 90 feet lower vertically, through a steel penstock about 2,300 feet long. The power thus generated is distributed over a large territory. All this has been done under various charters to be considered later. No controversy arose over the respective rights of the parties until 1917, two years after the defendant came into possession. Up to that time, the log owners had encountered no trouble. But in 1917, owing to inadequate storage, the plaintiff suffered delay and expense although it finally got its logs to the Hampden mill. In 1918, the logs reached Sebec Lake but too late to go forward and join the main drive. Consequently they

were sold at Sebec Lake. The defendant's position is clearly stated in a letter to the plaintiff under date of January 11, 1918, in which it said: "We do not understand that we are under any obligation to store water in Wilson Pond for the benefit of the log driving." This is the sharp issue, and to consider it understandingly we must recur to the statutes amending the original charter.

By an amendment in 1901, Private and Special Laws 1901, Chapter 472, the Wilson Stream Dam Company was given the right to build and maintain additional dams for the same purposes. This does not affect the issue here.

In 1903 another amendment was obtained, Private and Special Laws, 1903, Chapter 48, by which in addition to the powers already conferred upon it, the corporation was further "authorized and empowered at all times to store and hold by means of the dams mentioned in said original charter and said amendment, water for all domestic, sanitary, manufacturing, industrial, municipal and commercial purposes, and to create power for any and all such purposes" and to "sell, lease or otherwise dispose of the use of said water for any and all such purposes or to create power for any and all such purposes to any person, party or corporation, municipal or otherwise."

This amendment greatly enlarged the powers of the corporation so far as the storage and use of the water was concerned. Instead of being confined to a dam or dams to be used only at a certain portion of the year and for the storage of water for the single purpose of aiding in the driving of logs, it took on the additional power to store and use water throughout the entire year and for all commercial and municipal purposes.

However, the grant was not without qualification and limitation. The underlying and primary purpose of the original charter was fully preserved and guarded by these significant words: "Provided however, the water stored in said dams shall be used at all times so far as necessary for log driving purposes on Wilson Stream." This proviso is of the utmost importance. It expresses the legislative intent that the prior and superior rights of the log owners must be kept intact, and it therefore of necessity continued to impose upon the corporation the corresponding duty to accumulate and store, as well as to discharge when stored, the requisite amount of water for driving purposes. That duty was neither abrogated nor diminished by the granting of the additional rights. The true interpretation of

this amendment of 1903 is this: Under the act of 1899, when the driving season was over, the company could no longer retain the water in the dam and could use it for no other purpose. The gates must be opened and the water flow in its natural volume. Under the act of 1903, when the driving season was over the company could continue to store and hold the water during the remainder of the year and could use it for any commercial or municipal purpose. Certain rights and privileges were thereby added but no duties and obligations to log driving were thereby extinguished. These additional rights were independent of and were secondary to the driving rights in case of a conflict between the two.

The defendant would construe this proviso to mean that when the log owner desires the water for driving purposes he shall have it so far as may be necessary if it happens to be in storage when desired for immediate use, but that the company is under no obligation to accumulate and store the water in advance for that purpose although seasonably notified by the log owner, as in this case, that it should expect it; in other words, that the respective rights have been virtually reversed, that the manufacturing rights have superseded the driving interests and have become primary, while the driving rights are secondary so far as accumulation and storage are concerned. This in practice amounts to a partial or total extinction of the log owners rights, because the corporation can easily manage to use all, or a large part, of the stored water before, or shortly before, the log driver should need it, and little or none would be left for him.

Such a construction makes the amendment of 1903 a repeal of the storage duty under the act of 1899 and places the log owner at the mercy of the corporation. It is based upon the proposition that the Legislature had changed its long-time policy of utilizing the products of our wild lands in remote regions and applying the changed policy to the case at bar had deliberately and intentionally forsaken the owners of the forests adjacent to Wilson Pond and Wilson Stream. We cannot adopt such an interpretation. A heavy burden rests on the party asking it, and that burden has not been met in this case. True, the language of this proviso is that the water "stored" in said dams shall be used at all times so far as necessary for log-driving purposes, and does not in express terms add the words "hold back and retain" which were employed in the act of 1899. But in our opinion it was not the intention of the Legislature to modify or lessen

the duty of the corporation, and the word "store" in the amendment is equivalent as used here to "hold back and retain" as used in the original charter. If the obligation of the corporation is connected only with the use and not the storage, it would be as futile as to limit it to storage without use. The two must go together. They were created together and we do not think they have been sundered.

In consideration of storage and use, tolls were established in 1899, and they were not lessened by the act of 1903, although according to the defendant's contention the service to be rendered was minimized if not extinguished. Is it to be believed that the Legislature would have allowed the compensation to continue if the service was to be diminished?

Moreover, our construction is the one placed upon the amendment of 1903 by the parties themselves at the time of its passage and for fourteen years thereafter. This is most significant as bearing upon the intention of the corporation in asking for the amendment and of the Legislature in granting it.

Clearly there was no intention on the part of anyone at the time to modify the log-driving rights, but to give additional rights to the dam owner, and it is a well recognized rule of construction that statutes should be construed in a reasonable rather than in an unreasonable manner and so as to protect the rights of all rather than to sacrifice the rights of any.

The amendments subsequent to 1903 are in harmony with our views. Under Chapter 205 of the Private and Special Laws of 1905, the right to collect tolls was extended so as to cover all logs and pulp wood driven over the dams and improvements of the Wilson Stream Dam Company instead of being limited to those cut and hauled above the south line of Greenville as provided in the act of 1899. This shows that the Legislature still had in mind the rights and duties of the corporation as an aid to log driving.

In 1907, the Greenville Light and Power Company, previously incorporated under the general law, was confirmed in its incorporation and organization by Chapter 244 of the Private and Special Laws of that year, was authorized to extend its transmission lines, to supply the town of Greenville and Little Squaw Township with water taken from ponds and streams in said township, and was given the usual and necessary powers connected therewith and incidental thereto.

No mention whatever was made of the Wilson Stream Dam Company or the waters of Wilson Pond or Stream.

In 1907 the provision as to the tolls of the Wilson Stream Dam Company was again amended, Private and Special Laws 1907, Chapter 345.

In 1909 the Greenville Light and Power Company acquired the capital stock of the Wilson Stream Dam Company and by Chapter 95 of the Private and Special Laws of that year was further authorized to acquire all the property rights, privileges and franchises of that company and did so acquire them.

In 1915, the Penobscot Bay Electric Company acquired all the property rights, privileges and franchises of the Greenville Company, under Private and Special Acts of 1915, Chapter 52, and this corporation was the owner when these proceedings were begun.

Those franchises, acquired from the original company, first in 1909 by the Greenville Company and then in 1915 by the Penobscot Company, carried with them corresponding duties and all the obligations as to driving devolving upon the Wilson Stream Company before the mergers were assumed in the mergers and now rest upon the defendant. True, the duty of performing the obligations of the original rather insignificant corporation has in the course of time fallen upon a large and overshadowing corporation whose chief business is the creation and distribution of light and power over an extensive territory, and in which the desire has naturally arisen to enjoy the use of all the water in Wilson Pond and Stream at all seasons of the year unencumbered by the superior rights and privileges of the log owners; but the duty still remains in all its original force. It has run like a bright thread through the entire legislative fabric.

In our opinion, therefore, the plaintiff's rights in the case at bar are paramount to those of the defendant, and it was the duty of the defendant to accumulate and retain as well as to store and discharge an adequate supply of water for the plaintiff's use.

This brings us back to the report of the referees which finds as a fact that if the plaintiff's rights are paramount, the defendant both in 1917 and 1918 violated those rights. The report further says: "Neither in 1917 nor 1918, at the beginning of nor during the driving season was there stored by the defendant's dam an adequate head of water available for driving purposes. The defendant knew of the plaintiff's need of water for driving, seasonable notice having been

given and request made." This must be accepted as final. It might be added that under the changed conditions we think it reasonable to require the log owner to give to the dam owner seasonable notice of his need of the water, as was given here.

There is left for consideration only the question of damages.

DAMAGES IN 1917.

The referees have settled this, as they have found that the damages sustained by the plaintiff in 1917, if liability is found on the part of the defendant, by reason of the defendant's failure to store and retain an adequate supply of water for driving purposes, was three thousand dollars. This finding is final.

DAMAGES IN 1918.

This question involves two elements; first, the plaintiff's loss caused by delay and additional expense in driving due to an insufficient head. This the referees fixed at five thousand dollars.

The second element is the loss of manufacturing profits by reason of the failure to get the logs to the Hampden mill, and on this point the report says: "The whole question as to whether loss of profits is a proper element of damage in this case is reserved for the Law Court."

The allowance of profits in estimating damages in an action of tort of this nature depends upon the facts of each particular case. The legal rule, is that if the evidence shows the claim to rest upon a vague, uncertain and speculative basis, profits cannot be allowed. If, on the other hand, the loss of profits is proven to be the proximate result of the defendant's wrong and they can be shown with reasonable certainty then they can be recovered. They are in such case proven to be a part of the damage for which the plaintiff should be compensated. This is settled law. 8 R. C. L., 508.

In this case both these necessary elements are found by the referees as facts in their report. They say: "The plaintiff also claims that it suffered a loss of manufacturing profit to the extent of some $18,000 or $19,000 by reason of failure to get the logs to its Hampden Mill. But the plaintiff's claim is based upon an ex parte estimate of what would have happened under the most favorable conditions. We cannot base a judgment upon such an estimate without making large allowances. We have no doubt that the plaintiff if it had had an opportunity to manufacture these logs would have made a consider-

able profit in the operation. In our judgment that profit may be properly fixed at twelve thousand dollars. Damages in this behalf being additional to the amount allowed for the driving loss in 1918."

These findings leave no question of law open for the court. Other facts and contentions are discussed in the report in this connection, but they in no way militate against nor affect the findings of the referees on this question, and we are therefore bound by the findings.

The conclusion, therefore, is that the defendant is liable for $3,000 damages in 1917, and $17,000 in 1918, and the mandate must be,

Judgment for plaintiff for $20,000 with interest from date of the writ and costs.

ELLSWORTH E. PEACOCK, Admr., d. b. n.

vs.

ABBIE C. W. AMBROSE.

Kennebec. Opinion April 28, 1922.

Evidence of statements by an intestate during his lifetime, that he intended to give his property to the defendant is admissible upon the question of intent, and evidence of statements that he had given his property to defendant is admissible as being admissions against interest. The statute of limitations may be invoked in an action brought by an administrator who and his predecessor were familiar for more than six years prior to the bringing of the action with all the facts and defendant's claim in relation to the property involved.

Evidence of statement by intestate during his lifetime that he intended to give his property to the defendant was properly admitted upon the question of the intent with which a certain power of attorney was given by the plaintiff's intestate.

Evidence of witnesses that plaintiff's intestate had on several occasions stated that he had given his property to the defendant was properly admitted as being admissions against interest.

The testimony of the administrator in the Probate Court in 1914 showing his familiarity with the claims of the defendant as to the gift to her by the plaintiff's intestate from the time of his appointment in 1910 was admissible as showing knowledge on the part of the representative of the estate of the claims of the defendant for more than six years prior to the beginning of this action.

While there may have been no eye witness of a delivery from the plaintiff's intestate to the defendant of the property in question, there was evidence of a completed gift from which the jury may have properly found that there had been a delivery, the property being in the possession of the defendant.

This action is clearly barred by the statute of limitations. Not an action by heirs of deceased, but by the representative of his estate. The statute began to run upon the appointment of the administrator in 1910, who was familiar with all the facts and the defendant's claim in relation to the property involved in this action.

On motion and exceptions. This is an action for money had and received to recover $13,622.28 with interest, consisting of bank deposit accounts and promissory notes. On July 30, 1910, Edward P. Faunce, intestate, died in Readfield in Kennebec County, at the home of his sister, Abbie C. W. Ambrose, the defendant. In the fall previous he had been ill and early in December had a shock, and went to the Central Maine General Hospital in Lewiston where he remained until April 14, 1910, when he was removed to his sister's home in Readfield. While at the hospital he gave to his sister, the defendant, as she claimed the money deposited in the various banks and the notes, while the plaintiff contended that the deposits and notes were collected by the defendant by virtue of a power of attorney and that she held the money so collected in a fiduciary capacity. The defendant pleaded the general issue and a brief statement, invoking the statute of limitations, and in addition claimed the money as a gift from plaintiff's intestate, *inter vivos*. The case was tried to a jury and a verdict for defendant rendered. Plaintiff filed a general motion for a new trial, and took exceptions to the admissibility of certain testimony. Exceptions and motion overruled.

The case is stated in the opinion.

E. M. Thompson and E. E. Peacock, for plaintiff.

Andrews, Nelson & Gardiner, for defendant.

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

WILSON, J. An action of assumpsit for money had and received to recover of the defendant certain sums of money and a certain promissory note originally the property of the plaintiff's intestate, Edward P. Faunce, and alleged to be a part of his estate, the possession of which was obtained by the defendant in the lifetime of the deceased under a power of attorney given to her by the deceased, who was her brother, before his death, and which it is alleged the defendant refused to account for or deliver to the representative of the estate of the deceased. It is also alleged that the defendant has fraudulently concealed from the heirs of the deceased and from the representative of his estate the cause of action on which the plaintiff in his representative capacity is now suing to recover.

The defendant pleads specially the statute of limitations and under the general issue denies any liability, claiming a gift to her *inter vivos* by the plaintiff's intestate of all the property described in the plaintiff's writ.

The jury found for the defendant and the case now comes before this court on exceptions of the plaintiff to the admission of certain evidence and a motion for a new trial on the usual grounds.

In proof of the alleged gift *inter vivos*, the plaintiff having introduced evidence that the possession of the property described in the writ was obtained by the defendant under a power of attorney given by the plaintiff's intestate, the defendant offered the evidence of her daughter, who testified that prior to the alleged gift and execution of the power of attorney, the deceased, who was at that time living with the defendant, expressed to the witness his intent of giving all his property to the defendant. To the admission of this evidence exceptions were duly taken and allowed to the plaintiff and form a part of his bill of exceptions.

We think the evidence was clearly admissible upon the question of the intent with which the power of attorney was given to the defendant. *Nickerson* v. *Gould*, 82 Maine, 512, 513. Greenleaf on Evidence 16 Ed., Secs. 14k, 162c.

Exceptions were also taken by the plaintiff to testimony by the daughter and by an old family physician to the effect that the plaintiff's intestate had on several occasions, after the execution of the power of attorney and the taking into possession of the property in

question by the defendant, of which the jury may very properly have found from the evidence the deceased was then aware, especially as to the funds in the bank, stated in substance to each that he had given all his property to the defendant, which, if so, would include the property described in the plaintiff's writ.

This exception must also be overruled. It is urged that it should be excluded as hearsay on the ground that it is not a part of the *res gestae* and is merely a narrative of a past transaction. Not so. The plaintiff in this action is the representative of the deceased's estate. Declarations by the deceased in his lifetime *against his interest*, are admissible against the representative of his estate. *Fellows* v. *Smith*, 130 Mass., 378.

A third exception is to the admission of certain testimony, taken in the Probate Court in 1914, at the request of the plaintiff representing one of the heirs of the deceased, of one Edward C. Ambrose, the defendant's husband who was appointed administrator of the deceased estate in 1910. It was offered for the sole purpose of showing that the representative of the deceased's estate from the time of the first appointment down to the present has always had full knowledge of all the facts now alleged as forming a right of action against the defendant. The administrator was attorney for the deceased in his lifetime, drew the power of attorney, was present when it was executed and was, of course, fully cognizant of his wife's claims thereunder. The plaintiff who was appointed administrator *de bonis non* in 1917 after the death of the defendant's husband learned all the facts, on which he now bases his cause of action against the defendant, at the hearing in the Probate Court in 1914.

This piece of evidence was objected to, not on the ground that the substance of the testimony was prejudicial, but on the ground that any knowledge which his predecessor had was no bar to any action by him as the representative of the estate. The contention of the plaintiff being, as we understand it, that because he personally or his client did not have full knowledge of all the details of the defendant's claim to this property and that she refused, as he claims, to disclose it to him as counsel for one of the heirs, there was a fraudulent concealment of the cause of action by the defendant, which under Sec. 99, Chap. 86, R.S., would prevent the statute of limitations from running as to him, even though he sues in a representative capacity, until he acquired full knowledge in August, 1914, and that this action was brought within six years of that time.

It is a sufficient answer to this contention, we think, to say that this action is not brought by the plaintiff personally, but in behalf of the estate of Mr. Faunce, the representative of which has had full knowledge of all the facts since 1910, as will more fully appear in the discussion of the motion.

The motion must also be overruled. The jury may have based its verdict on either of two grounds, viz.: that a gift *inter vivos* was shown to their satisfaction, or that more than six years had elapsed since the representative of the estate of Edward P. Faunce had full knowledge of the transaction between her and her brother and of her claim. This court after full consideration of the evidence cannot say the jury's verdict was manifestly wrong. On the contrary, we think no other verdict could have been properly rendered.

The plaintiff lays much stress upon what he contends is a lack of evidence of any delivery of the property in question sufficient to render effective a gift *inter vivos*. It may be true there is no evidence of eye witnesses to a delivery or of anyone who was present when the gift was completed. The lips of her husband, who prepared the power of attorney by virtue of which at least the manual delivery or change in possession of the property was effected and who was probably cognizant of the intent with which it was done, are now sealed by death and the defendant's by law. It is not quite true, we think, that there is no evidence upon which the jury could have found a completed gift.

The evidence shows, if belived, that the deceased on several occasions, when he knew the property was in the possession of the defendant, said in substance to his niece and to his family physician that he had given all his property to his sister, the defendant. Such a statement implies a completed gift, which includes delivery. Notwithstanding an interest afterwards displayed in ascertaining whether the transfer of the funds had been attended to, and as to the amount of the interest being paid, there is sufficient evidence upon which, if believed, the jury may have found a completed gift.

But even if the evidence does not warrant a verdict for the defendant on this ground, we think the estate of Edward P. Faunce is clearly barred from maintaining any action against the defendant by the statute of limitations. This is not an action by the heirs of the deceased, but by the representative of his estate. The statute of imitations began to run against the estate of Edward P. Faunce as

to any claim against this defendant for this property as a part of his estate at least upon the appointment of the husband of the defendant as administrator in 1910, 11 R. C. L., Section 301. If he failed to properly administer the estate and collect the assets, the remedy of the heirs was in the Probate Court, *Robinson* v. *Ring*, 72 Maine, 140, or, perhaps, in equity, 11 R. C. L., Sections 293-297, *Worthy et als.* v. *Hames*, 8 Ga., 234. They obtained full knowledge of all the facts in 1914, if they did not have sufficient before, which was ample time to ask the Probate Court that the administrator be held accountable for this property, as assets of the estate, or if necessary, request his removal, 11 R. C. L., Sec. 294, Sec. 24, Chap. 68, R. S., in time for his successor to have brought an action to test the validity of the alleged gift before it was barred by the statute of limitations. They saw fit, however, to sleep on their rights, and no action was brought by the administrator, d. b. n., who was their personal counsel until 1920 in the form of these proceedings.

The statute of limitations must now be held to be a bar to any action by the representative of the estate of Mr. Faunce against the defendant to recover this property as a part of his estate.

Exceptions and motion overruled.

Justice PHILBROOK having formerly been of counsel did not participate.

ELLA I. HUNT *vs.* ARTHUR B. LATHAM.

Androscoggin. Opinion May 15, 1922.

In a deed of real estate sold for taxes against a non-resident owner the description, "Grand View Hotel—West Auburn" is sufficient, in the absence of any contention that there was more than one piece of property at West Auburn, known as "Grand View Hotel." The court may resort to extrinsic or parol evidence to locate the boundaries of the land so designated.

In an assessment of taxes against a non-resident owner of real estate, a record of assessment and valuation, showed the following particulars: in the column entitled "Description of Real Estate," "Grand View Hotel,—West Auburn"; in the column entitled "Value of Land," $100; in the column entitled "Value of Buildings," $1500; and in the column entitled "Total Assessment," $1600.

Held:

A sufficient description to support a sale for non-payment of taxes so assessed, in the absence of any contention that there was more than one piece of property at West Auburn, known as "Grand View Hotel."

Whenever land is occupied and improved by buildings or other structures designed for a particular purpose, which comprehends its practical beneficial use and enjoyment, it is aptly designated and conveyed by a term which describes the purpose to which it is thus appropriated.

The court may resort to extrinsic or parol evidence to locate the boundaries of the land so designated.

On report on an agreed statement. This is a writ of entry brought to determine the validity of a tax deed and the sufficiency of the description therein, and in the assessment. Judgment for defendant.

The case is stated in the opinion.

George C. Wing and George C. Wing, Jr., for plaintiff.

Getchell, Hosmer & Garcelon, for defendant.

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

MORRILL, J. This real action is submitted for our decision upon an agreed statement of facts which on account of its brevity is here copied in full:

"That plaintiff at the time of the bringing of the action had title to the property in question unless the tax deed relied upon by the defendant was valid.

And it was agreed that all the statutory requirements were fulfilled with the exception of the sufficiency of description in the tax deed and in the assessment.

The description in the tax deed is, "the following described real estate situated in said City of Auburn, to wit: Grand View Hotel, West Auburn."

The record of the commitment and assessment relating to the property in question in various columns is as follows; in the column provided for the name of person taxed, appeared Edna N. Pope, care of Mr. Scott, Franklin Real Estate Trust, Journal Building, Boston, Mass.; in the column entitled "Description of Real Estate" appeared "Grand View Hotel,—West Auburn;" under the column entitled "Value of Land" appeared the figures $100; under the column entitled "Value of Buildings" appeared the figures $1500; and under the column "Total Assessment" appeared the figures $1600.

It is admitted that April 1, 1916, Edna N. Pope was non-resident owner of the premises and was so described in the tax deed."

Thus the validity of the tax deed relied upon by defendant is the issue submitted for our decision, and that issue is still further narrowed to the sufficiency of the description in the tax deed and in the assessment.

In *French* v. *Patterson*, 61 Maine, 203, the rule governing this question is thus stated: "The statute does not require, nor is it often practicable that the assessors of taxes should give a minute description of the non-resident lands assessed by them. It is sufficient if they so describe them in their assessment that they can be identified with reasonable certainty." In *Inhbts. of Orono* v. *Veazie*, id. 433, it is said: "The description of real estate assessed, in this class of cases, must be certain, or refer to something by which it can be made certain."

We think that the description before us conforms to these requirements.

The property was assessed as real estate; the land and buildings were valued separately as required by law in case of real estate; the property was described by a name indicative of the uses to which it was put, and the section of the city, where it was situated, is given.

Such a description must be held to include the land appertaining to the hotel building and used with it for the purposes of a hotel. 3 Washburn on Real Property, 4 Ed., Page 397. (Book III, Ch. V, Sec. 4, Par. 33, 34). *Maddox* v. *Goddard,* 15 Maine, 218; *Moore* v. *Fletcher,* 16 Maine, 63, 66. *Cunningham* v. *Webb,* 69 Maine, 92, 96. The term "house", or "barn", or "mill" or "cottage" are familiar instances of a conveyance of a fee in land by a general description, applicable only to the purpose for which the land is used at the time of the grant. Whenever land is occupied and improved by buildings or other structures designed for a particular purpose, which comprehends its practical beneficial use and enjoyment, it is aptly designated and conveyed by a term which describes the purpose to which it is thus appropriated. *Johnson* v. *Rayner,* 6 Gray, 107, 110.

In the absence of any contention that there was more than one piece of property at West Auburn, known as "Grand View Hotel," we think that this description in assessment and deed clearly indicated the property taxed, and afforded a nucleus by which parol evidence may be legally available to render certain what property was intended. *Inhbts. of Orono* v. *Veazie,* supra.

The counsel for plaintiff, in argument, inquires "Where are the limits of the land taxed?" But the court may resort to extrinsic or parol testimony to locate the boundaries. *Brown* v. *Hazen,* 12 Maine, 164, 179. *Bell* v. *Woodward,* 46 N. H., 315, 322. One illustration will suffice; a description reading "my homestead farm, situated in A." is sufficient, and parol evidence may be received to identify the parcels of land of which it is composed, and their boundaries.

We hold therefore, that the description in both assessment and deed is sufficient; the record before us, however, does not contain the description of the demanded premises as given in the writ, nor any evidence that the premises so described were known as "Grand View Hotel." But the agreed statement has the following: "That plaintiff at the time of the bringing of the action had title to the property in question unless the tax deed relied upon by the defendant was valid." We construe this stipulation as meaning that no question is raised that the demanded premises were and now are known and capable of identification as the Grand View Hotel.

Judgment for defendant.

DEFORREST KEYES, In Equity *vs.* STATE OF MAINE.

Kennebec. Opinion May 15, 1922.

In case of the sale of real estate by the State for non-payment of taxes in order for the interest of the State to pass under the deed, it must purport to convey the State's interest in the townships or tracts of land assessed, and not purport to convey the State's interest in a certain number of acres in a certain township, without locating the acreage.

The rule is settled in this State that in the absence of statute a grantee in a tax deed, if the title proves defective, cannot maintain an action against a municipality to recover the consideration paid. If the deed contains covenants by the collector that the proceedings antecedent to the sale have been according to law, the purchaser in case of failure of title from any such cause must look to the covenanter, not to the city or town. This general rule, as above stated, applicable to municipalities, applies to the State.

This rule of "caveat emptor" applies to a failure of title by reason of facts antecedent to the tax purchase, of which the purchaser has or can obtain full knowledge; he receives such a conveyance as he expected to obtain. In such a case he cannot without proof of some fraudulent representation of concealment recover back the consideration paid; and such recovery can only be from a party to the fraud.

If the number of acres is a part of the description, it must yield to, and cannot control the more comprehensive and definite description of the townships or tracts, following the tax acts.

The State's interest under the assessment was not released on any part of any township or tract assessed, involved in this case.

The notices of sale issued by the treasurer of state, in the instant case, must be held to have offered for sale the State's interest in the several tracts, as described in the tax acts.

The State entered into a contract with the plaintiff to convey to him for a specified consideration all the interest in certain lands that it had a right to convey; this it did not do, and has allowed nearly twenty years to pass without doing it, notwithstanding the matter has been biennially before the Legislature. This is an unreasonable delay. Under the same circumstances one private individual would be entitled to recover against another, and for the purposes of this case the State, having waived its immunity to suit, is to be treated as any other suitor, corporate or individual.

The State cannot, under the circumstances disclosed by this case, in good conscience retain the money which the plaintiff paid into the State Treasury, for which the Legislature has declared that he received no consideration.

On report. This is a bill in equity brought pursuant to Chapter 80 of the Resolves of the State of Maine for the year of 1919, by Deforrest Keyes of Oneonta in the State of New York praying that from the State Treasury there be paid to him the amount he paid in 1902 for certain tracts of land which had been advertised by the State Treasurer as having been forfeited to the State for state taxes and county taxes, said tracts having been sold at public auction, and interest on the same. The cause was heard by a single Justice on bill, answer including demurrer and proof, and reported. Bill sustained.

The case is fully stated in the opinion.

George C. Wing, George C. Wing, Jr. and Charles J. Staples of Buffalo, New York, for plaintiff.

Guy A. Sturgis, Attorney General, for the State.

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

MORRILL, J. This cause is before the court by authority of a resolve of the Legislature of the State, approved March 27, 1919, by which the State of Maine waived its immunity from suit and imposed upon this court the duty of determining "on its merits without regard to defenses by statute," what amount, if any, is due from the State to said plaintiff "under the principles of the common law or the principles of equity." Resolve of 1919, Chapter 80. In this resolve the statement appears, without qualification, that the plaintiff has paid into the Treasury of the State of Maine the sums of seventeen thousand eight hundred and ninety dollars and twenty-four cents, and four hundred and fifty-five dollars and ninety-nine cents, "for which sums the said Deforrest Keyes received no consideration."

To fully understand the circumstances which actuated the Legislature in enacting this resolve, and the precise questions submitted for our decision, it will be profitable to review concisely the transactions between the plaintiff and the State of Maine.

On March 7, 1902, the plaintiff, a young man then about twenty-four years of age, a resident of Oneonta, New York, addressed a letter to "Comptroller State of Maine, Bangor, Maine," inquiring

"when the next sale of lands in your state for delinquent taxes takes place." This letter of inquiry found its way to the office of the Treasurer of State and on March 10, 1902 a clerk in that office replied as follows:

"March 10, 1902.

D. F. KEYES, Esq.,
Oneonta, N. Y.

Dear Sir:—

Replying to your favor of March 7th inst. have to inform you that the next sale of lands in this State for non-payment of taxes will be held the latter part of September.

I have entered your name on my mailing list and will send you a list of the lands to be sold a few weeks previous to sale.

Should you wish to make any purchase it will not be necessary for you to be present. You can inform me what tracts you desire to bid on and I will make your bids for you. Usually the lands are sold at figure stated in printed list.

Yours truly,

ORAMANDAL SMITH, State Treasurer. W."

During the summer of 1902 the Treasurer of State gave notice according to law of the annual sale of lands lying in unincorporated townships, forfeited to the State for state taxes and county taxes, certified to the Treasurer of State for the year 1900, and on or about August 1, 1902 a copy of such notice was mailed to the plaintiff from the Treasurer's office. The date fixed for the sale was September 24, 1902. The notice contained three hundred sixty-seven items of taxes in default for various years; of these taxes in default only forty-seven items were for taxes certified for the year 1900; to make this statement more intelligible, without copying the whole schedule:— Township A, Range 2, West of the East line of the State, in Aroostook County, appears ten times for taxes in default from 1891 to 1900 both inclusive; Township 8, Range 5, West of the East line of the State, in Aroostook County, appears seventeen times for taxes in default certified in years between 1881 and 1900 both inclusive; Township 16, Range 7, Eagle Lake Plantation, in Aroostook County,

appears fourteen times for taxes certified from 1881 to 1894 both inclusive; Fryeburg Academy Grant, in Oxford County, appears sixteen times for taxes certified from 1885 to 1900 consecutively. These instances are typical of the items scheduled in the notice in the eight counties in which the lands lie.

After receipt of this notice the plaintiff wrote the Treasurer of State as follows:

"Oneonta, N. Y., Aug. 20, 1902.

ORAMANDAL SMITH, State Treasurer,
Augusta, State of Maine.

Hon. Sir:—

On Aug. 1st I received from your department a list of the lands that would be sold for taxes Sept. 24, for which please accept my thanks.

I now desire to secure a good sized map of the State of Maine showing sections and lots and not knowing where to secure same I write you thinking perhaps you may have one you could send me as I am going to bid on some lots during your sale and would like to look up the location of same. Would be perfectly willing to pay you for same. I suppose there is never any postponements of tax sales to later date, if there should be would be pleased if you would inform me as I intend taking a trip to Maine the latter part of Sept.

Very truly yours,

D. F. KEYES."

To this letter a clerk in the treasurer's office replied as follows:

"August 22, 1902.

D. F. KEYES, Esq.,
Oneonta, N. Y.

Dear Sir:—

In compliance with your request of the 20th inst., I herewith enclose you map of the State of Maine showing townships.

The land sale is always held on date advertised. Should you find it impossible for you to be present you may authorize me to bid for you, stating townships you wish to purchase and highest amount you desire to pay. In most all cases the land is sold for amount given in schedule.

Yours very truly,

ORAMANDAL SMITH, State Treasurer, W."

On the day before the date fixed for the sale, the plaintiff called at the Treasury and had conversation with one Wiswell, the clerk who had replied to his letters; Wiswell testifies that he explained to him the "system of taxation,—that the taxes weren't levied against the individual owners, but against the township as a whole, and at the end of two years all the acreage remaining unpaid was advertised to be sold at auction." On the day of the sale the plaintiff came to the Treasury and in the course of conversation was told by Wiswell, according to the latter's testimony, "that there never had been a case decided in our law courts in favor of the purchaser of these lands." This testimony, if material, should be weighed with much care in view of Wiswell's statements in above letters that Keyes's presence at the sale was not necessary and that his bids would be made for him, and in view of his further testimony that to his knowledge no written word was ever given the plaintiff by anybody in the State Treasurer's office questioning the validity of a state tax deed, and that the first time he discussed in reference to this Keyes matter any possibility of defect in title was when Keyes's attorney called at the treasury in 1904 or thereabouts.

The State introduces against objection the stenographic report of the testimony of the treasurer, Mr. Oramandal Smith, before the Committee on the Judiciary of the Legislature of 1905, to the effect that he said to Mr. Keyes: "Mr. Keyes, the State does not stand behind these titles and every one of them may be contested and brought into our courts, and you will be subject to the decision of the courts." If it became necessary to pass upon the admissibility of this evidence, Mr. Smith being dead, we are inclined to regard it as inadmissible, not being under oath; but in the view which we take of the case, the conversations of Mr. Wiswell and Mr. Smith with the

plaintiff on the day of the sale are immaterial; the latter's rights do not depend upon whether he was or was not warned of the possible invalidity of titles under the sale.

The sale was held on September 24, 1902 according to the notice, and the plaintiff bid on, and became the purchaser of, three hundred and one items, and later, about October 15, 1902 received by express three hundred and one deeds. An examination of these deeds shows that only twelve are for sales for taxes certified for the year 1900, and that the entire number relate to only thirty-eight different townships; in other words the State's interest in a single township was sold several times; to make clearer the result of such examination of the deeds, certain typical instances may be taken—the State's interest in Township A, Range 2, West of the East line of the State, purported to be conveyed in ten deeds, one for each year, from 1891 to 1900 both inclusive, specifying in each of eight deeds, on account of taxes for 1891 to 1898, that such interest is in 597 acres, and in the other two deeds, 1899 and 1900, in 598 acres; the State's interest in Township E, Range 2, West of the East line of the State purported to be conveyed in thirteen deeds, one for each year from 1887 to 1899 both inclusive, specifying that such interest is in 1674 acres for 1887 and 1888, 1074 acres for 1889 and 1890, 1337 acres for 1891-1896, and 1333 acres for 1897-1899; the State's interest in Township 17, Range 8, West of the East line of the State, known as St. John Plantation, purported to be conveyed in fourteen deeds, one for each year from 1881 to 1894 both inclusive, specifying that such interest is in 1537 acres for 1881-1883, 1534 acres for 1884, 1537 acres for 1885 and 1886, 1787 acres for 1887, 1662 acres for 1888-1890, 2184 acres for 1891, 2363 acres for 1892, 2778 acres for 1893, and 1147 acres for 1894; the townships above named are in Aroostook County. One more illustration from another county will suffice to make clear the procedure of the Treasury officials; the State's interest in the well-known township in Oxford County, known as Fryeburg Academy Grant, purported to be conveyed in sixteen deeds, one for each year from 1885 to 1900 both inclusive, specifying that such interest is in 1231 acres for 1885, 1131 acres for 1886, 1064 acres for 1887 and 1888, 1265 acres for 1889 and 1890, 1124 acres for 1891, 1129 acres for 1892, 1227 acres for 1893, 2036 acres for 1894, 4289 acres for 1895, 4297 acres for 1896, 4370 acres for 1897 and 1898, and 4510 acres for 1899 and 1900.

For the State's interest which these three hundred and one deeds purported to convey the plaintiff paid $17,890.24; he also paid $301 for the deeds, for which there is no warrant of law; this sum was divided among the office force who made the deeds.

Not one of these deeds was effective to convey the State's interest in any tract of land, not because the township in *some* deeds was described as in the deed printed in the record, selected as typical, "A2 Range 13 and 14 W. E. L. S." in Piscataquis County, or as "A Range 2, W. E. L. S." in Aroostook County, or as "6 Range 3, N. B. P. P." in Penobscot County, or as "5 Range 9, N. W. P." in Piscataquis County, or as "1 Range 4, E. K. R." in Somerset County, but because *every* deed purported to convey the State's interest in a certain number of acres in a certain township, without locating the acreage, as in the sample deed printed in the record, "the following described parcel of land so forfeited, situate in the county of Piscataquis, viz.: 858 acres in A2 Range 13 and 14, W. E. L. S." Such descriptions are insufficient to pass the State's interest in any particular parcel of land. *Moulton* v. *Egery*, 75 Maine, 485; *Bank* v. *Parsons*, 86 Maine, 514; *Millett* v. *Mullen*, 95 Maine, 400, 412; they do not even create any doubt or cast any cloud on the owner's title. *Powers* v. *Sawyer*, 100 Maine, 536, 542.

The following year on September 24, 1903 the plaintiff again attended the sale of lands lying in unincorporated townships forfeited to the State for state taxes and county taxes, certified to the Treasurer of State for the year 1901, and bid off fifteen items of which twelve are for sales for taxes certified for the year 1901.

For the State's interest which these fifteen deeds purported to convey the plaintiff paid $455.99, and for the deeds $15.

Each of these deeds is insufficient to pass the State's interest in any particular parcel of land for the same reason applicable to the deeds of the preceding year.

In 1903 after the rights of redemption from the first sale had expired an attorney for plaintiff came to Maine for the purpose of locating his client's lands, and then for the first time learned of the utter worthlessness of these deeds. Again in 1904 another attorney came to Maine and in conversation with the Treasurer of State, attempted to have the deeds corrected, with no result except a reference of the matter by the Treasurer to the Attorney General for his opinion.

In 1905 application was made in behalf of the plaintiff to the Legislature for reimbursement of the sums paid as above stated. The application met with an adverse report from the committee. In 1907 a similar application met the same fate.

In 1909 a resolve in favor of the plaintiff authorizing the payment of $18,166.03 was vetoed by Governor Fernald in a brief message which stated: "The legal or equitable obligation of the State, if any exist, to acknowledge the claim made by Mr. Keyes is surrounded by much uncertainty and difference of opinion and until that uncertainty can be removed and those differences of opinion can be better harmonized I must respectfully decline to sign the resolve." See Laws of 1909, Page 1453. This veto message did not discuss the merits of the claim.

In 1911 and 1913 resolves in behalf of the plaintiff were favorably reported from committee, but indefinitely postponed by the Legislature.

In 1915 a resolve authorizing Mr. Keyes to bring suit against the State was indefinitely postponed.

In 1917 the Legislature accepted an adverse report, and in 1919 the resolve by which these proceedings were authorized, was passed.

Such is the history of the controversy now before us for adjudication. The action of the Legislature by the resolve of 1919, while not unprecedented, is unusual and designed to meet unusual conditions. In this connection we quote from a message by Governor Milliken, dated March 20, 1919, seven days before approval of the resolve under which we are acting, vetoing a similar resolve in favor of one Burns: "The State's immunity from being sued by an individual is an attribute of sovereignty and should be waived only upon rare occasions when there is urgent and conclusive evidence that only by such extraordinary means can the ends of justice be served." It is undoubtedly true, as contended by the Attorney General, that in consenting to be sued the State has not admitted any liability to the plaintiff or created any cause of action which did not previously exist. It has waived its immunity from suit, and has consented that the court may "determine on its merits without regard to defenses by statute what amount, if any, is due on said claim under the principles of common law or the principles of equity." Immunity from action is one thing; immunity from liability is another; the State has waived the former, but has submitted its liability to the determination of the court upon the merits of the case regardless of defenses by statute.

At the beginning of the inquiry we must recognize the rule as settled in this State that in the absence of statute a grantee in a tax deed, if the title proves defective, cannot maintain an action against the municipality to recover the consideration paid. If the deed contains covenants by the collector that the proceedings antecedent to the sale have been according to law, the purchaser in case of failure of title from any such cause must look to the covenantor, not to the city or town. *Treat* v. *Orono*, 26 Maine, 216; *Packard* v. *New Limerick*, 34 Maine, 266; *Arnold* v. *Augusta*, 118 Maine, 399; *Lynde* v. *Melrose*, 10 Allen, 49. The same rule applies as to a county in case of a sale by a sheriff for non-payment of a tax assessed for building a road. *Emerson* v. *County of Washington*, 9 Maine, 88; *Pennock* v. *Douglass County*, 39 Neb., 293. In a note to the case last cited printed in 42 Am. St. Rep., 588 it is said that the principle also applies to all tax sales "whether made for the benefit of a town, city, county, or state." While we have not seen a case arising upon a tax sale by a state officer similar to the sale in question, the reasons given by text-book writers and courts in reported cases apply to such a case and we perceive no ground for excluding the instant case from the general rule. In Michigan a statute authorized the refund of bids in certain cases where the titles proved defective on account of facts antecedent to the sale, but the right to a refund was strictly limited by the statute. *People* v. *Auditor General*, 30 Mich., 12. It was conceded by counsel in that case that the auditor general could only act in accordance with positive law, and could not refund any moneys upon the failure of tax titles except as some statute requires it. "The state does not guarantee tax titles, except as statutes may provide for it. In all other cases the purchaser must be content with such interests as he gets under his tax purchase;" Campbell, J. We therefore, hold that the general rule as above stated, applicable to municipalities, applies to the state. Nor is the plaintiff better off in equity. Per Appleton C. J., in *Stewart* v. *Crosby*, 50 Maine, 137. *Abbott* v. *Allen*, 2 Johns, Ch. 523 and note in Law Ed., Page 472. But this rule of "caveat emptor" applies to failure of title by reason of facts antecedent to the tax purchase of which the purchaser has or can obtain full knowledge; he receives such a conveyance as he expected to obtain. In such a case he cannot without proof of some fraudulent representation or concealment, recover back the consideration paid; and such recovery can only be from a party to the fraud. *Treat* v. *Orono*, 26 Maine, 217, 220.

It is proper to remark at this point that the purchaser at a tax sale should not, in any proceeding to test or touching the validity of such sale be regarded with suspicion, or put at a disadvantage merely because he is such purchaser. The State has adopted the policy of enforcing payment of taxes by sales of the property upon which taxes are delinquent; to stimulate interest in such sales it holds out the inducement of large profits. As was said in *Packard* v. *New Limerick*, supra: "The risk respecting the title and proceedings rests upon the collector and purchaser. When the purchaser acquires a good title, he is compensated for his risk, by being allowed at the rate of twenty per cent for the use of his money, if the lands are redeemed, and if they are not, by becoming the owner of the lands, usually, for a small part of their value. When the title does not prove to be good, he may be subjected to a loss of the amount paid for it. The town assumes no part of the risk, and does not become responsible for the goodness of the title conveyed to the purchaser who must rely on the covenants contained in the deed of the collector."

In the view which we take of this case the decision does not depend upon the application or non-application of this rule of "caveat emptor." Counsel for both plaintiff and the State have, however, argued the case from that standpoint. A decision of the case does, however, involve an examination of the entire procedure in the assessment of state taxes and the sale of lands to enforce payment of such taxes in arrears, and as the arguments of counsel lead to such examination, we have considered their respective contentions. It is of the greatest importance to the State that the correct procedure leading to such sales should be outlined, so far as involved in this case, even at the expense of an extended opinion. Sales to enforce payment of taxes in arrears should be effective, and deeds given under such sales should convey the State's interest in the lands taxed.

The counsel for plaintiff contend that the rule of immunity from liability of municipalities, counties and states, upon failure of tax titles, above recognized, does not apply where there has been fraud, circumvention and concealment; they rely in support of this contention upon certain expressions to be found in *Treat* v. *Orono*, supra, *Stewart* v. *Crosby*, supra, and *Emerson* v. *County of Washington*, supra. We need not consider whether, in such case, the consideration could be recovered from the State, or only from a party to the fraud. *Treat* v. *Orono*, supra, at Page 220; we will examine the facts upon

which counsel rely to establish fraud. They maintain that the notices of sale issued by the Treasurer of State for sales of land forfeited to the State for state taxes and county taxes, certified to the Treasurer of State for the years 1900 and 1901, were representations by the State upon which a prospective bidder had a right to rely, and that the plaintiff did rely thereon.

They maintain in their brief "that the advertisement of the State was constructively fraudulent because—

(a) The lands were not sufficiently described as required by statute.

(b) That the taxes were not lawfully assessed because not lawfully described.

(c) That lands were described which did not exist.

(d) That in fact there had been no forfeiture whatever as advertised by the State of Maine."

In summarizing their argument, they say: "The entire proceedings, ab initio, are void. There were no taxes levied. No lands, no interests were forfeited, nothing was sold, nothing was conveyed. The transaction was a nullity. This big mistake arose out of the misstatement by the State as to essential facts,—misrepresentations which have worked at least constructive fraud upon Deforrest Keyes."

This contention calls for an examination of the assessment of state taxes for the years 1878-1901 both inclusive; these taxes were assessed by the Legislature of the State, R. S. 1883, Chap. 6, Sec. 69 as amended by Laws of 1895, Chapter 56. An examination of the various tax acts for those years fails to show any illegality or irregularity in the assessments on the lands in which the plaintiff is interested. The lists which make up a part of section one of these acts are in three columns, the first containing a description of the tract taxed, the second, the amount of the tax in words, the third, the amount of the tax in figures. There is no statement of valuation or acreage. Prior to the creation of the Board of State Assessors in 1891 the state valuation was made by the Legislature; since that date the duty of making the valuation of the State has been imposed upon that board. Their duties in respect thereto were first defined by Public Laws 1891, Chapter 103.

Section seven directs them to make an annual report to the governor and council, "and for the years in which they shall equalize the

valuation of the state, their report shall include tabular statements of the state valuation."

Section eight constitutes the State Assessors a State Board of Equalization and directs them to perform the duties theretofore devolving upon the Legislature in apportioning the state tax among the several towns of the State.

Section eleven provides that a "statement of the amount of the assessed valuation for each town, township and lot or parcel of land not included in any township, after adjustment as provided by section thirteen, the aggregate amount for each county, and for the entire state as fixed by the board of equalization, shall be certified by said board and deposited in the office of the secretary of state as soon as completed, and before the first day of December preceding the regular sessions of the legislature. The valuation thus determined shall be the basis for the computation and apportionment of the state and county taxes, until the next biennial assessment and equalization."

By Section fifteen as amended by Public Laws 1893, Chap. 291, Sec. 1, the land agent was directed to furnish the State Assessors with full and accurate lists of all townships or parts of townships or lots or parcels of wild lands in the State, and all information in his possession touching the value and description of wild lands; and all other state officers are directed to furnish, when requested, like information touching said valuation. The section further provides:

"In fixing the valuation of unorganized townships, whenever practicable, the lands and other property therein, of any owners may be valued and assessed separately. All owners of wild lands or of rights of timber and grass on public lots, shall either in person or by authorized agent, appear before the board of state assessors at times and places of holding sessions in the counties where said lands are located, or at any regular meeting of the board held elsewhere on or before the first day of August of each year preceding the regular legislative session of this state; and render unto them a list of all wild lands thus owned, either in common or severalty, giving the township, number, range and county where located, part owned and an estimate of its fair value; and answer such questions or interrogatories as said board may deem necessary in order to obtain a full knowledge of the just value of said lands. Owners of less than five hundred acres of such lands in any township shall be exempted from the provisions of this section."

R. S., 1883, Chap. 6, Sec. 69 as amended by Public Laws 1895, Chapter 56, provides:

"Lands not exempt, and not liable to be assessed in any town, may be taxed by the legislature for a just proportion of all state and county taxes as herein provided for ordering the state and county taxes upon property liable to be assessed in towns. The state assessors shall make lists thereof, with as many divisions as will secure equitable taxation, conforming as near as convenient to known divisions and separate ownership and report the same to each successive legislature."

We note at this point that there is no duty imposed by these statutes upon the Board of State Assessors to determine the acreage of the several tracts of land upon which they fix the valuation for the assessment of state and county taxes; nor can any authority of law be found for such determination. The omission of such acreage from the description of the land taxed in the tax acts does not render the assessment invalid.

The contention that the lands were not lawfully assessed because not lawfully described must be based upon the fact that in the tax acts the Legislature used certain abbreviations in describing some of the tracts of land. This criticism applies to only part of the tracts included in the list. It cannot apply to such descriptions as "No. 9, South Division" in Hancock County, or "Fryeburg Acad. Grant" in Oxford County, or "No. 37 Middle Division" in Washington County.

The contention is aimed at descriptions of which the following are examples: "A. R. 2, W. E. L. S.," or "No. 8, R. 3, W. E. L. S.," in Aroostook County, or "No. 5, R. 9, N.W.P.," in Piscataquis County. This method of describing townships of wild lands in state tax acts has been in use since 1847, and a slightly less abbreviated form was in use since a much earlier date, and we venture to say that no person familiar with the wild lands of the state, or upon studying a map of the state, would fail to understand that the tracts so described, referred to "Township A, Range 2, West of the East line of the State," "Township No. 8, Range 3, West of the East line of the State," and "Township No. 5, Range 9, North of the Waldo Patent." *Hodgdon* v. *Burleigh et als.*, 4 Fed., 111, 117. So generally had these and similar abbreviations come into use that the Legislature gave them formal recognition by Public Laws 1905, Chapter 137, now found in R. S. 1916, Chap. 10, Sec. 42. We are not aware of any case in which these abbreviations standing alone have been held to render the

description fatally imperfect. So far as the language of the court in *Griffin* v. *Creppin*, 60 Maine, 270, and in *Bank* v. *Parsons*, 86 Maine, 514, condemns the use of such abbreviations as insufficient it should be disregarded; the descriptions under consideration in both those cases were otherwise fatally defective. We think that in every case, as in those last cited, where these abbreviations have been used, the designation of a certain number of acres in the township so described, without other location, has been under consideration. Such a description has been many times declared bad. *Moulton* v. *Egery*, supra, and other cases hereinbefore cited.

We hold that the assessments of the state taxes in question were legally made, that the descriptions of the lands taxed were sufficient, and that said lands were "held to the state for payment of such state and county taxes, with interest thereon at the rate of twenty per cent to commence upon the taxes for the year in which such assessment is made at the expiration of one year, and upon the taxes for the following year upon the expiration of two years from the date of such assessment." R. S. 1883, Chap. 6, Sec. 71. This interest of the State continues until the taxes assessed upon the several tracts are paid in full or the State's interest otherwise legally released.

Passing to consideration of the notices of sale, we note that paragraph three of the bill alleges that the advertisement of 1902 offered to sell and convey "all the interest of the state in the tracts of land therein described lying in unincorporated townships, said tracts having been forfeited to the state for state and county taxes, certified to the Treasurer of State for the year 1900;" the answer admits the allegation.

The description of the tracts in the notice follows the description in the tax acts with the addition of a number of acres opposite each description, as for example:

"Aroostook County.

Year		Acres.	Tax.
1900	A R 2 W.E.L.S.	598	10.40"

"Oxford County

1900	Fryeburg Academy Grant	4510	66.20"

The notice did not offer for sale the State's interest in 598 acres in A R. 2 W. E.L.S., or in 4510 acres in Fryeburg Academy Grant, but

in the tracts therein described following the description in the tax acts. The law under which the sale was made provides that "*lands* thus forfeited shall . . . . be sold . . . . Notice of the sale shall be given by publishing a list of the *lands* to be sold . . ." R. S. 1883, Chap. 6, Sec. 73. To designate a certain number of unlocated acres as a description of a tract of land seems absurd.

If the number of acres is a part of the description, it must yield to, and cannot control the more comprehensive and definite descriptions of the townships or tracts following the tax acts. The same considerations apply to the notice of 1903.

An examination of the case shows, moreover, that the State's interest under the assessments was not released on any part of any township or tract assessed, involved in this case.

We have already noted that the law provides:—"The state assessors shall make lists thereof, (the lands to be assessed by the legislature) with as many divisions as will secure equitable taxation, conforming as near as convenient to known divisions and separate ownership and report the same to each successive legislature." R. S. 1883, Chap. 6, Sec. 69. It is to be presumed that the State Assessors did their duty. The law also provides:—"Owners of the lands so assessed and advertised may redeem them, by paying to the treasurer of state the taxes with interest thereon, within one year from the time when such interest commences. Each owner may pay for his interest in any tract, whether in common or not, and shall receive a certificate from the treasurer of state, discharging the tax upon the number of acres, or interest, upon which such payment is made." R. S. 1883, Chap. 6, Sec. 72.

It appears from the record that a procedure obtained in the office of the treasurer of state, in construing this provision for redemption of a part of any tract, to permit a person to redeem a specified number of acres without other description; the practice was to take the number of acres in the township as given by the state assessors in their valuation as the basis of computing the tax on a specified portion, and to accept from an owner in severalty such part of the whole tax on the township as the number of acres in the portion owned in severalty bears to the whole acreage of the township as stated by the Board of State Assessors, giving the owner a certificate of payment on the number of acres so owned without further description. This practice explains the acreage as given in the notices opposite the

description of each tract. We think that this construction of section seventy-two cannot be sustained, or the practice approved. First, there is no duty imposed upon the state assessors, as we have seen, to fix the acreage in any township or tract as the basis of such computation. Mr. Wiswell testifies that the "acreage is brought about by the opinions of the different wild land owners." Second, such construction and practice defeats the purpose of the law to provide means for the discharge of the State's lien or interest upon specified portions owned in severalty. Third, it may well be contended that such construction is in contravention of the provision of the State Constitution, Article 9, Section 8; "All taxes upon real and personal estate, assessed by the authority of this State, shall be apportioned and assessed equally, according to the just value thereof;" inasmuch as it ignores the relative value of different portions of each township or tract.

It is undoubtedly the purpose of the second sentence above quoted from section seventy-two to provide a procedure whereby an owner of an interest in any tract, whether in common or not, may effectually obtain a release of the State's interest in his holdings. If he is a tenant in common, he may obtain such release by paying the proportion of the tax represented by his holdings; he would then obtain a certificate discharging the tax upon his one undivided half, or one undivided quarter, or one undivided twelfth, as the case may be; the State's interest would then be effectually released from that fractional interest, and remain upon the rest of the township or tract, and the advertisements should then offer for sale the State's interest, not in one half, three quarters, or eleven twelfths as the case may be, but in one undivided half, or three undivided quarters, or eleven undivided twelfths, because different portions may have different values. *Larrabee* v. *Hodgkins*, 58 Maine, 412.

If an owner in severalty of a portion of the township or tract taxed wishes to discharge the tax upon his holding, he may, if he sees fit, waiving the inequality in value between his holding and the remainder of the tract, pay the proportion of the tax which his acreage bears to the acreage of the township and tract as stated by the state assessors. This seems to have been the usual procedure. But if he takes a certificate discharging the tax upon a certain number of acres without further description, the payment and certificate are ineffectual to release the state's interest upon any part of the tract, and the whole

tract remains held for the balance of the tax. It is clear that such a certificate is insufficient to release the State's interest in any particular parcel, and thereby that interest be restricted to the remaining acreage. Take for example, Fryeburg Academy Grant in Oxford County which was returned by the state assessors as containing 6,500 acres; somebody paid on 1,990 acres and received a certificate discharging the tax on 1,990 acres without further description. The location of the 1,990 acres was not specified, nor could the location of the remaining 4,510 acres be determined. The Treasurer of State can neither determine what was the portion in which the State's interest has been released, nor the portion in which it was retained. The procedure in the treasurer's office was therefore insufficient to release the State's interest in any part of the townships or tracts taxed, and the notices, for this reason, as well as by their own phraseology, must be held to have offered for sale the State's interest in the entire tracts. The owner in severalty could make his payment effective by furnishing a description of his holdings, as he was later required to do by Public Laws 1905, Chap. 69, Sec. 3 and Public Laws 1905, Chap. 150, Sec. 2.

We have said that the owner in severalty may waive the inequality in value between his holding and the remainder of the tract and pay the proportion of the tax based upon acreage. If he does not choose to waive that inequality, it may well be contended as to levies made prior to the passage of Public Laws 1895, Chapter 56, that the construction of the statute and the practice under it, is in contravention of the tax provision of the State Constitution before quoted. The learned Attorney General in his brief for the State says: "During the entire history of this legislation, it was never suggested that the assessment itself was invalid because it was laid upon the entire township, because the owners of the lands were not named, or for any other reason pertinent to this case;" in this he has overlooked certain decisions by eminent judges in the United States District Court for the District of Maine. In *Clarke* v. *Strickland et als.*, 2 Curt., 439 Fed. Cas. No. 2864, (1855) the question was raised by Judge Ware, whether the tax could rightfully be levied upon a whole township, which was owned in severalty by different proprietors *when there was no mode of making a valuation and apportionment provided by law*, so that the tax must be levied on all the different proprietors pro rata, according to the quantity owned by each, without regard to the

relative value of the different lots or holdings. The same question was later (1880) raised by Judge Fox in *Hodgdon* v. *Burleigh et als.*, 4 Fed., 111, who states that Judge Ware's opinion was doubtless concurred in by Judge B. R. Curtis, who reported the earlier case. The question was not passed upon by either court. Nor is the question important here. The Legislature has apparently met the objection by providing the means of making a valuation of each holding, by directing the assessors to make their lists "with as many divisions as will secure equitable taxation, conforming as near as convenient to known divisions and separate ownership." Since the enactment of this provision in Public Laws, 1895, Chapter 56, the owner can at all times protect himself by giving to the state assessors a proper description of his holdings, and thus have them valued separately. Public Laws, 1891, Chap. 103, Sec. 15 as amended by Public Laws 1893, Chap. 291, Sec. 1. (R. S., 1916, Chap. 9, Sec. 9).

The treasurer of state can protect both State and land owners, and make his tax sales effective to pass title to the State's interest in specific townships and tracts by following the divisions given in the tax acts and by requiring a description of his holdings from the owner in severalty desiring to pay a part of the tax. The question raised in *Clarke* v. *Strickland et als.* and in *Hodgdon* v. *Burleigh et als.* is only of importance in the instant case as bearing on the practice of the treasury officials, and we have held that that practice cannot be sustained for other reasons. The language quoted by the Attorney General from the opinion in *Adams* v. *Larrabee*, 46 Maine, 416: "If the assessment had been on the whole township, in solido, designating the number and range, it would have been good. In such case each owner could have computed the amount due from him for his part,—" was not necessary to the decision of the case, and is so treated in the head note.

We hold, therefore, that the lands were sufficiently described in both assessment and notice of sale, and that the latter offered for sale the State's interest in the several tracts as described in the tax acts.

The third reason given for maintaining that the advertisements of the State were constructively fraudulent,—that lands were described which did not exist—is not sustained by the record. This result follows from our conclusion that the number of acres stated in the notice is not controlling. The number of acres may not have existed; but the lands as described in the tax acts did exist.

Counsel for the plaintiff finally contends that there had been no forfeiture whatever as advertised. "No lands, no interests were forfeited," they contend.

This contention is evidently based upon a misconception of a part of R. S. 1883, Chap. 6, Secs. 71 and 72; the former section provides,—"When the legislature assesses such state tax, the treasurer of state shall within three months thereafter, cause the lists of such assessments, with the lists of any county tax so certified to him, both for the current year, to be advertised for three weeks successively in the state paper, and in some newspaper, if any, printed in the county in which the land lies, and shall cause like advertisement of the lists of such state and county taxes for the following year to be made within three months after one year from such assessment;" interest is "to commence upon the taxes for the year in which such assessment is made at the expiration of one year and upon the taxes for the following year upon the expiration of two years from the date of such assessment."

Section 72 provides,—"Owners of the lands so assessed and advertised, may redeem them, by paying to the treasurer of state the taxes with interest thereon, within one year from the time when such interest commences. . . . . Each part or interest of every such township or tract, upon which the state or county taxes so advertised are not paid with interest within the time limited in this section for such redemption, shall be wholly forfeited to the state, and vest therein free of any claims by any former owner."

Section 75 provides: "Any owner may redeem his interest in such lands, by paying to the treasurer of state his part of the sums due at any time before sale; or after sale, by paying or tendering to the purchaser, within a year, his proportion of what the purchaser paid therefor at the sale, with interest at the rate of twenty per cent a year from the time of sale, and one dollar for a release; and the purchaser, on reasonable demand, shall execute such release; . . . . Or such owner may redeem his interest by paying as aforesaid to the treasurer of state, who, on payment of fifty cents, shall give a certificate thereof; which certificate recorded in the registry of deeds in the county or district where the lands lie, shall be a release of such interest, and the title thereto shall revert and be held as if no such sale had been made."

Without examining in detail the various statutes passed upon the subject from R. S., 1841, Chap. 14, Secs. 1-9 to the form in which they are found in R. S. 1883, Chap. 6, Secs. 69-75, we think it must be considered settled that the state, in view of all the statutory requirements and especially the provisions for redemption within one year after sale, has but a lien upon the land. Such was the opinion of Chief Justice Peters expressed in *Chandler* v. *Wilson*, 77 Maine, 76, 82. "In such case the state has the land not to keep—not to use—but to sell for the taxes. The state in view of all statutory requirements, has but a lien upon the land." Mr. Justice EMERY after an exhaustive review of the statutes and authorities in *Millett* v. *Mullen*, 95 Maine, 400, 417, considered the question no longer open. It is undoubtedly advisable that the last part of Section 72 above quoted (R. S., 1916, Chap. 10, Sec. 45) should be so changed in the next revision as to conform more accurately to the accepted construction of the law. The plaintiff's position, however, on the point now under consideration cannot be sustained. Moreover, the statement in the notice of sale that the tracts of land have "been forfeited to the state" is not a representation on which the grantee has the right to rely. *Pennock* v. *Douglass Co.*, 39 Neb., 293; 42 Am. St. Rep. 579, at Page 585.

We hold, therefore, that the contention of plaintiff's counsel that the notice of sale was constructively fraudulent cannot be maintained; that the rule of "caveat emptor" applies to sales of the character here under consideration; and that the plaintiff in making his bids for the State's interest in the several tracts of land sold assumed all risk of failure of title through informality or illegality in the assessments, in the proceedings of the county commissioners as to county taxes, and through defective notices, or defective proceedings in offering the various items for sale. He had full opportunity to examine the antecedent proceedings and to determine their validity. We have no occasion, therefore, to determine the validity of sales on September 24, 1902 of the State's interest in lands not certified to the treasurer of State for the year 1900; for example, Township 17, Range 8, West of the East line of the State, known as St. John Plantation, in Aroostook County, which is listed fourteen times for taxes in arrears for the years 1881 to 1894 inclusive; or Township 16, Range 7, West of the East line of the State, known as Eagle Lake Plantation, in Aroostook County, which is also listed

fourteen times for taxes in arrears for the years 1881 to 1894 inclusive.

Nor have we to consider whether the procedure at the sale was correct in offering for sale the state's interest in the same township several times at the same sale: for example, Fryeburg Academy Grant in Oxford County was listed sixteen times for taxes in arrears for the years 1885 to 1900 both inclusive, and the State's interest was offered for sale, and was sold, sixteen times, and sixteen deeds were given, one for each year. Was this practice correct, or should the State's interest in Fryeburg Academy Grant have been offered and sold once for a minimum price of all the taxes then in arrears thereon, interest and cost of sale? R. S. 1883, Chap. 6, Sec. 73.

These questions which arise many times in the proceedings for the years here under consideration, are all within the rule which we hold applicable to such sales. The plaintiff in bidding assumed all chances of invalidity of the sale from any of these causes.

The resolve under which we are considering this case, declares in its opening clauses, as noted at the beginning of this opinion, that the plaintiff received no consideration for the sums which he paid to the state, and that fact is the basis of the grant of authority to institute these proceedings.

The learned Attorney General challenges the correctness of this statement of the resolve and maintains that the plaintiff did "acquire by virtue of the proceedings in question rights of great practical and pecuniary value, and that it is his own fault that they were allowed to become worthless."

First, he argues that the plaintiff's deeds, if recorded, would have constituted a cloud upon the title to the real estate, and that the land owner would be compelled to pay the tax, to obtain the removal of the cloud. But this court has held that a tax deed containing a description precisely like the description contained in every deed which the plaintiff received, is insufficient to create any doubt or cast any cloud upon the owner's title, since a mere inspection shows upon its face that it conveys no title. *Powers* v. *Sawyer*, 100 Maine, 536, 542.

"Further," the Attorney General argues, "regardless of the legal or equitable situation, it is apparent that plaintiff had paid taxes assessed against the property of other persons which properly belonged to the owners to pay, and had he been diligent in attempting to secure

reimbursement from those who had benefited by his action, it can hardly be doubted as a practical matter that he would have succeeded in recouping a large portion of his loss." The answer to this argument is the same as before, that the deeds upon inspection disclose that they convey no title, and therefore are valueless as a basis for demanding reimbursement. He further argues that the transaction was speculative; that the plaintiff stood to make large profits; that is true; but the transaction is directly authorized by the law of this State and is the foundation of our system of enforcing payment of taxes in arrears. As long as the State sanctions and approves it, and encourages bidders, the practice of buying state tax titles is not justly open to criticism. We, however, hold the buyer to full responsibility under the rule of "caveat emptor;" he assumes all chances of any imperfections or irregularities existing up to the time the property is struck off to him, and he is entitled to a deed of what he bought.

The answer to the Attorney General's argument upon the question of failure of consideration, and the justification of the legislative declaration that the plaintiff received no consideration for the sums which he paid to the State, is found in the fact that in not a single instance did Keyes receive the deed to which he was entitled as the successful bidder at the sale. We have seen that the Legislature regularly assessed these lands, that thereby the lands became held to the State for the payment of the taxes assessed, that no part of the State's interest had been released, that the State's interest in said lands was advertised for sale, and that the plaintiff was the successful bidder; the case shows that the deeds for the 1902 purchase were sent the plaintiff by express on October 15, about three weeks after the sale, and for the 1903 purchase the deeds were sent to him October 2. Had these deeds purported to convey the State's interest in the townships or tracts of land assessed, and not in a certain number of unlocated acres in each of those townships or tracts, the plaintiff would have received deeds of what he purchased; and if perchance the title had proved defective for any reason, the plaintiff would have had no recourse to the State; he would have received a deed of what he bought, and there would not have been a failure of consideration. *Abbott* v. *Chase*, 75 Maine, 83, 87. For example, the Treasurer of State advertised the state's interest in Fryeburg Academy Grant, 4510 acres, in Oxford County, also Township 8, Range 5, W.E.L.S. 1192 acres, in Aroostook County, also Township 9, South Division,

6060 acres in Hancock County; the plaintiff was the successful bidder therefor; he did not receive deeds of the State's interest in the tracts of land as advertised, but deeds, worthless upon their face, of the State's interest in 4510 acres in Fryeburg Academy Grant, the State's interest in 1192 acres in 8, Range 5, W.E.L.S., the State's interest in 6060 acres in 9, South Division. Had the plaintiff received deeds of what he bought, he would have had no cause of complaint, however fatally defective his titles might prove; he would have received a deed of the State's interest in a described tract of land, not of the State's interest in an unlocated number of acres. As it is, the State has received and holds his money, and has given him deeds worthless upon their face, in place of those to which he was entitled. This we think, fully supports the statement of the resolve that the plaintiff received no consideration for the money paid by him.

Does this situation present a state of facts which entitles the plaintiff to recover the consideration paid? We think that this question must be answered in the affirmative.

The State entered into a contract with the plaintiff to convey to him for a specified consideration all the interest in certain lands that it had a right to convey. In drafting the deeds a mistake was made; the plaintiff did not receive conveyances of the interest of the State which he had purchased, but worthless instruments in form of deeds. The plaintiff paid his money and the State has kept it. The State, it may be said, has never refused to convey the interest which it agreed to convey; but it has unreasonably failed and neglected to do it. After the plaintiff paid the consideration, it was for the State to act; the State was bound to give him good deeds, that is, deeds that would have conveyed all the interest which the State had the right to convey. It has allowed nearly twenty years to pass without doing this, notwithstanding the matter has been biennially before the Legislature. We think that this is an unreasonable delay. Under the same circumstances one private individual would be entitled to recover against another. *Pancoast* v. *Dinsmore*, 105 Maine, 471. Under the legislative resolve the State has consented to be sued waiving its immunity. For the purposes of this case it is to be treated as any other suitor, corporate or individual. The plaintiff, therefore, should recover in this case.

We think that the State cannot, under the circumstances disclosed by this case, in good conscience retain the money which the plaintiff

paid into the State Treasury, for which the Legislature has declared by the resolve of March 27, 1919, that he received no consideration; and that judgment should be rendered in his behalf for the sum of seventeen thousand, eight hundred ninety dollars and twenty-four cents ($17,890.24) with interest thereon from September 24, 1902, and for the further sum of four hundred fifty-five dollars and ninety-nine cents ($455.99) with interest thereon from September 24, 1903.

We think that he is not entitled to recover the sum of $316 which was exacted without authority of law and did not come into the State Treasury; the State is not liable therefor. Nor is the plaintiff entitled to receive his expenses in endeavors to obtain repayment of his money. *Joy* v. *County of Oxford*, 3 Maine, 131, 135.

The Chief Justice and Justices PHILBROOK and WILSON, having been of counsel, take no part in this decision.

The bill is sustained with costs, and a decree may be entered in accordance with this opinion.

So ordered.

INHABITANTS OF MECHANIC FALLS *vs.* FRANK A. MILLETT.

Androscoggin. Opinion May 15, 1922.

Under the provisions of R. S., Chap. 10, Sec. 6, as amended by Chapter 105, Public Laws 1919, but prior to the amendment by Chapter 119, Public Laws, 1921, the exemption from the payment of taxes, relates only to cases where the total property of the soldier or sailor does not exceed the value of five thousand dollars.

Under the provisions of the R. S., Chap. 10, Sec. 6, as amended by Chapter 105 of the Public Laws of 1919, the exemption claimed in the case at bar relates only to cases where the total property of the soldier or sailor does not exceed the value of five thousand dollars.

When the total property of the soldier or sailor does exceed the value of five thousand dollars, there is no exemption in the amount of five thousand dollars, with taxable burden on the balance, but taxes are assessable and collectible on the full amount of the property.

But said Chap. 10 of the R. S., as further amended by Chapter 119 of the Public Laws of 1921, which was adopted after the assessment of the taxes herein sought to be collected, and after the date of the writ in this case, exempts his property to the amount of five thousand dollars from taxation, and he should be compelled to pay taxes only on the balance of his property over and above said sum of five thousand dollars.

On report on an agreed statement. This action was brought to recover the sum of one hundred and ninety dollars with interest from October 1, 1920, the balance claimed by the plaintiffs to be due from the defendant for unpaid taxes to the town of Mechanic Falls for the year 1920. The defendant was a soldier who served in the war of eighteen hundred and sixty-one and five, but his property subject to taxation exceeded the value of five thousand dollars. Defendant filed the general issue, and a brief statement alleging that the taxes were illegally assessed. The case was reported on an agreed statement, and it was stipulated that should the court find defendant liable, judgment for one hundred and ninety dollars and interest from October 1, 1920, should be entered. Judgment for plaintiffs.

The case is fully stated in the opinion.

Harry Manser, for plaintiffs.

Frank A. Morey, for defendant.

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

PHILBROOK, J. This is an action brought to recover a balance claimed by the plaintiffs to be due from the defendant to the town of Mechanic Falls for unpaid taxes assessed for the year nineteen hundred twenty. The case is submitted on an agreed statement of facts. It is admitted that all requirements of law were complied with in relation to the assessment of the tax and the institution of the action. It is also admitted that the defendant was a soldier who served in the war of eighteen hundred sixty-one and five, was honorably discharged, had reached the age of eighty years, but whose property subject to taxation exceeded the value of five thousand dollars. It is also agreed that the only question for determination is whether the defendant is exempt from taxation, for the year nineteen hundred twenty, upon taxable property to the value of five thousand dollars, the amount sued for being the tax upon five thousand dollars

in value of the defendant's property, which he declined to pay upon the ground that he was exempt from such payment under the provisions of R. S., Chap. 10, Sec. 6, Paragraph IX, as amended by Chapter 105 of the Public Laws of nineteen hundred nineteen. The subject matter of the question to be determined relates, therefore, to statutory exemption from the payment of property taxes.

Previous to the year nineteen hundred nineteen an exemption from the payment of a poll tax had been granted to all soldiers and sailors, regardless of age, who served in the army or navy of the United States in the war of eighteen hundred and sixty-one and five, commonly spoken of as the Civil War, and were honorably discharged from such service. In that year the Legislature provided by amendment that "the estates of all soldiers and sailors who served in the war of eighteen hundred and sixty-one and five, the war with Spain, and the war with the Imperial German government and its allies, and were honorably discharged, who shall have reached the age of seventy years, and whose property shall not exceed the value of five thousand dollars," should be included in the list of tax exemptions.

The defendant, whose property otherwise subject to taxation exceeded the value of five thousand dollars, claims that under the amendment he is exempt from payment of a tax upon five thousand dollars' worth of property and should have been taxed only upon so much of his property as exceeded that sum.

Since the amendment of nineteen hundred nineteen is of such recent origin it is not strange that it has not before been construed by this court, and diligent search among the decisions of other courts fails to disclose any ruling upon this precise point.

While the language of the amendment seems quite plain, and hardly calls for judicial construction, yet we must not overlook the settled decisions relating to the taxation of property, as well as the familiar provision of the fundamental law which requires that "all taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof."

Holding fast to a safe and conservative rule regarding legislative exemption from taxation, this court has declared that in order to entitle any kind of property to exemption from taxation, the intention of the Legislature to exempt it must be expressed in clear and unambiguous terms, that all doubt and uncertainty as to the meaning of a

statute is to be weighed against exemption, that taxation is the rule and exemption is the exception. *Portland, Saco and Portsmouth R. R. Co.* v. *Saco,* 60 Maine, 196; *Auburn* v. *Young Men's Christian Association,* 86 Maine, 244; *Gorham* v. *Ministerial Fund,* 109 Maine, 22.

A thoughtful examination of the amendment of nineteen hundred nineteen, under which the defendant claims exemption as above stated, makes clear the fallacy of his claim. By that amendment the Legislature went no further than to say that the aged, honorably-discharged veteran, whose diligence and economy had enabled him to accumulate only a modest fortune, which did not exceed five thousand dollars, should be relieved from drawing upon that accumulation for the support of public charges which are to be met by taxation. It did not say that the veteran, upon whom fortune and financial success had smiled in a measure greater than the sum mentioned in the amendment, should be granted the favor of any part of the tax exemption which was granted to his less fortunate comrade.

We are confirmed in our view as to the legislative intent in nineteen hundred nineteen, under the provisions of which the action at bar was brought, when we observe that the Legislature of nineteen hundred twenty-one, sitting after the bringing of this action and perhaps moved by the situation arising in this very suit, again amended the statute by distinctly exempting from taxation "the estates to the value of five thousand dollars of all soldiers and sailors" who had served in the wars already enumerated, were honorably discharged, and had reached the age of seventy years. This later amendment throws a flood of light upon the intent of the Legislature which voiced the provisions of nineteen hundred nineteen and shows conclusively that the defendant's claim is fallacious as we have already said.

We determine that the defendant is liable for the tax assessed and under the stipulation contained in the agreed statement the mandate must be,

Judgment for plaintiffs in the sum of one hundred ninety dollars and interest from October 1, 1920.

GERALD L. SAUNDERS *vs.* J. W. PRATT.

Oxford. Opinion May 19, 1922.

For delivery to the carrier to constitute delivery to the vendee, "The seller must not sacrifice the buyer's right to claim indemnity from the carrier," unless conditions of delivery by seller to carrier are in accordance with instructions from vendee to seller.

It does not appear that the verdict of the jury was manifestly wrong on any of the facts submitted for their determination in arriving at their verdict.

An action of assumpsit to recover for some apples, alleged to have been sold and delivered to defendant, and for commissions in purchasing some apples for defendant. A verdict in favor of plaintiff was returned by a jury on both items, and defendant filed a general motion for a new trial. Motion overruled.

The case is stated in the opinion.

Tascus Atwood, for plaintiff.

Frank W. Butler, for defendant.

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

WILSON, J. An action of assumpsit to recover the value of forty barrels of apples, alleged to have been sold and delivered to the defendant, and for commissions earned by the plaintiff in purchasing one hundred and thirty-nine barrels of apples for the defendant. The jury found for the plaintiff on both items for the amount claimed in the writ, and the case comes before this court on a motion for a new trial on the usual grounds.

The claim for commissions depended upon the interpretation of certain letters and a conversation over the telephone testified to by the plaintiff. In the final analysis it involved a question of fact for the jury, under proper instructions by the court, which we must assume were given, as no exceptions were taken.

The objection is also made that the item for commissions included commission upon the apples which the plaintiff himself sold to the defendant and which if not raised by himself were not purchased by him for the defendant under their agreement. Upon the evidence the jury was warranted in finding that the agreement between the parties was that the apples should not cost the defendant more than one dollar and fifty cents per barrel, including commissions, delivered on the cars. Under their agreement the plaintiff might properly recover one dollar and fifty cents per barrel for such apples as were included in the shipment, which belonged to himself, viz.: forty barrels; and though he improperly claimed in his writ commission of ten cents per barrel on his own apples, since he only claimed to recover one dollar and forty cents per barrel for the apples themselves the verdict was for no more than he was entitled to recover, and the defendant was not aggrieved thereby.

As to the item for forty barrels of apples sold and delivered, the defense was that they were never delivered to the defendant as he refused to receive them, they arriving at their destination in a frozen condition. The question also was raised that some of them were not up to the specifications as to size.

To avoid the effect of the delivery to the carrier,—they being shipped by rail in accordance with the instructions of the defendant,—constituting a delivery to the defendant, the defendant relies upon the fact that they were, with the consent of the plaintiff, shipped "at the owner's risk," which deprived the defendant of a claim against the carrier in case they were damaged in transit. The defendant contending that delivery to a carrier does not amount to a delivery to the vendee where the seller does anything without the authority of the vendee to deprive the vendee of a claim against the carrier in case the goods are damaged in transit.

This rule seems to have been first laid down in *Clark* v. *Hutchins*, 14 East 475, and the American decisions recognizing the rule may be found in 23 R. C. L., 1429, L. R. A., 1917, F. 561. As stated by the court in *Miller* v. *Harvey*, 221 N. Y., 54. For delivery to the carrier to constitute delivery to the vendee, "The seller must not sacrifice the buyer's right to claim indemnity from the carrier."

In the case at bar, however, there was evidence from which the jury could have fairly found that the defendant instructed the plaintiff to ship the apples in a refrigerator car, which he did. At the

time of year in which the shipment took place the railroad would not accept shipment of fruit in refrigerator cars except at the "owner's risk." As to whether the shipment upon these conditions was, under all the circumstances, a reasonable compliance with the directions of the defendant was, we think, a question of fact for the jury, as was also the question of whether any of them failed to conform to the specifications as to size.

A review of the evidence does not satisfy this court that the verdict of the jury was manifestly wrong upon either item.

Motion overruled.

EDWARD J. CONQUEST, Trustee in Bankruptcy of the estate of

BENJAMIN APPLEBAUM

vs.

JACOB GOLDMAN.

Penobscot. Opinion June 2, 1922.

A trustee in bankruptcy occupies a dual position. He represents the debtor and also the creditors. In an action brought by such trustee to set aside fraudulent conveyances or transfers, constructively fraudulent because in violation of the Bulk Sales Law, he is not required to prove a deficiency of assets. In the instant case the question of value should have been submitted to the jury, as the alleged admission was ambiguous, and the price received for the stock was some evidence of value.

In actions brought by a trustee in bankruptcy, being actions which the debtor could have maintained had bankruptcy not intervened, it has for obvious reasons never been necessary to prove deficiency of assets. But in actions brought by such trustee to set aside fraudulent conveyances or transfers constructively fraudulent because in violation of the Bulk Sales Law, actions which the debtor could not have maintained, prior to 1910 it was held that deficiency of assets must be proved. Since the amendment to the Federal Bankruptcy Act enacted in 1910, which provides that the trustee "shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly unsatisfied," neither a creditor nor a trustee is required to prove a deficiency of assets.

In the opinion of the court the question of value should have been submitted to the jury, the alleged admission being ambiguous, and the price for which the stock was actually sold being some evidence of value.

On exceptions by defendant. This is an action to recover the value of a stock of goods sold by the bankrupt to the defendant in violation of the Bulk Sales Statute. The defendant moved for a directed verdict for the reason that there was no evidence of deficiency of assets. This motion was denied and the defendant excepted. The plaintiff also moved for a directed verdict. This motion was granted, the presiding Judge ordering a verdict for $1,713.54, on the ground that the only evidence of value was the defendant's admission. To this ruling defendant reserved exceptions. Exception to direction of verdict sustained.

The case is stated in the opinion.

George H. Morse and S. J. Levi, for plaintiff.

M. E. Rosen and George E. Thompson, for defendant.

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

DEASY, J. Trover by the trustee in bankruptcy of Benjamin Applebaum against the defendant who purchased from Applebaum his stock of merchandise without conforming to the conditions of the Bulk Sales Statute. The facts clearly bring the case within the provisions of that statute as construed in *Philoon* v. *Babbitt,* 119 Maine, 172. The Judge, therefore, properly directed that a verdict be returned for the plaintiff. But we think that he was not justified in taking the question of damages, i. e., value, from the jury and ordering a verdict for $1,713.54.

The examination of the defendant in the bankruptcy court was admitted in evidence. In the course of that examination a book was produced containing an inventory of the goods and the cost of the same to Applebaum. The cost thus shown was $1,669.31, which plus interest was the amount of the directed verdict. At the close of a long examination in the bankruptcy court the defendant answered "yes" to the following question: "The cost price of the goods to Applebaum as indicated by the figures in this book you considered a fair market value for such goods?" The defendant's answer

to this question was claimed to be an admission that the merchandise when bought by him was of that value, and upon such admission the directed verdict was apparently based.

When in the course of his testimony in the pending suit the defendant was asked about this alleged admission, he replied, "No, I didn't said it." The question asked was not free from ambiguity. The questioner of course had in mind the value of the second-hand stock when sold by Applebaum. But the defendant with little knowledge of law and an imperfect understanding of English might well have understood that "the fair market value of such goods" meant the market value of fresh goods when bought by Applebaum.

If his affirmative answer seems to be an admission that the second-hand stock when sold to him was equal in value to new goods when bought by Applebaum, we are of the opinion that, to use his own unschooled phrase, he "didn't said it" understandingly.

The burden was on the plaintiff to prove damages. The goods were sold by Applebaum to the defendant for $1,243.45, which is seventy per cent. of the cost of new goods. This selling price is some evidence of value which, in connection with other facts and circumstances, should have been submitted to the jury.

The defendant is entitled to a new trial on the question of damages. But he contends further that a verdict in his favor should have been directed. No evidence showing deficiency of assets was produced, and the defendant cites several cases holding that in the absence of such evidence neither a creditor nor a trustee in bankruptcy representing creditors can recover. But the amendment of 1910 to the Bankruptcy Act renders these cases obsolete.

A trustee in bankruptcy occupies a dual position. He represents the debtor. In actions that he brings in such capacity, i. e., actions which the debtor could have maintained had bankruptcy not intervened, it has for obvious reasons never been held necessary to prove deficiency of assets. *Drew* v. *Myers*, 81 Neb. 750; 116 N. W., 781. But the trustee also represents creditors. In this capacity he may maintain suits to set aside fraudulent conveyances (*Flint* v. *Chaloupka* 81 Neb., 87; 115 N. W., 535) or transfers constructively fraudulent because in violation of the Bulk Sales Law. *Philoon* v. *Babbitt*, supra.

In such cases it was held prior to the amendment of 1910 that the plaintiff must prove deficiency of assets. See *Mueller* v. *Bruss*, 112 Wis., 412; 88 N. W., 229.

But the amendment of 1910, Chap. 412, Sec. 8, 36 U. S. Statute, 840, provides that the trustee "shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." A creditor so circumstanced need not prove deficiency of assets. The fact that the execution has been returned unsatisfied is at least prima facie evidence of such deficiency. "The trustee is not required to allege in an action under this clause to recover property fraudulently transferred that a deficiency of assets exists." Collier on Bankruptcy, 11th Ed., Page 735.

In the case of *Kraver* v. *Abrahams*, 203 Fed., 782, the effect of the amendment is thus stated: "The rule laid down in the cases cited was based upon the ground that the trustee has no rights superior to the creditors whom he represents, and that, even if the transfer is fraudulent, there is no right to avoid it unless it appears that the assets of the bankrupt estate are insufficient to pay the creditors in full. The necessity, if it exist, to aver and prove a deficiency of assets, appears, however, to have been removed by the amendment of 1910, by which it is provided that as to all property not in the custody of the bankrupt court the trustee shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution returned unsatisfied. In other words, under the amendment, where a transfer is alleged to have been fraudulent as to creditors, and insolvency is alleged to have existed at the time, the trustee is in the position of a creditor who has proved by an execution returned unsatisfied that a deficiency of assets exists. There is, therefore, no necessity for its averment in the statement of claim."

The Judge correctly refused to direct a verdict for the defendant, but erred in taking the question of damages from the jury. It is not necessary to consider the other exceptions.

Exception to direction of verdict sustained.

STATE OF MAINE *vs.* EDWARD SAYERS.

Somerset. Opinion June 2, 1922.

Liquor may be intoxicating in fact, and yet not be intoxicating liquor within the purview of the law because not "capable of being used as a beverage." Whether any compound is so capable of use is a question of fact, and a sale of it for beverage purposes is some evidence that it is capable of such use.

The defendant sold to one Trask a bottle of Rose Toilet Water, a compound containing about fifty per cent. alcohol. There was evidence justifying a finding that the sale was for beverage purposes.

Trask said that he took two swallows of the liquid, went back to his work and later took two more swallows. He became unconscious and so remained for several hours. During his stupor his heart and lungs functioned but feebly.

It was contended that the compound was not capable of being used as a beverage, and therefore was not intoxicating liquor within the meaning of the statute.

Upon all the evidence, the jury verdict of guilty was not clearly erroneous.

On exceptions by respondent. The respondent was tried in the Western Somerset Municipal Court for the County of Somerset upon a warrant alleging a single sale of intoxicating liquor, and upon appeal the case went to the Supreme Judicial Court and was tried at the January term, 1922, and respondent was found guilty. Before the verdict, counsel for the respondent requested a directed verdict for respondent on the ground of insufficient evidence, which was refused by the presiding Justice, and respondent excepted. After verdict counsel for respondent filed a motion in arrest of judgment, attacking the sufficiency of the warrant, which motion the presiding Justice denied, and respondent excepted. Exceptions overruled.

The case is fully stated in the opinion.

James H. Thorne, County Attorney, for the State.

B. F. Maher and W. H. Hawes, for respondent.

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

DEASY, J. The respondent moved in arrest of judgment for the alleged reason that "no seal appears upon the warrant." He con-

tends that the seal shown in the record was affixed to the certification and not to the warrant. This contention is unfounded.

A motion for a directed verdict, on the ground of insufficient evidence, was denied. The respondent sold to one Trask for two dollars and fifty cents a half-pint bottle of "Rose Toilet Water" alleged to be intoxicating liquor. Prof. Whittier, who analyzed the liquid, testified that it contained fifty-two and one half per cent. of alcohol by volume, or forty-five per cent. by weight. It also contained some substance, not shown by the analysis to be poisonous, giving it the odor of roses.

Trask testified that he took two swallows of the compound and a little later two more. He thereupon became unconscious and so remained for several hours. Medical testimony discloses that during his stupor his heart and lungs functioned but feebly.

The respondent contends that a verdict of not guilty should have been directed because the evidence fails to show that the compound sold was intoxicating.

There can be no reasonable doubt that the liquid sold by the respondent was in fact intoxicating. Its high percentage of alcohol shows this to say nothing of Trask's unfortunate experience in the use of it.

But the respondent argues that it was not an intoxicating liquor within the meaning of the statute because "not capable of being used for tippling purposes or as a beverage" (*State* v. *Int. Liquors*, 118 Maine, 201) and because not "practicable to commonly and ordinarily drink it as a beverage" (*Heintz* v. *Le Page*, 100 Maine, 545).

This was a question of fact for the jury to pass upon. The evidence was sufficient to justify a finding that the respondent sold the liquor with the full understanding that Trask was buying it for drinking. As against the respondent this is some evidence that it was fit for such use.

If the respondent sold the compound as a beverage he cannot complain if his present contention that it was too poisonous and deadly for such use is received with some suspicion.

Undoubtedly a liquor which is intoxicating in fact may be "incapable of use as a beverage" and therefore not intoxicating liquor within the purview of the statute nor within the meaning of the substantially equivalent provision of the Federal Law. Whether so incapable or otherwise is a question of fact.

We are not convinced that in the present case this issue of fact should have been taken from the jury by a directed verdict.

Exceptions overruled.

ERNEST L. PARKMAN *vs.* ADELE M. FREEMAN.

Cumberland. Opinion June 5, 1922.

In a description in a deed the following language "All my right, title and interest in and to land on the easterly side of a line located as follows:" conveys grantor's title only to such land or parcels of land as are contiguous to or adjoin such line, and does not include land not adjoining such line, though lying in an easterly direction from it, but not in any way surveyed, specifically referred to, or described, and not necessary to the accomplishment of the purpose of the parties.

In determining the construction of a deed evidence which shows the circumstances of the parties and the purpose they had in view, is admissible, not to change to any extent the words used, but the better to enable the court to understand the meaning to be attached to the language used.

The practical construction given by the parties, as an interpretation of the grant, is never admissible to throw down language which is definite and certain, nor when in violation of settled rules of construction.

Land described as on the easterly side of a certain line must be bounded by that line. "On the easterly side" of a certain line is a description that only fits a lot actually bordering the line on its easterly side.

On exceptions and general motion for new trial by defendant. This is a real action to determine title to certain real estate situate at the corner of Forest Avenue and Hartley Street, in the Deering District in Portland. Defendant pleaded the general issue and by brief statement disclaimed as to part of the premises demanded. The question involved was the construction of a deed, which in its description recites . . . . "all my right, title and interest in and to land on the easterly side of a line located as follows . . . . at right angles with Clinton Street on a course north 20 degrees 50 minutes east about 106 feet to lotted land of Martha A. Gray." Two

of the three parcels demanded adjoined the above described line on the easterly side, which were disclaimed in the brief statement, but the third parcel did not adjoin said line though lying easterly therefrom, title to which was the point in controversy.

Exceptions were taken by defendant to a ruling by the presiding Justice excluding certain testimony offered by defendant. The jury returned a verdict for plaintiff, and the defendant filed a general motion for a new trial. Motion and exceptions overruled.

The case is stated in the opinion.

Frank H. Haskell, for plaintiff.

Verrill, Hale, Booth & Ives, Philip G. Clifford and Joseph E. F. Connolly, for defendant.

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

MORRILL, J. Real action. The case is before the Law Court upon defendant's exceptions and general motion for a new trial.

In 1900 Martha A. Gray, the plaintiff's predecessor in title, and Nathan S. Freeman, the defendant's predecessor in title, were adjoining owners of land situated on the northerly side of Clinton Street in the city of Portland; the dividing line between their properties was parallel with Forest Avenue, and located about 370 feet therefrom measured on the northerly line of Clinton Street; it made an angle of about 62°, 20′ with said street line.

In August 1900 these adjoining owners agreed to relocate the dividing line between their properties at right angles with Clinton Street; an engineer was employed who located the line which we will designate as A B, starting on the northerly line of Clinton Street 381.2 feet westerly from Forest Avenue. On August 31, 1900 they exchanged warranty deeds; Mrs. Gray conveyed to Freeman "a certain lot of land situated in said Portland and bounded and described as follows, viz.: All my right, title and interest in and to land on the easterly side of a line located as follows: beginning at a point on the northerly side line of Clinton Street and distant from the intersection of the northerly side line of said Clinton Street and the southwesterly side line of Forest Avenue westerly three hundred and eighty-one and two tenths (381.2) feet; thence at right angles with said Clinton Street on a course N. 20°, 50′ E. about one hundred and six (106) feet to lotted land of Martha A. Gray." By this deed it is conceded

that Mrs. Gray conveyed to Freeman two triangular lots of land both adjoining the line A B, one on the street front, the other in the rear, which in August of the next year Freeman sold to one Cutts as parts of a building lot.

Freeman conveyed to Mrs. Gray "a certain lot of land situated in said Portland and bounded and described as follows, viz.: All my right, title and interest in and to land on the westerly side of a line located as follows: beginning at a point on the northerly side line of Clinton Street" etc. (describing the line exactly as described in the deed from Mrs. Gray to Freeman.) By this deed it is conceded that Freeman conveyed to Mrs. Gray a triangular lot of land adjoining the line A B, which on the next day she conveyed to one Curran as part of a building lot. Mrs. Gray died in November, 1906 and Freeman some time after July 9, 1915, the exact date not appearing.

The defendant claims, however, that Mrs. Gray's deed to Freeman also conveyed another lot of land which lies in an easterly direction from, but does not adjoin, the line A B; she describes this lot in her pleadings and disclaims all of the demanded premises except the lot so described. This lot in dispute as described in defendant's plea is of general triangular shape although its northerly line follows a fence not entirely straight in its course; the apex of the triangle is in or very near the westerly line of Forest Avenue; the southerly line runs westerly nearly at right angles to Forest Avenue about 145 feet; the westerly line is 46.5 feet long and runs northerly, at about right angles to the southerly line, to a point not in dispute; this point is the nearest part of the lot in dispute to the line A B, and is about 160 feet distant easterly from the northerly end thereof; the intervening land was owned by Freeman on August 31, 1900.

The question presented, then, is: Did the deed of Martha A. Gray to Nathan S. Freeman of August 31, 1900 convey all her right, title and interest in this triangular lot last referred to, which does not adjoin the line A B, as well as her right, title and interest in the two other triangular lots which do adjoin the line A B? This question must be answered in the negative.

Upon the defendant's theory that a latent ambiguity exists in the deed evidence was introduced at the trial, without objection, to explain the deed and to make clear the intentions of the parties by the construction which they were said to have put upon the deed. Upon the evidence so introduced, after a charge to which no exceptions

were taken, the jury returned a verdict for the plaintiff, with which we do not feel called upon to interfere, as manifestly wrong. Even upon the theory of defendant and giving all evidence introduced by her its full effect, it would have been very short-sighted on the part of Mrs. Gray to have conveyed to Freeman more of the disputed tract than is embraced in his deed to defendant dated July 9, 1915, which while carefully alluding to other deeds as sources of title, does not refer to Mrs. Gray's deed to him of August 31, 1900; Freeman had no apparent use for the small triangle northerly of and adjoining his Forest Avenue lots, and Mrs. Gray by conveying it to him would have disabled herself from doing on her Forest Avenue front the very thing which she was accomplishing on the Clinton Street front, viz.: creating rectangular building lots. The evidence does not warrant any such conclusion.

But we do not find it necessary, or consider it desirable, to place the decision of the case upon above ground alone. We regard much of the testimony as inadmissible; here there is no latent ambiguity to be explained; the matter to which the language is to be applied is free from doubt. That portion of the evidence which shows the circumstances of the parties and the purpose they had in view, is admissible, not to change to any extent the words used, but the better to enable the court to understand the meaning to be attached to the language used. *Foster* v. *Foss*, 77 Maine, 280. "The supposed intentions of the parties, even if fortified by circumstances and conditions, cannot be permitted to overcome the express language of the grant taken as a whole, and properly construed." *Whitmore* v. *Brown*, 100 Maine, 410, 413. The practical construction given by the parties, as an interpretation of the grant, is never admissible to throw down language which is definite and certain, nor when in violation of settled rules of construction. *Woolen Co.* v. *Gas Co.*, 101 Maine, 198, 213.

Thus it is clear that although Mrs. Gray in terms conveyed "a certain lot or parcel of land, situated, etc." her deed actually conveyed *two* lots each adjoining the line A B, in pursuance of the purpose of the parties to so locate the line between them to lay out rectangular building lots; and it is equally clear that the language used cannot include a third lot, not adjoining the line A B, not in any way surveyed, specifically referred to, or described, and not necessary to the accomplishment of their said purpose.

The noun, "side", is thus defined in the dictionaries: International; the margin, edge, verge, or border of a surface. New Standard; any one of the bounding lines of a surface. Century; one of the two terminal surfaces, margins or lines of an object. Hence, it is very clear that land described as on the easterly side of a certain line must be bounded by that line. "On the easterly side" of a certain line is a description that only fits a lot actually bordering the line on its easterly side. *Illinois Cent. R. Co.* v. *Baldwin,* 77 Miss., 788; 28 So. 948.

The lot in question is therefore excluded by the terms of the description contained in the deed. In view of the construction which we have placed on the language of the deed, it is unnecessary to consider the exceptions.

Motion and exceptions overruled.

EASTPORT WATER COMPANY *vs.* E. A. HOLMES PACKING COMPANY.

Washington. Opinion June 8, 1922.

To set aside a verdict it is not enough to show that it is clearly wrong. It must be shown to be manifestly wrong to the prejudice of the moving party. He must show that he is aggrieved by it.

The readings of a water meter, which is shown by proof to be a correct measuring device of the water flowing through it, are competent evidence, but if it is found that it does not correctly register the amount of water flowing through it, such readings cease to be evidentiary.

When one would avoid a verdict, he must do more than to show it to be clearly wrong; he must show it to be manifestly wrong to his prejudice.

The trial court did not abuse discretion by admitting evidence of tests which consisted of the timing of the venting of water from the taker's side of a meter, under usual conditions; from which as a premise it was argued, as the conclusion of a mathematical proposition, that all the water for which the plaintiff had charged could not have flowed through the meter in the given period. The weight of that evidence was a question for the jury.

On exceptions and motion for new trial by plaintiff. This is an action in assumpsit on account annexed to recover for water furnished by plaintiff to defendant for two tenement houses for one year at a flat rate of $14.00 per year, and for 907,820 gallons at 45 cts. per one thousand gallons as excess water. Plea the general issue. The cause was tried to a jury and verdict of $42.62 was rendered for plaintiff. The plaintiff excepted to the admission of certain testimony, and filed a general motion for a new trial. Exceptions and motion overruled.

The case is stated in the opinion.

Isaac W. Dyer and J. H. Gray, for plaintiff.

H. J. Dudley, for defendant.

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

DUNN, J. A semi-annual or flat rate of seven dollars entitled the defendant, as a consumer of the Eastport Water Company, to receive and use a stipulated quantity of water. For more, it was to pay forty-five cents for each one thousand gallons.

In this action the plaintiff sought to recover for the flat rates for two successive periods, and besides on a charge for 907,820 gallons of water, which latter will be referred to as the excess. The flat rates were alleged to have accrued, and the excess to have been supplied, within one year from September 1, 1920; the total debit of the account amounting to $422.52.

The kernel of the controversy was that for the excess. With regard thereto certain meter registrations were in evidence. The jury, evidently finding that those were incorrect, returned a general verdict for the plaintiff in the sum of $42.62. So far as it was intended to be inclusive of an allowance for excess, the verdict is plainly without a foundation in the record. The meter records comprised the sole evidence offered by the plaintiff on that point. This should have weighed for the readings of the meter dials, or not at all, as those readings were proved to be correct or incorrect. The measuring device employed was either right or wrong. If wrong, how far wrong could not be told. Surely, upon the submitted evidence, a finding that the meter was inaccurate was not palpable error. The

jury determined the meter to be partially wrong. But, in the very nature of things, the case was that of accepting the meter at its face, or of rejecting it altogether.

The statement that the verdict is contrary to evidence is not equivalent to saying that the plaintiff's motion for a new trial is sustainable. By whatever process of reasoning ultimate decision was reached, (and it is not shown that the conclusion was an unreasoned one), the verdict is not unjust as against the plaintiff. Concededly, the plaintiff was entitled to recover for the flat rates; namely, in the sum of fourteen dollars. It has the fourteen dollars, and more, in the sum awarded. Additionally, had there been proof, it would have been entitled to recover for the excess. The insuperable difficulty was the absence of proof. The jury, in the valid exercise of duty, regarded the meter as discredited, and there was nothing else by which to gauge the quantity of water supplied. True, as was in argument advanced, one fact may be inferred from another fact, but the inference must be from a fact already proved; a mere probability will not suffice. *Alden* v. *Maine Central Railroad Company*, 112 Maine, 515; *Mahan* v. *Hinds*, 120 Maine, 371. Still yet, when one would avoid a verdict he must do more than to show it to be clearly wrong; he must show it to be manifestly wrong to his prejudice. This plaintiff has not shown itself to be aggrieved. It has shown a wrong verdict, but not one doing it an injustice. *Marshall* v. *Baker*, 19 Maine, 402. *Stephenson* v. *Portland Railroad Company*, 103 Maine, 57. The error of which the plaintiff complains is one that, the meter figures being disregarded, gives it greater damages than it had a claim to by the remaining evidence. In this situation, the defendant, and not the plaintiff, is the injured litigant; and the defendant is uncomplaining. This error has left the plaintiff as uninjured as though it were a stranger to the record.

A reserved exception challenges the admissibility of the testimony of an official of the defendant corporation concerning certain tests made by him with regard to the flow of water. The tests consisted in the successive timing of the venting of one gallon of water through each of the only three supply-pipe faucets on the taker's side of the mooted meter, under usual conditions. Carried to logical premise, it was therefrom argued, as the conclusion of a mathematical proposition, that not nearly all the excess could have flowed through the meter in the given period, granting even a greater habitual use of

water than the evidence had disclosed. The testimony was competent, or, to speak in more approved phrase, the trial court did not abuse discretion in admitting it. *Boston Woven Hose Company* v. *Kendall,* 178 Mass., 232. The weight of that evidence was a question for the jury.

Motion overruled.
Exception overruled.

HARRY S. JONES *vs.* GRACE M. GRINDAL.

Hancock. Opinion June 8, 1922.

An inventory of an estate duly sworn to and filed in the Probate Court is admissible to prove and is prima facie evidence of the amount of the estate which passes into the hands of the trust officer, but not conclusive, and may be offered to show the financial benefits which the widow of the deceased may receive from that estate.

The inventory of an estate duly sworn to by the executor or administrator and filed in the Probate Court is admissible to prove and is prima facie evidence of the amount of the estate which came into the hands of such trust officer, but not conclusive, and may be offered to show the financial benefits which the widow of the deceased may receive from that estate. Such evidence is open to denial or explanation either as to property improperly scheduled, or as to title or value of the same.

In the instant case no legal ground for exception is pointed out either in record or argument, and it not being clearly shown that the excepting party was injured by the question and answer, such exception is not considered.

The customary and established burden resting upon a party seeking to set aside the verdict of a jury has not been sustained in the case at bar.

On motion and exceptions by defendant. This is an action to recover damages for an alleged slander. The plaintiff was in the employment as bookkeeper, accountant and salesman of C. W. Grindal, husband of defendant, for ten or twelve years prior to the death of said Grindal, who was a retail dealer in groceries and grain. After the death of her husband the defendant was appointed adminis-

tratrix of his estate and continued the business with the plaintiff in her employ for about sixteen months when he left such employment. Plaintiff alleges that the defendant after he left her employ in a conversation with one Charles M. Kittridge, falsely and maliciously spoke and published of and concerning the plaintiff the false, scandalous and malicious words as follows—"it is all true. He has taken grain time and time again without making any account of it and I can prove it." "I have found him very dishonest with me." "I can prove everything I say." "Mr. Jones took grain, flour and grass seed and made no account of it." The defendant filed a plea of general issue, and a brief statement that the false, scandalous and malicious statements alleged by the plaintiff to have been said by defendant, were privileged statements, and also pleaded justification. The case was tried to a jury and a verdict for $1,425.00 was rendered for plaintiff. Defendant excepted to the ruling of the presiding Justice admitting the inventory of the estate of the intestate husband of the defendant, and also filed a general motion for a new trial. Motion and exceptions overruled.

The case is fully stated in the opinion.

Peters & Crabtree, for plaintiff.

W. R. Pattangall and Hale & Hamlin, for defendant.

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

PHILBROOK, J. Action for slander. The case is before us upon defendant's exceptions and upon motion to set aside plaintiff's verdict in the sum of fourteen hundred twenty-seven dollars. ($1427.00).

STATEMENT OF THE CASE.

The plaintiff is a business man, forty-three years of age, with a wife and three children dependent upon him for support. For a period of ten or twelve years he was employed as bookkeeper, accountant and salesman for C. W. Grindal. The defendant is the widow of Grindal and administratrix of his estate. In his lifetime Grindal was a retail dealer in groceries and grain. After his decease the defendant continued the business with the plaintiff in her employ. The charges

made against the plaintiff by the defendant, as alleged in the writ, were such as might seriously affect the reputation of the plaintiff and might materially interfere with obtaining employment in any community where those charges were made. They directly related to the lack of honesty and integrity of the plaintiff and were couched in language which imputed criminal conduct upon his part. The plaintiff claimed that the charges were maliciously made and demanded both actual and punitive damages.

The defendant, while denying the use of the language set forth in the writ, admitted that after the plaintiff's employment with her had ceased, certain prospective employers of plaintiff called upon her, without invitation upon her part, to inquire as to the character, honesty and ability of the plaintiff. She says that whatever statements she then and there made were confidential and privileged, that no malice actuated her conduct. She also sought justification on the grounds that her statements were true, or that she had reasonable cause to believe them to be true.

THE MOTION.

In addition to the general verdict for the plaintiff, special findings of fact submitted to the jury were determined by the following questions and answers.

(1) Was the plaintiff guilty of dishonesty in his dealings with the defendant as stated by her? Answer, No.

(2) Were the statements made by the defendant of and concerning the plaintiff made maliciously? Answer, Yes.

The charge of the presiding Justice, contained in the record, has been examined carefully and is found to contain a most clear, complete and correct statement of the various principles of law involved in the contentions of both parties. By the general verdict and special answers, the jury found upon these questions of fact, viz.: that the statements alleged in the plaintiff's writ and declaration were made; that they were slanderous; that they were made maliciously even if they were privileged; that they were not true; and that the defendant did not have reasonable cause to believe them to be true.

Such findings warrant not only actual but punitive damages. The amount of the latter, within reasonable limits, has a wide range depending, among other things, upon the general situation, the character and station of the parties, and the wealth of the person to

be punished. Under the familiar rules relating to the stability of jury verdicts, both as to liability and amount of damage, the defendant has not persuaded us that the motion should prevail.

THE EXCEPTIONS.

Since financial standing of the defendant may be shown, as affecting the amount of punitive damages, the plaintiff, subject to exception, offered the inventory of the estate of the intestate husband of the defendant. This was objected to on the ground that it brought into the case the opinion of the appraisers as to the value of property without opportunity for cross-examination and hence was purely hearsay testimony. But by provision of statute every executor or administrator is required to make and return upon oath a true inventory of the real estate and of all the goods, chattels, rights and credits of the deceased which are by law to be administered and which come to his possession or knowledge. Moreover, it is familiar law that the bond of the executor or administrator binds him to account for every dollar's worth of the property as set forth in the inventory unless by proper evidence and procedure he is relieved of some portion of his obligation. In the present case the record shows that although the defendant was sued in her individual capacity, yet in her representative capacity, as administratrix of her husband's estate, she swore to the truth of the very inventory which she now says should not be used as evidence of the value of property which came into her possession as administratrix, her legal share of which she would sooner or later acquire. This was not conclusive evidence for she had, and at the trial availed herself of, the right to show that the value of her husband's estate, when finally settled, might be diminished by various causes.

The principle here under discussion is involved in *Little* v. *Birdwell*, 21 Texas, 597, 73 Am. Dec. 242, where a widow returned an inventory showing title to certain property to be in her husband's estate. Later she claimed title to the same property. She was confronted with her inventory which was admitted as evidence. The court held that the inventory was not conclusive evidence but prima facie evidence of title in the estate which might be rebutted by proof that in point of fact, the title was not in the testator or intestate, but in another. "The widow was not estopped or concluded from asserting

her right or separate property although she had returned an inventory of the property as belonging to the estate of her deceased husband" said the court in the case just referred to.

In *Reed* v. *Gilbert*, 32 Maine, 519, an inventory of property duly returned to the Probate Court was held to be prima facie evidence that no other property belonged to the estate.

An inventory is not conclusive either for or against an administrator but is open to denial or explanation. *Cameron* v. *Cameron*, 15 Wisconsin, 1; 82 Am. Dec., 652.

The inventory which an administrator returns into court is held by the Supreme Court of Pennsylvania, *In re Stewart's Estate*, 20 Atl. Rep., 554, to be prima facie evidence not only of the extent but also of the value of the estate which has come into his hands, but he may still show that through inadvertence, ignorance or mistake, property has been put into it which did not in fact belong there.

Upon this branch of defendant's exceptions we hold that the inventory of an estate duly sworn to and filed in the Probate Court is prima facie evidence of the amount of the estate which came into the hands of the executor or administrator, but not conclusive, and may be introduced to show, prima facie, the financial benefits which a widow of the deceased may receive from that estate. Such evidence is open to denial or explanation either as to property improperly scheduled, or as to title or value of the same.

The remaining exception relates to the following question put to and answered by the plaintiff. "What is the approximate amount of the yearly net income, taking out expenses of doing business, of the Grindal estate since the death of C. W. Grindal until the time you left?" To which the reply was, "Approximately $14,000." The legal ground upon which the question and answer were objected to do not appear in the record. In argument defendant's counsel suggested that this question and answer, together with the admitted inventory, gave a chance to argue that defendant was a woman of wealth. Since no legal ground for exception was pointed out, either in record or argument, and it not being clearly shown that defendant was injured by the question and answer, we must decline to consider it.

Motion and exceptions overruled.

PHILOMENE JACQUE'S CASE.

Cumberland. Opinion June 8, 1922.

The findings on questions of fact by the Chairman of the Industrial Accident Commission, if based upon some competent evidence, drawing reasonable inferences from proven facts, are final. The written report by the employer to the Commission in accordance with the statute is admissible in so far and in so far only as it contains statements which are declarations against interest.

On appeal from the decree of a single Justice affirming the decision of the Industrial Accident Commission awarding damages under the Workmen's Compensation Act, it is

Held:

(1) The decision must stand, as the chairman's finding that death ensued as a consequence of the accident is based upon some competent evidence, drawing reasonable inferences from proven facts.

(2) The written report made by the employer to the Commission in accordance with the statute, stating, among other things, the nature of the accident, was admissible in so far and in so far only as it contained statements which were declarations against interest. There was no error in its admission in this case.

On appeal by defendants. This is a proceeding by petition by Philomene A. Jacques, claimant, as dependent widow of Archie L. Jacques, for compensation under the provisions of the Workmen's Compensation Act. Archie L. Jacques, husband of claimant, on the ninth day of May, 1918, while working as a carpenter for the Cumberland Ship Building Company at South Portland, fell from a staging receiving injuries to his face, limbs and side. He ceased working for two or three days and then went back and tried to work but after a few days he stopped working, and on the fifth day of June gave up his work entirely and from that time to the date of his death, April 12, 1919, he did no work.

On the day following the accident he had a hemorrhage from the mouth, and early in the following month he had other hemorrhages, and grew weaker and weaker until his death from tuberculosis. An answer was filed by the respondent resisting compensation on the grounds that the death of the husband of claimant was not the result

of an accident arising out of and in the course of his employment, but was the result of a pre-existing disease. After a hearing on the petition the Commission awarded compensation in the sum of ten dollars per week for a period not to exceed three hundred weeks, and respondents appealed from the decree of a single Justice affirming such award.

Appeal dismissed with costs. Decree of sitting Justice affirmed.

The case is stated in the opinion.

Emery, Waterhouse & Paquin, for claimant.

Andrews, Nelson & Gardiner, for respondents.

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

CORNISH, C. J. On appeal from the decree of a single Justice affirming the decision of the Chairman of the Industrial Accident Commission awarding damages under the Workmen's Compensation Act.

Two questions are involved.

First. The validity of the decision holding that the death of Archie L. Jacques, the husband of the claimant, was the result of an injury sustained by him arising out of and in the course of his employment by the Cumberland Ship Building Company.

The chairman so found as a fact, and this finding must stand if there was any competent evidence to support it. The defendant contends that death was due to tuberculosis and that the accident sustained no causal relation to the result.

An extended discussion of the evidence would be of slight value to the profession. It is sufficient to note that the deceased was afflicted with incipient tuberculosis of the lungs in the Fall of 1917; that on the advice of his physician he left the seacoast for the dryer air of the inland woods and spent the Winter there; that he returned home in the Spring of 1918 having gained fifteen or twenty pounds in weight; that he soon after resumed work for the defendant employer; that he met with an accident on May 9, 1918, by falling from a staging; that he resumed work after a few days but he worked only at intervals until June 10, when hemmorrhages developed and labor ceased; that tuberculosis became active and he died on April 4, 1919.

True, two physicians who never saw the deceased, testified for the defendants as experts that in their opinion, if there was no outward

and visible evidence of injury to the chest, (and there is no evidence that there was) they would not expect the incipient and dormant tuberculosis to be set up by the accident, as an exciting cause, and that therefore the hemorrhages in their view had no connection with the fall. This, however, was merely a matter of opinion, an educated guess, and, if death ensued, it is immaterial whether that was the reasonable and probable consequence or not; the only question is whether in fact death did ensue as a result of the injury. *Sponatski's Case,* 220 Mass., 526. The chairman so found upon what constituted some competent evidence, drawing reasonable inferences from proven facts. *Mailman's Case,* 118 Maine, 172.

Second. The defendants attack the ruling of the chairman admitting in proof of the nature of the accident the written report made by the employer under date of May 10, 1918, and filed with the Commission, stating among other things that the employe was injured while doing his regular work and that "the planks of a staging slipped throwing the injured." This report was made in accordance with the statute which requires that all assenting employers shall make prompt reports to the Commission of all accidents to their employes in the course of employment. R. S., Chap. 50, Sec. 41. We think the ruling was correct. The report was signed by the manager of the service department whose authority is not questioned. In so far and in so far only as it contained statements which were declarations against the interest of the employer the report was admissible. Had the same statements been made in a letter they could obviously be introduced under the ordinary rules of evidence as a declaration against interest. The fact that the report was made and filed as an official document required by law cannot detract from its admissibility. On the other hand this fact might well add to its weight.

The Massachusetts Court have gone further and held that the statements in such a report may be considered by the Industrial Accident Board without the report being formally introduced in evidence. The Board may take judicial notice of it. *Carroll's Case,* 225 Mass., 203, affirmed in *Brown's Case,* 228 Mass., 31. That question, however, is not before us. The report in this case was formally offered and admitted. Its admission was without error.

Appeal dismissed with costs.
Decree of sitting Justice affirmed.

MARY CLAPP

vs.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY.

Cumberland. Opinion June 8, 1922.

Negligence unless alleged in the declaration is not an issue. If, however, testimony is introduced without objection which warrants a finding by the jury of negligence, an objection that the evidence does not support the declaration comes too late after verdict. Declaration may be amended on seasonable objection.

In an action by a passenger against a street railroad company to recover damages for personal injuries caused by the sudden starting of the car while the passenger is alighting, under a declaration alleging that the sudden starting of the car was caused by the defendant through its agent or agents, the negligence of the conductor through inattention to his duties towards the passenger whom he knew wished to alight at a given transfer point, in not preventing in the exercise of due care the sudden starting of the car by an unauthorized act, or in not seasonably giving a countermanding signal, is not an issue.

When during the trial of such a cause testimony is introduced without objection from which the jury is warranted in finding that the conductor knew or ought to have known that the plaintiff wished to alight at a given transfer point, and was negligent in not being alert to see that she did so safely, in consequence whereof she was injured, an objection that the evidence does not support the declaration comes too late after verdict, upon motion to set the verdict aside.

If the objection had been seasonably taken at the trial, an amendment would have been allowable.

The case having been fully tried without surprise to the defendant, so far as the record shows, an amendment may be considered as made, and the verdict allowed to stand.

The court is, however, of the opinion that the damages awarded are excessive.

On motion by defendant. An action to recover damages for injuries sustained by plaintiff, a passenger, while alighting from a street car of defendant at Lincoln Street in South Portland, caused by a sudden starting of the car. The jury returned a verdict of $2,050.00 for the plaintiff, and the defendant filed a general motion

for a new trial. Motion sustained unless the plaintiff within twenty days after filing of mandate shall remit all of the verdict in excess of $1,000.

The case is fully stated in the opinion.

Hinckley & Hinckley, for plaintiff.

Verrill, Hale, Booth & Ives, J. E. F. Connolly and L. V. Walker, for defendant.

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

MORRILL, J. This is an action to recover damages for injuries suffered by the plaintiff, a passenger, while attempting to alight from a Portland bound Saco car of defendant at Lincoln Street, Ligonia, so called, in South Portland, through the sudden starting of the car. The plaintiff's case is thus stated in the declaration: "that as said plaintiff was on the running board and was stepping from said car to the street, while said car was at a standstill, said car suddenly and without warning and in a violent manner started forward; that the sudden starting of said car was caused by the defendant, through its agent or agents." The defendant has filed a general motion to set aside a verdict for plaintiff.

If consideration of the testimony is confined to the allegations of the declaration, the decision on this motion lies within rather narrow limits. Here there is no allegation of negligence on the part of defendant or its servants in not taking precautions against the unauthorized act of a passenger in starting the car, or in failing to use due care to protect alighting passengers before or after such unauthorized act had taken place. The allegation is direct, that the sudden starting of the car was caused by the defendant through its agent or agents. Two employees only of the defendant were on the car, the conductor and the motorman. The plaintiff's contention is thus stated in the brief: "The plaintiff contends that no bells were given for the car to go ahead at the time, and from her version it is evident that either the conductor spoke to the motorman and told him to go ahead, or the motorman started without instructions."

As to the conductor, this contention is mere conjecture without evidence to support it. The conductor is eliminated from any part in starting the car by the principal witnesses for plaintiff, Roland G.

Clapp, plaintiff's husband, and one Robert F. Lade, who with his wife was sitting on the seat in front of Mr. and Mrs. Clapp. If the conductor had directed the motorman to start, Mr. Clapp or Mr. Lade, or some other passenger must have heard him. Not a word of testimony appears in the record that the conductor ordered the motorman to start the car, or gave the starting signal.

As to the motorman, the plaintiff wholly fails to sustain her contention that he started the car without instructions. It is clear that he received the two-bell signal.

But the case was tried in behalf of the plaintiff upon the theory that the conductor was negligent and inattentive to his duties to a passenger whom he knew wished to alight at Lincoln Street, Ligonia, in not preventing, in the exercise of due care, the starting of the car as it happened or in not seasonably giving a countermanding signal. Testimony along this line was introduced without objection and the issue thus tendered was met by defendant. Upon a careful reading of the testimony we think that the jury was warranted in finding the conductor negligent in not exercising due care to protect any passenger who might wish to alight at a regular transfer point. There were two regular transfer points, one at Cash's Corner, the other at Ligonia. According to the conductor's testimony he gave the signal to stop at Ligonia about one hundred and twenty-five rods before reaching that transfer point; he then went to the front of the car and proceeded to give out transfers for use in Portland. Having given that signal to stop at Ligonia, if he had remained at the rear of the car, or at any other place, where he could have watched, and did watch for passengers who might wish to alight, the accident probably would not have happened. It must also be remembered that the plaintiff and her husband testified that before reaching Cash's Corner, the first transfer point, Mr. Clapp told the conductor in substance that they would transfer at Cash's Corner, if a connecting car was there; if not, that they would transfer at Ligonia. The conductor does not recall this conversation, but he evidently had in mind that somebody was to transfer at Ligonia, because he gave the bell-signal to stop there. Upon this testimony the jury might find that the conductor knew or ought to have known, that the plaintiff and her husband wished to transfer at Ligonia, and was negligent in not being alert to see that they did so safely. It was not necessary for the conductor to give out transfers for use in Portland before leaving Ligonia.

Strictly under the declaration there is no evidence upon which the verdict can be sustained; the negligence proved was not an issue under the declaration. But the point was not raised at the trial. If objection has been seasonably taken, an amendment would have been allowable. *McKinnon* v. *Ry.*, 117 Maine, 239. The case having been fully tried, without surprise, so far as the record shows, to the defendant, we think that an amendment may be considered as made, *Wyman* v. *American Shoe Finding Co.*, 106 Maine, 263, and the verdict allowed to stand.

The defendant also argues that the damages are excessive; that the plaintiff has greatly exaggerated her injuries. While we recognize that the extent of the plaintiff's injuries is a question for the jury, no less than the question of liability, a careful examination of the evidence, particularly the testimony of the physicians who saw and examined the plaintiff shortly after the occurrence, satisfies us that her injuries have been overestimated, and that the jury manifestly erred in the award of damages; we think that one thousand dollars will be ample, even generous compensation for her injuries. The entry will be,

Motion sustained unless the plaintiff within twenty days after mandate is filed shall remit all of the verdict in excess of $1,000; if said remittitur is filed, motion overruled.

SHIRLEY H. MANN *vs.* ROGERS C. SUMNER et al.

Androscoggin. Opinion June 8, 1922.

Legal title sustained as against alleged prescriptive title.

The plaintiff claimed title to 17/18 of the tract of land described in his writ and by virtue of his quit-claim deeds. The defendants claimed color of title under their unsealed warrantee deed, and under such color of title they claimed to have gained a prescriptive title to the whole tract.

The presiding Justice to whom the cause was submitted without the intervention of a jury found that the plaintiff had the better legal title to what his deeds covered and awarded him 17/18 of the lot.

A careful examination of the record fully warrants the conclusion at which the Justice arrived.

On exceptions by defendants. This is a real action for the possession of certain real estate situate in the town of Leeds. The case was heard by the presiding Justice without a jury. Both parties claimed title under one Reuben Ridley. The plaintiff claiming title under certain quit-claim deeds from the heirs of Reuben Ridley of 17/18 of the parcel described in the writ. The defendants claimed title, as heirs of Joshua H. Sumner, under a deed given by Reuben Ridley to Joshua H. Sumner and Jeremiah Day, which was without a seal, and was admitted in evidence for the purpose of giving color of title, as bearing upon the question of prescriptive title claimed by defendants. The presiding Justice ruled against the contentions of the defendants, and found that the plaintiff had the better legal title to what his deeds covered and awarded him 17/18 of the lot. Defendants excepted. Exceptions overruled.

The case is stated in the opinion.

Frank O. Purington and Harry Manser, for plaintiff.

William H. Newell and Benjamin L. Berman, for defendants.

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

SPEAR, J. This case was heard by the presiding Justice without the intervention of a jury.

It involves a real action for the possession of certain real estate definitely described in quit-claim deeds to the plaintiff by the heirs of one Reuben Ridley. The defendants claim title under the same Reuben Ridley, upon an instrument purporting to be a warrantee deed, but being devoid of a seal, was ineffective to convey title, as found by the presiding Justice. *McLaughlin* v. *Randall*, 66 Maine, 226, *Jewell* v. *Harding*, 72 Maine, 124, *Brown* v. *Dicky*, 106 Maine, 97. The deed was admitted, however, for the purpose of showing color of title in the defendant. The case as presented established three contentions: (1) That the plaintiff claimed title to 17/18 of the tract described in his writ and by virtue of his quit-claim deeds. (2) That the defendants claimed color of title under their warrantee deed. (3) That, under color of the title, they have gained a prescriptive title to the whole tract. Accordingly the issue is narrowed down to the question of whether the defendants proved a prescriptive title. Otherwise the plaintiff, upon his deeds would show a better legal title.

The presiding Justice found that the plaintiff had the better legal title to what his deeds covered and awarded him 17/18 of the lot.

To this finding the defendants except upon the ground that: "The Presiding Justice ruled that the testimony as to possession and acts done by Joshua H. Sumner, failed to show such requisite continuity of possession for twenty years, as the law required to perfect a title by prescription to the land in suit." The only question raised by the exceptions is whether there was any substantial evidence upon which the presiding Justice based his finding.

As his decision was in the negative, that there was not sufficient evidence to establish the requisite continuity of possession for twenty years, it is necessary to discover whether there is any substantial evidence to prove the fact of such continuity.

A careful examination of the record shows the negative and fully warrants the conclusion at which the Justice arrived.

Exceptions overruled.

STATE *vs.* HARRY H. CLANCY, Appl't.

Cumberland. Opinion June 8, 1922.

Evidence sufficient to warrant the jury in rendering a verdict of guilty.

The only issue raised by the exceptions is, whether there was sufficient evidence to warrant the jury in rendering a verdict of guilty.

The charge of the Justice was made a part of the exceptions, and upon perusal appears to be painfully neutral. To it no exceptions were or could be taken.

The jury had ample evidence upon which to base a conviction.

On exceptions by respondent. This is a complaint charging the respondent with unlawful possession of intoxicating liquor. When the evidence was all in, the respondent filed a motion requesting a directed verdict of "not guilty" on the ground of insufficient evidence, which was denied by the presiding Justice, and the case submitted to the jury and a verdict of guilty returned. The respondent excepted to the ruling refusing to direct a verdict. Exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.

Clement F. Robinson, County Attorney and Ralph M. Ingalls, Assistant County Attorney, for the State.

William C. Eaton, for the respondent.

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

SPEAR, J. This case involves a complaint charging the respondent with having in his possession intoxicating liquors with the intent that they should be sold in this State in violation of law.

When the evidence was all in, the respondent "moved the Presiding Justice to direct the jury to return a verdict of not guilty, because said respondent says that there is not sufficient evidence in said case to warrant the jury in returning a verdict of guilty." The motion was denied, the case submitted to the jury and a verdict of guilty returned.

To the refusal of the Justice to direct a verdict of not guilty, upon the grounds suggested, the respondent excepted, and these exceptions were filed and allowed. The only issue raised by the exceptions is, whether there was sufficient evidence to warrant the jury in rendering a verdict of guilty.

The charge of the Justice was made a part of the exceptions, and upon perusal appears to be painfully neutral. To it no exceptions were or could be taken. We are of the opinion that the jury had ample evidence upon which to base a conviction.

It appears from the record that two deputy sheriffs, one having a search warrant, visited the house of the respondent, who was the proprietor of a drug store three blocks away, for the purpose of searching for the presence of intoxicating liquors. They made known their mission, looked around a little, and then the respondent came out of the kitchen and started up stairs. Deputy Sheriff Wheeler walked out towards the stairway where he heard what he describes "as some kind of a gurgle." Thereupon he went up stairs, proceeded to the bathroom and there found the respondent with a bottle, in front of the toilet bowl, in the act of turning its contents down the bowl. He made an attempt to secure possession of the bottle but the respondent interfered, and completed the draining of the contents of the bottle without further molestation. He then pulled the chain and destroyed the evidence of what had been poured into the bowl. The deputy then took the bottle and remarked that it smelled like whiskey but the respondent said it was Jamaica Rum, an intoxicating liquor. This was the first piece of evidence, undisputed, upon which the jury were required to act.

The respondent's explanation of his conduct as above narrated and admitted was that he knew that a bottle of liquor, belonging to his brother was up stairs, and he feared that if the deputies found it they would arrest him, hence his anxiety and conduct in trying to remove it from the observation of the sheriff. And he is corroborated in this statement by his brother and another party. But the explanation was entirely a matter for the consideration of the jury. If they had believed it they would undoubtedly have acquitted the respondent. But they may very properly have asked the question why, if his explanation was true, he did not frankly make it to the officers. And the jury have said in answer, that it was a case in which a guilty conscience needed no accuser. They may have thought that the

defendant failed to do, upon the impulse of the moment, what an innocent man would be likely to do; that an innocent man, as an instinct of honesty, would have stated to the officers the truth, and not have tried to deceive and elude them by suppressing the truth. The jury also had the right to say that when the respondent took the stand in his own behalf, however guilty, he would deny the truth of the offense with which he was charged and assert his innocence. Otherwise there would be no trial. *State* v. *Ward*, 119 Maine, Page 485.

The jury undoubtedly put no reliance in the explanation. But this is not all. After the spilling the respondent took the officers into the bedroom which he claimed his brother was occupying and told deputy Wheeler "he took the bottle out of the trunk that was on the floor there." But deputy Wheeler said "when he stooped down to open the trunk the trunk was locked and his brother had to furnish the key to unlock it with." This evidence was not disputed. The brother said the bottle was his and on top the trunk. But the attempt of the defendant to open the trunk may have proved to the jury that he told Wheeler, though falsely, that it was in the trunk, else why the attempt to open it, if he took it from the top?

Here again, if the jury concluded that he testified falsely as to where he got the bottle, and regarded it as a material circumstance, as they certainly had a right to do, they were authorized to weigh his falsehood heavily against him. It was a circumstance strongly evidentiary of guilt, *State* v. *Benner*, 64 Maine, 289, *State* v. *Ward*, 119 Maine, Page 482.

We are of the opinion that the evidence as reported presents a typical case for the consideration of a jury. They saw as well as heard all the parties, and, in coming to their conclusion, may have placed as much stress upon the manner and appearance of the respondent and his witnesses as in what they said, or even more. If the jury had believed the defendant, their verdict should have been in his favor. If they did not believe him, then there was ample testimony to sustain the verdict which they rendered.

Exceptions overruled.
Judgment for the State.

STATE *vs.* DANIEL F. LONG.

Androscoggin. Opinion June 8, 1922.

In a complaint under Paragraph 7, Sec. 12, of Chap. 36 of the R. S., the phrases "one firkin containing forty pounds of lard, twenty pounds of butter, and one bowl containing two pounds of lard" taken together as a whole constitute a sufficient description of the articles of food alleged to have been exposed to contamination in violation of law. The gravamen of the offense is the offering, in violation of the statute, goods for sale that have been exposed to forbidden contamination.

The phrases "one firkin containing forty pounds of lard, twenty pounds of butter, and one bowl containing two pounds of lard" must be read together and taken as a whole in describing the articles of food alleged to have been exposed to contamination in violation of the statute.

The gravamen of the offense is not in the offering of goods for sale, but in violating the statute in offering goods that have been exposed to forbidden contamination.

The language of the complaint stated the case under the statute and gave the respondent ample notice of the issues he would be required to meet.

On exceptions by respondent. This complaint which originated in the Municipal Court, alleged that the respondent offered for sale certain articles of adulterated food, in violation of Paragraph 7, Sec. 12, of Chap. 36 of the R. S. The respondent filed a general demurrer with the right to plead over, asserting as a ground on which his demurrer was based, that it was the containers of the articles of food that were offered for sale, and not the contents thereof.

After a hearing on such demurrer, the presiding Justice overruled the same, and adjudged the complaint good, to which ruling the respondent excepted. Exceptions overruled. Respondent to plead over.

The case is stated in the opinion.

Benjamin L. Berman, County Attorney, for the State.

Frank T. Powers, for the respondent.

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

SPEAR, J. This is a case in which Daniel F. Long of Lewiston is charged in a complaint originating in the Municipal Court, with offering for sale certain articles of food, alleged to be adulterated or misbranded under Chap. 36 of the R. S., Sec. 12, Paragraph 7, namely: "For the purpose of this chapter an article shall be deemed to be adulterated . . . . if in the manufacture, sale, distribution, transportation, or in the offering or exposing for sale, distribution or transportation, it is not at all times securely protected from filth, flies, dust and other contamination, or other unclean, unhealthful or unsanitary conditions."

The complaint is as follows: "L. J. Dumont of Lewiston, in the County of Androscoggin, on the twenty-third day of July, in the year of our Lord one thousand nine hundred and twenty-one, in behalf of the state on oath complains: That Daniel F. Long, on the twenty-third day of July A. D. 1921, at said Lewiston, unlawfully did then and there offer for sale at the restaurant conducted by him, the said Daniel F. Long, certain articles of food, to wit; one firkin containing forty pounds of lard, twenty pounds of butter, and one bowl containing two pounds of lard, which said food was then and there adulterated, in that the said food was not then and there protected from flies, dust and other contamination and being then and there exposed to unclean, unhealthful and unsanitary conditions."

To this complaint the respondent filed a general demurrer, with the right to plead over. The ground upon which the demurrer is based is stated in the respondent's argument as follows: "According to the plain wording of the complaint he is charged with offering for sale at his restaurant "one firkin containing forty pounds of lard." It is the firkin and not the contents, which is descriptive of the firkin, that he is charged with offering for sale; and this could also apply to the "bowl containing two pounds of lard."

The meaning of the complaint when construed according to the ordinary meaning of the words and phrases used to express the charge against the respondent, is clear and intelligible. The phraseology is that the defendant offered for sale "one firkin containing forty pounds of lard." In simpler language, but meaning precisely the same, so far as the differentiation between the firkin and the lard

is concerned, it states that he offered for sale "a firkin of lard." The amount is immaterial. Can it be said, if a person entered a store and called for a firkin or pail of lard that he would expect to receive an earthern pot or empty tin pail? Or would he expect to receive a firkin or pail containing a certain quantity of lard.

Held:

(1) That the phrases "one firkin containing forty pounds of lard, twenty pounds of butter, and one bowl containing two pounds of lard" must be read together and taken as a whole in describing the articles of food alleged to have been exposed to contamination in violation of law.

(2) That the gravamen of the offense is not in the offering of goods for sale, but in violating the statute in offering goods that have been exposed to forbidden contamination.

(3) That the language of the complaint stated the case under the statute and gave the respondent ample notice of the issues he would be required to meet.

Exceptions overruled.
Respondent to plead over.

STATE

vs.

NICK VETRANO, ELIZABETH TROCCHIO and PHILOMENA TROCCHIO.

Cumberland. Opinion June 8, 1922.

Documentary evidence consisting of letters written by the three alleged conspirators, and two confessions or admissions purporting to have been made by two of the three parties charged, are admissible against all the parties charged.

In the instant case the State undertook to prove its case against the three alleged conspirators by the introduction of five letters, one written by one of them and two written by each of the others, and two confessions or admissions purporting to have been made by two of the three conspirators. One of the conspirators, Philomena Trocchio, who had not confessed or made any admissions, requested a separate trial which was refused.

Held:

1. That the documentary evidence and admissions were properly admitted.
2. That the evidence was sufficient to prove the conspiracy alleged against all the parties charged.
3. That, consequently, the refusal of the presiding Justice to allow Philomena Trocchio a separate trial was not error, but fully justified.
4. That there was sufficient evidence before them to warrant the jury in the deduction that the State had sufficiently proved the name of the person intended as the object of the conspiracy.

On exceptions and appeals. The respondents were indicted under the provisions of R. S., Chap. 128, Sec. 24, for conspiracy. Philomena Trocchio, one of the respondents, requested a separate trial, which was refused, and exceptions taken. The State offered documentary evidence consisting of a letter written by the respondent, Philomena Trocchio, and two letters written by the respondent, Elizabeth Trocchio, and two letters written by the respondent, Nick Vetrano, and two confessions or admissions purporting to have been made, one by the respondent, Elizabeth Trocchio, and the other made by the respondent, Nick Vetrano, which evidence was admitted against the objection of the respondents, who took exceptions.

The exhibits in this case are numbered in the order in which they were offered in evidence, and the numerals at the right indicate the order and date on which the letters were written, and are inserted here instead of in the opinon that the opinion might be less voluminous.

STATE'S EXHIBIT 1. No. 2.

No. 46 Ridge Ave.

Asbury Park, N. J.

DEAR AUNT:

Received your letter and was surprised to hear from you. I have always asked for your address, but no one seemed to know it.

I was surprised to meet my cousin Salvatore when my uncle got killed, and I also expected to see you there to but you failed to come. After the funeral we all went to New Haven to meet Salvatore's sister. What was the trouble you did not come to the funeral,—that was the reason my mother went mostly to see you.

I can read and write either in American or Italian and the only one in the family that can do so. I learned to read and write when I was serving the six years in colledge.

When I arrived home and found your letter we all were surprised and very glad to hear you were all well. When you answer if you want me to write in Italian why just say so. Me and also my people would like to have you come and see us. Will close now with best regard to your family from us all. I remain your loving nephew.

NICK VETRANO.

STATE'S EXHIBIT 2. No. 4.

Feb. 4, 1921

Asbury Park, N. J.

DEAR AUNT:

Your letter received and was glad to hear from you. I went to see a fellow about what you wanted done and he wants $400.00/100 as it

is to far away. I also saw another and he wants $200.00/100 and expenses. If you think either of these will do why send two railroad tickets and I will come with him myself.

If you think this will be alright why let me know what day to come.

My mother thanks you very much for the ticket but she is too old to take such a long trip, but I will try and get her to come this summer.

Hope this letter find you all well. Best regards from us all, I remain as ever.

NICK VETRANO.

STATE'S EXHIBIT 3. No. 3.

Portland, Maine.

Jan. 30, 1921.

Dear uncle just a few lines to let you know that we are all feeling well and hope to find you in the same way.

Dear uncle we received your letter we were very glad to hear from you we had a hard time to get your address.

When it happened about the death we dident know

We dident let my father know about it we heard about it 4 days after it.

Them words that she said and tell you she wont you to get him for her and get a god one and let use know about it write it in Enlish she wonts to know how much he wonts let use know quick dont let nobody know about it.

Write in Enlish because nobody know how to read or write in the other kind of way write in Enlish she wont a god one she wont him to cut his face. tell you mother to come here if she wonts the ticket for the train we will send it to her. Let use know if you know what we mean.

send use a god one because we wont him we will let you know she neads him very bad we will let you know when to let him come.

she wonts him to get his face give to cuts make it a cross on his face let use know how much he wonts.
answer quick if you get him let use know quick.
Best regars to all.

If you wont to know why write to Lilly DeRise he will let you know all about it she said to send use a telegram and let use know quick about the man. If you get him or not answer just as quick as you can. Quick answer we are wating
Best regars to all.
from ELIZABETH TROCCHIO

38 India St.

Portland, Maine

STATE'S EXHIBIT 4. No. 5.

Portland, Maine

Sunday 13, 1921

Dear Nick just a few lines to let you know that we are felling well and hope to find you the same way.

Dear Nick you know who my mother wonts to have his face cut you know him he has been near you their she said that you know him she wonts you to send her some one that she dont know she wonts you to send her a stranger because she dont wont nobody to know she dont wont you to come because the people knows you she just wonts the stranger to come. My mother said do you wont to buy him the ticket their or shell we buy it here my mother said to send here the stranger and give him the address and tell him get of Untion Station to take the grand trunk car and get of to the grand trunk and tell him to ask for 38 India St. if they wont to know who he wonts say Same Mundrell send him quick let me know if we shell give you or him the money when he get of from the care tell him to not ask anybody elese only America. I dident fell way that why I dident answer your letter quick she don't wont you to come just send the stranger dont tell nobody out their because the people will tell just tell the stranger.

STATE'S EXHIBIT 5.

STATE OF MAINE

Cumberland, ss. Portland, Me. Feb. 28, '21

I, Elizabeth Trocchio, 16 years old in April A. D. 1921 living at 38 India St. Portland, Me. on oath depose & say; that my mother got me to write two letters to Nick Vetrano

First letter to Nick to get a man to come here to cut somebody's face. The exhibit letter one she received in answer to one she wrote; father knows nothing about it—

Last letter wrote to Nick would send tickets when the man was ready to come: Wanted to have man's face cut for getting my sister in trouble: Nick at Asbury Park, N. J. My mother is Nick's Aunt: My mother's name is Filomena Trocchio and resides at 38 India St.

ELIZABETH TROCCHIO

Witness

DEANE S. PAINE

PHILIP W. WHEELER

STATE'S EXHIBIT 6. No. 1.

Portland, Me. January 25, 1921.

DEAR NEPHEW:—

I am writing this letter as I am desirous of your news, because it is a long time without receiving your news. Now that I have been able to attain your address it is my place to write, now let me know if you can write American. I can let my children write to you in American, as I want you to know some facts of serious nature, there-

fore I want to know if you write the letters yourself or let them write to some one else, because what I want to tell you if you can not read them I will not write it to you—then when at the station I will come over there; let me know like-wise how your father and mother are getting along. Then, I have nothing more to tell you. I beg of you to answer by return mail.

Remember me to yourself and your family, I sign

Your aunt

FILOMENA TENERIELLO

"My address"

NUNZIO TROCCHIO

No. 40 India St.

Portland, Me.

STATE'S EXHIBIT 7.

State of New Jersey:

County of Monmouth, ss.

Nick Vetrano, being duly sworn, according to law, upon his oath deposes and says that he is the person named in certain extradition papers shown to him by Horace L. Byram, Chief of Police of the City of Asbury Park, New Jersey, issued by the State of Maine and the State of New Jersey.

Deponent further says that he was shown three letters addressed to him which had previously been taken from his possession by Officer Williams, and in the presence of said Officer Williams and Detective Davenport and Chief Byram and Sheriff Wheeler he (Vetrano) identified the said letters and said that he had received them by mail from his Aunt in Portland, Me.

Sworn and Subscribed to before me
this 26th day of February 1921; NICK VETRANO
H. L. BYRAM
(L. S.) Notary Public.

All of the respondents were found guilty by the jury, and the presiding Justice refused to grant a motion requesting him to set aside the verdict in each case, from which ruling each respondent took an appeal. Exceptions overruled. Appeal denied.

The case is sufficiently stated in the opinion.

Clement F. Robinson, County Attorney and Ralph M. Ingalls, Assistant County Attorney, for the State.

Samuel L. Bates, for the respondents.

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

WILSON, J., dissenting. MORRILL, J., concurs in dissenting opinion.

SPEAR, J. This case involves a charge of conspiracy under the following indictment found in the Superior Court of Cumberland County: "The Grand Jurors for said State upon their oath present that Nick Vetrano of Asbury Park in the County of Monmouth in the State of New Jersey and Elizabeth Trocchio and Philomena Trocchio, of Portland in said County on the fourteenth day of February A. D. 1921, at said Portland feloniously did conspire and agree together with the malicious intent wrongfully and wickedly to kill, wound, maim and injure the person of one Pasquale DeSarno."

This indictment is found in accordance with the provision of R. S., Chap. 128, Sec. 24. The part pertinent to this present issue reads as follows: "If two or more persons conspire and agree together, with fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or property of another . . . . they are guilty of a conspiracy."

The case comes up on exceptions to the admission of certain documentary evidence, to the refusal of the presiding Justice to allow Philomena Trocchio, one of the alleged conspirators, the right of a separate trial; and upon appeals of each of the respondents, after conviction from a refusal of the presiding Justice to grant a motion requesting him to set aside the verdict in each case.

The State undertakes to prove its case against the alleged conspirators by the introduction of five letters and two confessions or admissions purporting to have been made, one by Elizabeth Trocchio, and one by Nick Vetrano.

The parties immediately concerned in this alleged conspiracy were Philomena Trocchio, Elizabeth Trocchio her daughter, and Nick Vetrano her nephew. The inception of the alleged conspiracy, the State contends upon the evidence, originated in the mind of Philomena Trocchio; that its inspiration was a grudge which she cherished against Pasquale DeSarno for having gotten her daughter "in trouble," and the purpose to employ a person, through the intervention of Nick Vetrano, to mutilate the face of Pasquale DeSarno by cutting a cross thereupon.

There is no question, whatever, but that the letters clearly admissible, and the confession of Elizabeth Trocchio and Nick Vetrano, prove them to be guilty of the conspiracy charged unless relieved by the alleged failure of the State to prove the name of the object of the alleged conspiracy, which will be later discussed. The defendant, Philomena, however, strongly protests that the letters and confessions were not admissible as tending to prove participation in the conspiracy on her part, inasmuch as a conspiracy must first be established before the acts or words of alleged co-conspirators can become admissible.

We do not understand the rule of the admission of testimony, in proof of a conspiracy, to be as limited as above stated and claimed. We think the true rule, as shown by ample authority is, that the acts and words of all parties alleged to be participants in the conspiracy, as well as all other testimony, are admissible in the discretion of the court, for the purpose of proving the fact of a conspiracy, but are not to be taken into consideration against any one of the parties concerned, until, from the evidence thus admitted, the fact of a conspiracy is proved; after which the acts and words of each co-conspirator, whenever done or whenever said, in furtherance of the common purpose are admissible against all the alleged conspirators, upon the ground that the act of one is the act of all.

We know of nothing about a conspiracy so solemn or sacred that it may not be proved like any other alleged criminal offense. Conspiracy, as generally defined, is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

It is evident from that definition that the gravamen of conspiracy is "combination," "concerted action" and "unlawful purpose." We

can discover no rule, either in reason or law, why all evidence from whatever source, coming from the alleged conspirators themselves or from other parties, is not admissible to prove a combination of the parties accused, their concerted action and their unlawful purpose, precisely the same as similar evidence would be admissible to prove a combination or concerted action or unlawful purpose upon any other charge, either civil or criminal.

In other words, when in the discretion of the court all the evidence tending to prove a conspiracy is admitted, and the jury upon examination, comparison and deduction from that evidence, come to the conclusion that it is so connected as to warrant the inference that a conspiracy is proved, then the charge is proved against all. If, however, the evidence is not so connected as to warrant the inference that a conspiracy is proved against all the alleged parties, then those against whom the proof fails are exempt from the charge, and the acts and words of the alleged co-conspirators cannot be considered against them.

In confirmation of the above general statement of the rule the following authorities may be referred to: 5 R. C. L., 1088, 37. "Necessity of Direct Evidence. . . . Conspiracies need not be established by direct evidence of the acts charged, but may and generally must be proved by a number of indefinite acts, conditions and circumstances which vary according to the purposes to be accomplished. The very existence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused, done in pursuance of an apparently criminal or unlawful purpose in common between them. The existence of the agreement or joint assent of the minds need not be proved directly. It may be inferred by the jury from other facts proved. It is not necessary to prove that the defendants came together and actually agreed in terms to have the unlawful purpose, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. If, therefore, one concurs in a conspiracy, no proof of agreement to concur is necessary in order to make him guilty. His participation

in the conspiracy may be established without showing his name or giving his description."

We cite this section in full, as every statement therein made, is fully verified by decisions from a wide range of jurisdictions. In *Commonwealth* v. *Smith*, 163 Mass., 411 the court make this statement: "A conspiracy may be proved by circumstantial evidence, and this is the usual mode of proving it, since it is not often that direct evidence can be had. The acts of different persons who are shown to have known each other, or to have been in communication with each other, directed towards the accomplishment of the same object, especially if by the same means or in the same manner, may be satisfactory proof of a conspiracy. Carson's Am. Cas. on Conspiracy, Chapter 5. 3 Greenl. Ev. 93, 2 Bish. Crim. Proc., 227. *United States* v. *Cole*, 5 McLean, 513. *State* v. *Sterling*, 34 Iowa, 443. *Archer* v. *State*, 106 Ind., 426."

In *People* v. *Arnold*, 46 Mich., 409, 9 N. W. Rep., 406 in an opinion by Judge Cooley the Michigan Court say:

"It is further urged that the court erred in receiving in evidence the admissions of John Snediker. These were admissions of a joint offense, made after its commission, and from their nature, it is said, could only be received against Snediker alone. But the fact that the offense is joint cannot exclude admissions. They are admissible against the party making them, and the court must protect the other by cautioning the jury not to permit the confessions of his alleged associate to prejudice him. If the participation of the other is not made out by independent evidence, there can be no conviction; but the existence of a conspiracy must commonly be made out by the detached acts and statements of the individual conspirators."

12 C. J. 632 states the general rule of the admissibility of evidence in this class of cases as follows: "General evidence of the conspiracy and the nature thereof may in the first instance be received as a preliminary step to the more particular evidence showing the participation of a defendant. 'This is often necessary to render the particular evidence intelligible and to show the true meaning and character of the acts of the individual defendants.' "

226 states the character of the evidence admissible. "The fact of a conspiracy may be proved by any competent evidence. The conspiracy may of course be shown by direct evidence, and, it is apprehended should be so proved if this character of evidence is

attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy. Proof of the combination charged, it has been said, must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. The nature of the crime usually makes it susceptible of no other proof, and the rule which admits this class of evidence applies equally in civil and criminal cases."

227 states the latitude allowed in the admission of evidence. "In the reception of circumstantial evidence great latitude must be allowed. The jury should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue and which will enable them to come to a satisfactory conclusion. The government has the right to show the whole history of the conspiracy from its commencement to its conclusion. But much discretion is left to the trial court in a case depending on circumstantial evidence, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact."

Numerous citations will be found, under each paragraph, in support of the above rules.

In 51 Am. Dec. note 83, is found this statement: "And if it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object: The Mussel Slough Case, 5 Fed., Rep. 680."

It is claimed by the respondent, Philomena Trocchio, that none of the evidence disclosed by the letters between her daughter and Vetrano, or their confessions, were admissible against her until a conspiracy in which she was a participant had been proved. Such is the general rule, but the exceptions are so numerous that in nearly all the jurisdictions of this country the order of introducing all testimony upon conspiracy charges, is left to the discretion of the presiding Justice.

In *Comm.* v. *Waterman*, 122 Mass., 59 it is said, "The order in which testimony is introduced is largely in the discretion of the court." In *Comm.* v. *Smith*, 163 Mass., 418 it was held that "The order of introducing the evidence is within the discretion of the

presiding judge." In *Spies* v. *People*, 122 Ill. 1, 3 Am. St. Rep., 489 in an exhaustive note it is said, after stating the general rule, "The exception, however, to this general rule is that the state may prove the facts in any order it chooses as to conspiracy, in acts done and declarations made." See also many cases cited.

We find no case in Maine not in harmony with all the foregoing principles of law concerning rules of evidence applicable to proof of conspiracy. Perhaps the most elaborate case in this state upon the questions here involved, is *Strout* v. *Packard*, 76 Maine, 148. In a learned opinion by Justice Symonds, although he does not elaborate, yet, he states the rule touching the kind, character, scope and admissibility of evidence tending to prove conspiracy, which is in accord with the general principles before stated. The summary of his finding is found in next to the last paragraph of his opinion on Page 157. "We can find no authority, and we can see no reason, for allowing the jury to regard the disconnected act of one of the defendants at another time and place as evidence pertinent to the issue, whether another defendant was guilty of a joint trespass on the night in question. That was the effect of the rulings given accompanied with the refusal to give the instruction requested."

The effect of the whole opinion is, that, although all of the evidence of the alleged participants was admissible, the jury could "regard" it, against those only who were proven, by legitimate inference from that evidence, to have been participants.

The defendant further claims that conspiracy cannot be found under the evidence against any of the respondents, because the criminal act agreed upon, was not carried into effect. But that contention cannot prevail. 5 R. C. L., 1066, 7 states the rule: "While the gist of the civil action for conspiracy is the acts done in pursuance thereof, and not the combination, the criminal offense, at common law, is complete as soon as the confederacy or combination is formed. The legal character of the offense depends neither upon that which actually follows it nor upon that which is intended to follow it; it is the same whether its object be accomplished or abandoned. It may be followed by one overt act, or a series of them, but the offense is complete without any subsequent overt act."

In an elaborate note in *People* v. *Richards*, 51 Am. Dec. 82, the rule is stated this way: "When the unlawful agreement is established

the offense is complete. The object need not be attained, nor need anything be done in pursuance of the agreement. No overt act need be proved; it is an offense complete and consummate in itself." See also numerous citations.

One other legal aspect is to be noted before considering the testimony. The point is raised that Nick Vetrano, being a resident of New Jersey cannot be held as a party to a conspiracy in contemplation of a crime to be committed in the State of Maine. A most recent case upon this subject is found in *Strassheim* v. *Daily*, 221 U. S. 280 in which it was held: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." Cases covering a wide jurisdiction both in this country and in England may be cited in support of the above principle.

We now come to a discussion of the application of the foregoing principles of law to the evidence admitted in the case. It appears from the record that after all the oral testimony had been presented, the State then offered the various exhibits represented by the letters and the written confessions of Elizabeth and Nick. Instead of inserting the exhibits at this point, we have prefixed them in the form of a statement of facts to the opinion, to which reference will be hereafter made by indicating the number of the exhibit. Except as to the defense, which will be discussed later, by the claimed failure of the State to prove the name of the proposed victim, we do not deem it necessary to discuss the evidence with respect to the guilt of Elizabeth Trocchio and Nick Vetrano, found by the jury. That a diabolical scheme was abetted by these two parties, a violation, not only of all law, but of the instincts of fair play and decency, and worthy only of the vendetta of Corsica from whence it came, and evidence of a depraved and cowardly nature, is proved beyond cavil.

"O, Conspiracy, ashamedst thou to show thy dangerous brow by night when evils are most free?

O, then, by day where wilt thou find a cavern dark enough to mask thy monstrous visage?"

There is no moral doubt that Philomena Trocchio was the author of the atrocious scheme to mutilate the face of Pasquale DeSarno. And we now come to the question whether the testimony and the exhibits, under the legal principles above enunciated, afford sufficient

evidence to connect her with the offense charged? We think they do.

Before examining the exhibits it may be enlightening to refer to the circumstances surrounding the inception of this case. Independent of the question of conspiracy, evidence of particular acts are admissible, and may be considered with reference to proof of conspiracy. See cases cited. When and where did this case start? There can be no question that, as a matter of proven fact, it started with the letter No. 1 represented by Exhibit 6.

How did it start? Nick Vetrano, an Italian living in New Jersey, was her nephew and knew her in the "old country" as he says, but that he hadn't heard from her, and in fact, didn't know where she was. No family relations existed in the least between Nick and his aunt, either by correspondence, or communication in any other way. Elizabeth says in Exhibit 3. "We had a hard time to get your address." Yet at this moment Mrs. Trocchio was anxious to obtain Vetrano's address. Had she a motive? If so, what? Philomena Trocchio was the mother of a family living in Portland. She had at least two daughters, one of whom, as is expressed in the testimony, had been gotten "into trouble" by Pasquale DeSarno. She, therefore, had a violent grudge against DeSarno on that account. These are undisputed facts. Is there any question as to a motive in seeking Nick? After having discovered the residence of her nephew, she then went entirely outside of the family to Mary Grace Polino, and dictated the letter marked Exhibit 6. The husband had no knowledge of this letter, nor so far as the evidence shows did the children. These then, were the circumstances, the undisputed facts, and with this letter the plot opened.

Mary Grace was a witness and testified that she had read the letter to Philomena, who said that she would like to know of Nick if he wrote Italian or American, because she had something to tell him that nobody should know. When this letter, with the others, was shown Philomena, she did not deny her knowledge of them, or having dictated the letter written in Italian, but answered, as the Sheriff stated, "As I recall, she made motions with her hands and says, 'friendly letters, friendly letters.' " There is accordingly, no question as to the admissibility of Exhibit 6.

It is plain, however, that Exhibit 6 does not in itself express any direct evidence of guilt. Even so, when compared with Exhibit 3, we are of the opinion that the writer of Exhibit 6 will be traced

directly to the authorship of Exhibit 3. It is not questioned that Exhibit 3 was written by Elizabeth, the sixteen-year-old daughter of Philomena. This relationship is significant, and should be borne in mind in comparing the subject matter of Exhibit 6 with the subject matter of Exhibit 3. So striking is the similarity of facts and expression in the two exhibits that if we compare them sentence by sentence, or subject by subject, the statements in No. 6 practically dovetail into the statements in No. 3.

By comparing the two exhibits the following inferences appear:

First, Exhibit 6 says, "Now that I have been able to attain your address," and Exhibit 3 "We have had a hard time to get your address." While the significance of this is not important, yet one is an echo of the other.

Second, the very first inquiry that Philomena ever made in her letter to Nick was, "Now let me know if you can write American." Exhibit 1 Nick's reply to Exhibit 6, says, "I can read and write either in American or Italian and the only one in the family that can do so." Three days later Elizabeth wrote to Nick in English in which she says, "Write it in English," and then repeats the injunction, "Write in English because nobody know how to read or write in the other kind of way. Write in English etc." Therefore, Elizabeth wrote to Nick to do just what the mother had asked him if he could do. Was it a coincidence that Elizabeth, sixteen years old, should think of this without suggestion?

Third, Exhibit 6 then states, after asking Nick if he can write American, "I can let my children write to you in American." Three days later Elizabeth did write to Nick in English,—American. Exhibit 3, the first letter of Elizabeth dovetails precisely into what the mother said in her letter her children could do. For Elizabeth did write in American, and this is exactly the way the mother said she could communicate with him. The connection of the mother with Exhibit 3, shown by the last comparison is emphatic when analyzed in connection with the writing of Exhibit 6 in Italian, by a stranger, and the writing of Exhibit 3 in English, by Elizabeth. She knew when she went to Mary Grace Polino that her children could not read or write Italian. She did not know whether Nick could write in English or not. She therefore, went to Mary Grace and dictated to Nick the letter containing the inquiry whether he could

write in American. If he could, she says, "I can let my children write to you in American, as I want you to know some facts of serious nature."

She did not go to the Italian girl again for the correspondence, but Elizabeth answered Nick's letter. Nick's letter was written to her mother addressed to her upon the envelope, and saluted her as "Dear Aunt," and had no reference to Elizabeth. Why should Elizabeth answer this letter at all? Was it another coincidence, or was she directed to do just what the mother wrote Nick the children could do. The answer to this question by necessary implication connects the mother with the contents of this letter.

Fourth, Exhibit 6 said to Nick, "I want you to know something of serious nature." Exhibit 3 shows that Elizabeth did communicate to Nick something of a serious nature. The letter says, "She wonts you to get him for her and get a god one and let use know about it. Write it in English. She wonts to know how much he wonts. Let use . . . . she wonts a god one she wonts him to cut his face . . . . she wonts him to get his face give to cuts make it a cross on his face. Let use know how much he wonts." Can there by any question that Exhibit 3 written to Nick, and the first and only communication to him after the writing of Exhibit 6, was an explanation of what was meant in Exhibit 6 by, "facts of serious nature?" Is it another coincidence that this young girl, sixteen years of age, answered Nick's letter written to her mother, in explanation of a statement made in Exhibit 6, the contents of which, so far as the evidence shows, she knew nothing, and which was written in Italian, which she could not read, and by another person? The proof is conclusive that the facts of Exhibit 3 were dictated by the one who wrote Exhibit 6.

Fifth, Exhibit 6 the first letter, so far as the evidence shows, written by Philomena to Nick, closes with this precatory sentence, "I beg of you to answer by return mail." Under the circumstances, that was a signficant request and showed that there was something pressing upon the mind of Mrs. Trocchio, and the echo to that is found in the closing sentences of Exhibit 3 in which it is said, "Answer quick if you get him let use know quick." Further along, "If you get him or not answer just as quick as you can. Quick answer we are waiting."

Sixth, the language of Exhibit 3 clearly refers to something that had been before told to Nick. Elizabeth, when she commences to write about the employment of some one "to cut his face," uses this language, "Them words that she said and tell you."

What did she refer to by "them words that she said?" It is obvious, in view of the fact that Nick could have had no information as to what his aunt desired, except what was contained in her letter, that it referred to what in her mother's letter was expressed by the language, "facts of a serious nature." That language as well as all the other language of the letter by reference to "she," time after time, prove conclusively that somebody dictated Exhibit 3 to Elizabeth Trocchio. Who was it? By the process of elimination, there can be possibly but one person, and that person is Philomena Trocchio, her mother, who had before dictated Exhibit 6.

In view of the fact that Exhibit 6 was written for Philomena in Italian; that no copy of it was kept; that Elizabeth could not read Italian; that there was no evidence that in any way she knew what it contained; and that the material contents of Exhibit 6 are translated in substance and almost in form into the composition of Exhibit 3; prove conclusively that Elizabeth was not the author of Exhibit 3, but that whoever dictated Exhibit 6, was; and establish the succession of acts in pursuit of a common cause and to accomplish the same end, each of which in itself, may not be sufficient to prove a conspiracy, but when all are considered together warrant the inference that Philomena was a participant.

It may be suggested, however, that Exhibit 6 and Exhibit 3 when read together are so uncertain and vague that their contents do not prove a conspiracy. But evidently the phraseology in Exhibit 3, "get a god one she wonts him to cut his face . . . . she wonts him to get his face give to cuts make it a cross," was quickly and fully understood by Nick, as on February 4th within three days after receiving Exhibit 3 he answered in Exhibit 2 as follows:

"DEAR AUNT:

Your letter received and was glad to hear from you. I went to see a fellow about what you wanted done and he wants $400.00 / 100 as it is to far away. I also saw another and he wants $200.00 / 100 and expenses. If you think either of these will do why send two railroad tickets and I will come with him myself."

For some cryptic reason, perhaps, the language of the letter was symbolic to him of just what Philomena Trocchio wanted him to do. The contents of Exhibit 3 may seem to us like looking through a glass darkly, but Nick evidently felt that he was seeing face to face. But whether that be so or not, Exhibits 6 and 3, are but links in the chain of exhibits which present a perfect case of conspiracy, so far as proof of the participants are concerned. Exhibits 2 and 4 are connected continuations of 6 and 3, and when all read together make a perfect whole. A conspiracy being established, Exhibits 5 and 7 the confessions of Elizabeth and Nick, are admissible. Upon all the evidence we are of the opinion that a conspiracy is clearly proved against Philomena Trocchio, as well as against Elizabeth Trocchio and Nick Vetrano. The conclusion that the jury were authorized from all the testimony to find that Philomena was guilty of conspiracy takes care of the other exceptions, and renders fruitless the exception to the refusal of the presiding Justice to grant her a separate trial, her guilt removing even the color of abuse of discretionary power by the justice.

But upon the motion it is contended, although a conspiracy may have been shown, so far as a concerted agreement is concerned, that nevertheless, the verdict must be set aside, because the State failed to prove by name that Pasquale DeSarno was the object of the conspiracy, as named in the indictment.

In support of this contention they cite *Commonwealth* v. *Harley*, 7 Met. 506 and *Commonwealth* v. *Kellogg et al*, 7 Cush., 477. In the Harley Case a conspiracy was charged to defraud Stephen W. Marsh. The court held that the allegation, naming Marsh, was material and must be proved, and say: "But that allegation could not be established by proof that the defendants conspired and agreed together to cheat the public generally or any individual they might be able to defraud." The Kellogg Case passed upon a similar question, cited the Harley Case and briefly stated the issue as follows: "It was contended that a general intent to defraud, if it operated, when carried into effect, to defraud a particular individual, might well authorize the charge of a conspiracy to defraud such person, though that person was not in contemplation of the parties at the time of entering into the conspiracy, and it did not appear that the defendants had agreed to perpetrate the fraud on him particularly. But it was held, that proof that the defendant conspired to defraud the

public generally, or any individual it might meet and be able to defraud, would not sustain the indictment charging, as it did, a conspiracy to defraud the individual who was named in the indictment."

That is not at all what the State undertook to prove and did prove in the present case. The evidence from beginning to end pointed, not to the public generally, nor to any individual whom its evidence might happen to involve, but to one particular definite individual,—the man who had gotten the daughter in trouble. The present case is clearly differentiated for this reason from the rule in the Kellogg Case which is stated as follows: "It would be improper to apply to the original conspiracy the purpose to defraud the party who was eventually defrauded, but not within any previous purpose or design of the conspirators or in reference to whom the conspiracy itself had any application." In the present case every conspirator and especially the mother and Elizabeth had designs upon a particular person to whom the conspiracy, itself and alone, also applied.

There is no moral uncertainty in regard to that fact. Under the above requirements of proof we are of the opinion that there is sufficient evidence to sustain the verdict of the jury.

We have said that the jury had a right to find upon all the testimony that the parties named in the indictment were guilty of a conspiracy to do personal injury to the man whom Philomena and Elizabeth claimed to have wronged the daughter. There is no question but that they knew who the man was, and we think, from the letters, that the jury had a right to decide that Nick also knew who he was. State's Exhibit 4, letter number 5, reads as follows: "Dear Nick, you know who my mother wants to have his face cut you know him he has been near you their she said that you know him." However this may be, the knowledge of one was the knowledge of all. 5 R. C. L., 1089, Par. 39, and cases cited. The indictment set out the name of Pasquale DeSarno as the object of the conspiracy.

The State must prove that the conspirators intended Pasquale DeSarno, not some other man. The jury had a right to say that the evidence did not in the least point to any other man. They had a right to assume that proof of the name in the indictment was prima facie evidence of the man intended. Proof of the name of the man intended is all the law requires.

There is not even a reasonable doubt that the conspiracy was to do personal injury, namely to cut a cross upon the face of the man who Elizabeth said had got her sister in trouble.

Sheriff Graham testified in open court: "I asked her if she wanted to get a man to come and cut the face of . . . . I can't recall the name of the Italian. At that time I had it in mind, and she says, "Yes." I said, "The man that made trouble for your sister?" She says, "Yes. That is the man I want to have cut." She said "Wouldn't you do it?" Q. "Was his name mentioned between you in the conversation? A. Yes. I mentioned the first name. At the minute the name has slipped me." He later testified that the name he mentioned was Pasquale.

Can there be any question that a particular person was meant by Elizabeth and her mother? And had not the jury a right to infer that when the name Pasquale was mentioned by the Sheriff that Elizabeth knew exactly whom he meant?

In our opinion the jury had sufficient evidence to warrant them in finding proof of the name. Philip W. Wheeler a deputy sheriff went to New Jersey to bring Nick Vetrano to Portland on extradition papers. When Nick was arrested in New Jersey there was found upon his person Exhibits 3, 4 and 6, the incriminatory letters. He had read them and understood their contents. Exhibit 7, is his affidavit to the same effect. During an interview with Nick concerning his connection with the case Deputy Wheeler testified as follows: "Q. Did you have any talk with Nick on the way with reference to his connection with the case? A. I did. Q. Will you tell the jury any thing he had to say about it? A. Why he said that he had answered those letters and had received letters with reference to sending somebody down to cut up this man. Q. Did he mention the name of the man or did you mention it? A. I mentioned it, yes. Q. What name did you mention to him? A. Pasquale DeSarno. Q. What did he say to that? A. He said he couldn't seem to place him; didn't know as he could place him; didn't know who he was; didn't think he did." That answer is a crippled denial, and the jury under the circumstances had the right to infer that he did know who Pasquale DeSarno was, especially so, when considered in connection with the letter written by Elizabeth and found upon his person, that he did know the man; that he lived near him and that her mother said he knew him. However that may

be, the testimony above recited was delivered in open court in the presence and hearing of all the respondents, and disclosed to them, what they already knew, that the man whom the State was proving to be the object of their conspiracy was Pasquale DeSarno, the same name that was alleged in the indictment, and the same name stated to Nick. Furthermore, Sheriff Graham testified that Elizabeth said the name of the man who had gotten her sister in trouble was Pasquale. This also was testified to in open court in the presence of all the parties. In view of the circumstances connected with the case and the trial, and that Pasquale DeSarno was named in the indictment and was stated to Nick to be the name, the jury was warranted in the inference that Elizabeth meant Pasquale DeSarno, otherwise she would have added another name if she had in mind another person. There was only one name in her mind and she knew perfectly who he was, hence her answer was confined to a particular Pasquale, the same Pasquale named by Wheeler, to wit, Pasquale DeSarno. Furthermore, there is no variance between the proof and the allegation of the name in the indictment; the evidence of Wheeler is that it is Pasquale DeSarno; the evidence of Graham is that Elizabeth said it was Pasquale, corroborative so far as it went.

None of the evidence is disputed. The jury had a right to regard it as all true, and to draw therefrom and from all the circumstances and probabilities any and all inferences that the closest analysis would permit.

If the indictment in the present case had named the object of the conspiracy as some one unknown there would not be the slightest question as to whom the evidence pointed and that conspiracy was to mutilate the man, whoever he might be, who Elizabeth claimed, had gotten her sister in trouble. The State declared his name was Pasquale DeSarno. It was therefore incumbent upon the State, having named the man, to prove the name, only. Such proof is deemed necessary, only in order to give the respondents notice of the person named, that they might be able to meet the allegation by proving some other Pasquale DeSarno than the one named in the indictment or some other man altogether, which would be the only possible defense open to them; and to plead autrefois convict, *Commonwealth* v. *Hunt*, 4 Met., 111.

It is, therefore, evident that the name of the object of the conspiracy is merely an incident of the conspiracy not necessary to proof of it, the conspiracy itself being the gravamen of the charge.

The conspiracy having been proved against all to procure the mutilation of the person who had gotten the sister in trouble; Elizabeth being merely the amanuensis of her mother in writing the letters to Nick; the mother having said to Nick, in one of the letters, so written: "Dear Nick you know who my mother wants to have his face cut you know him he has been near you their she said that you know him"; Elizabeth having been found by the jury to know the name to be Pasquale DeSarno; and Elizabeth being the mere mouthpiece of her mother in writing the letters, it therefore follows, that she wrote what her mother told her to write and, consequently when she wrote "she said that you know him" the only rational inference to be drawn from that statement is, that the mother knew the object of the conspiracy to be Pasquale DeSarno, when she dictated that letter.

We are of the opinion that the jury had sufficient evidence before them to warrant them in the deduction that the State had sufficiently proved the name of the person intended as the object of the conspiracy.

Exceptions overruled.
Appeal denied.

WILSON J. Dissenting.

I am unable to follow the reasoning of my associates on the last point as to Philomena, viz., that it is shown by competent evidence that she conspired against one Pasquale DeSarno, and feel that I should state my reasons for my dissent.

It seems to me that these principles are applicable:

No testimony is competent to be considered against Philomena when tried with her alleged co-conspirators which would not be admissible against her if tried separately.

Confessions and admissions of a co-conspirator made after the conspiracy is at an end are not admissible against anyone but the person making them. Greenleaf on Evidence, Vol. I, 16 Ed., 184a; Wharton on Criminal Evidence, Sec. 699; *Commonwealth* v. *Rogers*, 181 Mass., 193.

Upon this basis neither the statements of Vetrano or Elizabeth to the officers, made after their arrests and not in the presence of Philomena and when the conspiracy must be held to be abandoned,

would be admissible against Philomena if tried separately or competent to be considered against her when tried together.

Eliminating the statements by Vetrano and Elizabeth to the officers, there is no evidence in the case that it was the man who got her daughter in trouble against whom the conspiracy was directed, or that his name was Pasquale DeSarno.

The opinion brings the proof of the man as Pasquale DeSarno home to Philomena on the ground that Elizabeth being her amanuensis, and it appearing by the admission or confession of Elizabeth that she knew who was meant, *ergo* the mother also knew. We know that to be a fact, but it is not shown by evidence competent against the mother that even Elizabeth knew, or knowing, that it was Pasquale DeSarno who was meant.

The criminal law does not recognize agents as such, only accomplices and co-conspirators. If Elizabeth's knowledge had been proven by evidence admissible against the mother, I would agree it was sufficient. If it was shown by any statement of Elizabeth while the letters were being written, well and good. But the State offers as its only evidence on this point statements made to the officers, not in the presence of Philomena, and after the conspiracy was at an end. No rule of evidence occurs to me by which they are admissible against the mother, except that relating to statements of accomplices and co-conspirators, and that, as I conceive it, does not apply to statements made after the conspiracy is ended.

Exclude them and how does the case stand against Philomena? Clearly lacking on this point. It does not meet the question to say that Elizabeth was acting at her mother's dictation. That only made her an accomplice or a co-conspirator. No different rule applies as to the admission of statements to third parties because the accomplice was carrying out the directions of the principal and a co-conspirator.

It would be a dangerous doctrine, I think, to permit one conspirator to say, when the conspiracy has been accomplished or abandoned, and not in the presence of the others: "Yes, I knew against who it was directed all the time. It was *A*;" and have that statement to a third party used to convict all the other conspirators of conspiring against *A*, if it was *A* who was named in the indictment. The burden being on the State to prove the allegation that it was Pasquale DeSarno who was conspired against, it has failed as to Philomena, and as to her the appeal should be sustained.

ELLEN J. WHITMORE, In Equity, by JAMES W. FISHER, Her Guardian

vs.

THE CHURCH OF THE HOLY CROSS

AND

THE FIRST CONGREGATIONAL PARISH OF GARDINER.

Kennebec. Opinion June 9, 1922.

A devise of an absolute estate in clear and unmistakable language cannot be lessened or effected by subsequent words in the same paragraph inconsistent therewith. Real estate devised upon a condition subsequent, in case of re-entry for breach, reverts to the heirs of the testator, not to the residuary legatee. A legacy absolute in terms, but suggesting a particular use, creates neither a condition nor trust. A grantor or his heirs only can take advantage of a breach of condition subsequent, and there is no forfeiture until entry or statutory equivalent. One who gives an estate on condition subsequent has no estate left that he can either alienate or devise. The same rule that applies to devises, applies to bequests of personal property.

In the instant case the devise of the parsonage was not on condition subsequent. The devise was absolute. There is no clause in the will providing for re-entry for breach of a condition, and nothing appears in the will to indicate that the testator intended to create a condition subsequent. The use of the words "as a parsonage" cannot by any rule of construction be said to mean that the testator intended to restrict the use, or alienation of the property.

On appeal by complainant. This is a bill in equity seeking the construction of the will of Harriet E. Whitmore, late of Gardiner, deceased. The defendants demurred generally to the bill as a whole, and also specifically to each paragraph, on the ground that the complainant had no interest in the subject matter of the bill. The demurrer was sustained by the sitting Justice and the bill dismissed,

from which decree complainant appealed. Appeal dismissed. Decree of sitting Justice affirmed, with costs.

The case is fully stated in the opinion.

Andrews, Nelson & Gardiner and A. L. Perry, for complainant.

McLean, Fogg & Southard, for the defendants.

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

HANSON, J. Bill in equity to obtain the construction of the will of Harriet E. Whitmore, late of Gardiner, deceased.

The defendants demurred to the bill as a whole, and to each and every paragraph thereof, on the ground that the plaintiff has no interest in the subject matter of the bill, and that the facts set forth in the bill do not justify relief.

The sitting Justice in his final decree sustained the demurrer and dismissed the bill. The case is before the court on appeal from the decree.

The bill alleges that Harriet Whitmore, formerly of Gardiner, deceased, devised her homestead in Gardiner to the First Congregational Parish of Gardiner, "as a parsonage," said devise taking effect in 1892. December 9, 1919, the said Parish by warranty deed conveyed the same to the Church of the Holy Cross, and that the Church of the Holy Cross has contracted to sell said estate to one Bennett Slosberg.

It is further set out that the First Congregational Parish of Gardiner has now no church building, no settled pastor, and no occasion for any parsonage building; that the plaintiff, Ellen J. Whitmore, is the executrix named in said will, and is also residuary legatee under the will.

The bill further recites that the First Congregational Parish of Gardiner is still in existence and is a legally organized church qualified to hold property, but that it does not now own or occupy a place of worship or have a settled pastor, but that the time may come when it will have a pastor and will want a parsonage.

The controversy arises under the following paragraphs of the will:

"Fourth: I give and devise to the First Congregational Parish of Gardiner, Maine, having a place of worship on Brunswick Avenue in said Gardiner, the house and lot now occupied by me as a homestead on Brunswick Avenue aforesaid as a parsonage.

"Fifth: I give and bequeath to the said First Congregational Parish the sum of One Thousand Dollars to be held and invested by trustees to be selected by the Parish, the income of the same to be used as far as necessary in keeping said homestead and lot given as a parsonage in repair, also I give and bequeath to said First Congregational Parish the further sum of Two Thousand Dollars to be held and invested by trustees selected by the Parish, the income of the same to be used for the maintenance of singing in the Church occupied by said Parish."

The decree of the sitting Justice sustaining the demurrer and dismissing the bill must be affirmed. The plaintiff is executrix of the will, and residuary legatee named therein. She is under guardianship. The petition is irregular because signed by her attorney as principal, but necessarily so perhaps in view of the circumstances.

The principal questions raised on appeal will be considered in their order.

1. Has the plaintiff an interest as executrix which authorizes her to seek construction of the will? While the guardian is authorized to appear and act for the plaintiff generally, in all things relating to the care and custody of the person and property of his ward, his authority as guardian does not extend to representing her as executrix, and, as such guardian, to seek the construction of a will. *Burgess* v. *Shepherd*, 97 Maine, 522. Further, it does not appear that she has any interest as executrix. Many years have passed since the plaintiff completed every duty devolving upon her as executrix, and that being the case she cannot, as such, intervene in the interest of any persons, heirs or others, alleging an interest under this will. Her counsel in addition very frankly state that their client "being now mentally incompetent, she could not, in her own person, carry out the provisions of said will, or the instructions of the court if the will were construed." A bill in equity to obtain the construction of a will cannot be sustained, unless the construction may affect the rights of the complainant, in person or property, or unless it may affect the performance of his duties under the will, as executor, trustee, or otherwise. *Burgess* v. *Shepherd*, 97 Maine, 522; *Webb* v. *Dow et als*, 120 Maine, 519; Gardner on Wills, 146.

Has plaintiff an interest as residuary legatee? Plaintiff's counsel urge "that this bill should be maintained for the purpose of determining her rights as residuary legatee, regardless of her mental

condition." We adopt the course in the instant case for the reason suggested, that if a right in the plaintiff exists, the same should be determined now.

Counsel contend that (1) "the devise of decedent's residence" as a parsonage "constitutes a condition subsequent, and that the interest was contingent, and that therefore upon breach of any condition the interest would revert." (2) That if the language of the will did not create a condition subsequent, it did establish a trust. It is the opinion of the court that the devise of the parsonage was not on condition subsequent. The devise was absolute. There is no clause in the will providing for re-entry for breach of a condition, and nothing appears in the will to indicate that the testator intended to create a condition subsequent. The use of the words "as a parsonage" cannot by any rule of construction be said to mean that the testator intended to restrict the use, or alienation of the property. *Doyen* v. *Rayburn*, 214 Ill., 344; *Adams* v. *First Baptist Church*, 148 Mich., 140; 11 L. R. A. (N. S.), 509.

"The cases are almost unanimous in holding that recitals in deeds indicating that the land conveyed is to be used for school or educational purposes do not create conditions subsequent rendering the estate liable to divestiture upon a departure from the use specified." Note to L. R. A. 1918 B, 696. *Phinney* v. *Gardner*, 121 Maine, 44.

"It is well settled also that the mere recital of the purpose for which a conveyance was made, or to be used does not import a condition." *First Presby. Church* v. *Bailey*, 97 Atl., 583, (Del. 1916); *Baldwin* v. *Atwood*, 23 Conn., 367, 7 L. R. A., 1119; *Watterson* v. *Ury*, 5 Ohio C. C. 347, affirmed in 52 Ohio St., 637. When, as in the instant case, an absolute estate is given by a paragraph of a will in clear and unmistakable language, it cannot be cut down to a less estate by subsequent words in the same paragraph inconsistent therewith. Such subsequent words are treated as of no effect. *Sherburne* v. *Littel & others*, 220 Mass., 385.

It is clear that the petitioner has no interest as residuary legatee. If the devise had been upon a condition subsequent, she then would have no interest. In such case the property upon re-entry for breach of condition would revert to the heirs of the testator, not to the residuary legatee. A legacy absolute in terms, but suggesting a particular use, does not create either a condition or a trust. 11 C. J. 351, and Note 27. See L. R. A. 1918 B. And a grant to a religious

society, "the interest thereof to be annually paid to their minister forever," is a gift to the society. Idem; *Smith* v. *Nelson*, 18 Vt., 511. The mere imposition upon a grantee or devisee of an obligation in respect of the use of the real estate granted or devised, without the use of technical terms to create a condition, or else of language clearly expressive of an intent that the land should revert if the obligation is not performed, will not create a condition. *Farnham* v. *Thompson*, 34 Minn., 330; 57 Am. Rep., 59.

"There is a class of cases in which the expression of purpose to which the land granted or devised is to be put is taken merely as indicating the motive of the grantor or devisor, or a recognition by him of the contemplated use. In *Erhardt* v. *Baltimore Monthly Meeting of Friends*, 93 Md., 669, 49 Atl., 561, a devise to a religious corporation in trust for the purpose of applying the income for the use of the school under the control of such corporation was held valid as a gift to the corporation, the purpose expressed being within the scope of its corporate functions and the devise therefore not being objectionable as creating a trust for unascertained beneficiaries." 7 L. R. A. 1123, Note, and cases cited.

"None but the grantor or his heir can take advantage of a condition subsequent, and it can be defeated only by the actual entry of the grantor or his heir." *Adams* v. *First Baptist Church*, 148 Mich., 140, Note; *Marwick* v. *Andrews*, 25 Maine, 525; *Osgood* v. *Abbott et al.*, 58 Maine, 73.

"The failure to perform a condition subsequent does not devest an estate, for the grantor or his heirs may not choose to take advantage of the breach, *and none other can;* and, until advantage is taken by entry or statutory equivalent, there is no forfeiture." *Cook* v. *St. Paul's Church*, 5 Hun., 293, 11 L. R. A. (N. S.), 524, Note; *Proprietors of the Church in Brattle Square* v. *Moses Grant et als*, 3 Gray, 142.

"It is fundamental that conditions subsequent tending to restrict and defeat an estate are not favored. They can be created only by apt and appropriate language which, ex proprio vigore, establishes that only a conditional estate was conveyed; and when such a condition is shown to have been created, the rule of construction is that of strictness against the grantor and in favor of the holder of the estate. Generally speaking, the apt and appropriate words evidencing that the grant is on condition subsequent are found in a pro-

vision for forfeiture and right of re-entry." *Kilgore* v. *Cabell County Court*, L. R. A. (N. S.), 1918 B., Page 692, Note.

It is well settled in this State that one who gives an estate subject to defeat on condition subsequent has no estate left that he can either alienate or devise. "Where one grants a base or determinable fee since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him, that is, he has no future vested estate in fee; only what is called a naked possibility of reverter, which is incapable of alienation or devise although it descends to his heirs." *Pond* v. *Douglass*, 106 Maine, 85. The rule is the same whether such estate is created by deed or by will. Both are incapable of alienation. Tiedman Real Prop. 3d Ed., Sec. 291. Where the estate is granted upon an express condition, it is unnecessary to stipulate also for a right of entry for a breach of the condition. That follows without an express reservation to that effect. *Thomas* v. *Record*, 47 Maine, 500; *Gray* v. *Blanchard*, 8 Pick., 291, 292. And the heir, though he be not expressly mentioned in the deed, may take advantage of the breach by entry. 2 Greenleaf Cruise, 42 tit. XIII, c. 2. "For an heir shall take advantage of a condition, though no estate descend to him from the ancestor." *Osgood* v. *Abbott*, 58 Maine, 80.

Quoting a former finding of this court: "No one can take advantage of such a condition, and make an entry to create a forfeiture of the estate, but an heir at law of the devisor. Co. Litt., Sec. 347; Co. Litt. 214 (b) & 218 (a). There is no proof in this case that an heir at law has ever made an entry for the purpose of causing a forfeiture of the estate." *Marwick* v. *Andrews*, 25 Maine, 525, at 530; *Board of Education* v. *First Baptist Church*, 63 Ill., 204; *First Presby. Church* v. *Elliott*, 65 S. C., 251. "The right of alienation is an incident of ownership, belonging as well to church corporations as to individuals. A church corporation has a legal right to alien its real estate and house of worship, unless restrained by its charter, and provided the proceeds are devoted to the purposes of its organization. *Cushman* v. *Church of the Good Shepherd*, 14 Pa. Co., Ct. 26. If there is a breach of a condition subsequent, the estate continues in the grantee until it is devested by an actual entry of the grantor or his heirs. *Adams* v. *First Baptist Church*, 148 Mich., 140, Note. A devise of real estate to a religious corporation, "to be used as a parsonage and nothing else, and to be kept for that purpose and used for nothing else," does not create a condition subsequent which will

cause a forfeiture if the property is devoted to other uses. Idem. The plaintiff has no greater right in the personal estate involved. The rule which, by statute, has generally been made to apply to devises, has always been recognized in bequests of personal property. *Loring* v. *Hayes*, 86 Maine, 351. A bequest of the interest or produce of a fund, directly or through a trustee, without limitation as to continuance, is a gift of the fund itself. *Hartson* v. *Elden*, 50 N. J., Eq., 522; *Angell* v. *Springfield Home for Aged Women*, 157 Mass., 241; *Sampson* v. *Randall*, 72 Maine, 109. "The gift of the perpetual income of real estate is a gift of the fee; a gift of the income for life is a gift of a life estate. The same rule applies to personal estate and the donee for life has the actual possession of the property, unless the will otherwise provides. *Sampson* v. *Randall*, 72 Maine, 109. "The same rule applies to personal estate as to real estate, namely, the gift of the income is in contemplation of law equivalent to a gift of the property itself. . . . . If the gift is of the income for life, the donee takes a life estate; and if the gift is of the perpetual income, then the donee becomes the absolute owner of the property. So held in *Stone* v. *North*, 41 Maine, 265." *Sampson* v. *Randall*, 72 Maine, 109; *Burgess* v. *Shepherd*, 97 Maine, 526, 3. Did the language of the will establish a trust, (1) as to the real estate, (2) as to the personal estate? It is the opinion of the court that no trust was created in respect to either the real estate, or the money bequeathed under Paragraph 5 of the will. It is apparent from the language used that no trust was intended to be created by the testator. It is true she did indicate in terms that the money given was "to be held and invested by trustees to be selected by the parish," but such declaration is not sufficient standing alone to establish a trust. It is simply a direction that the money should be in charge of the trustees to be chosen by the parish, the method employed universally in church management, and a custom well known to the testator. This conclusion is fortified by the language of paragraph one of the will, where the testator in very apt language did create a trust concerning the larger portion of her estate, and of which the plaintiff was principal beneficiary.

The gift in each case was to the parish absolutely; there was no restriction upon the use of the income. There was a declaration as to the use of part of the income for repairs, "so far as necessary," with no direction whatever as to income not necessary for repairs, and no cestui que trust was named. In such circumstances a trust

is not created, for the reason that the parish had, and has, both the legal estate and the beneficial interest. A trust cannot exist where the same person possesses both the legal estate and the beneficial interest. 7 L. R. A. 1119, 103 Md., 662, 64 Atl., 314. "Whenever a trust is alleged to be created by any instrument, or instruments, there must be a separation of the legal estate from the beneficial enjoyment, and a trust cannot exist where the same person possesses both; . . . "if the legal and equitable interests happen to meet in the same person, the equitable is forever merged in the legal." The legal estate and beneficial interest being vested in the defendant, the First Congregational Parish of Gardiner, the estate it took was an absolute fee simple. *Doan* v. *The Church of the Ascension*, 103 Md., 662, 7 L. R. A. (N. S.), 1119.

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

FLORENCE J. MCCARTHY et als., In Equity

vs.

ELIZABETH G. MCCARTHY et als.

Cumberland. Opinion June 9, 1922.

The court ordinarily declines to answer questions, or give requested instructions, in an equitable proceeding, where there are no existing conditions, occasion, or emergency, set forth in the bill requiring an answer or instructions. Where questions and requested instructions are predicated upon a contingency, answers should not be given as a rule until such contingency arises, or is about to arise, or imminent.

No existing conditions, occasion, or emergency is set forth in the bill requiring an answer to the first question: nor can the amount or character of the estate to be "disposed of according to the laws of inheritance of the State of Maine in force at date hereof," be now ascertained.

The fact that a question may arise in the future is ordinarily not enough. Such question should not be decided until the anticipated contingency arises, or at least until it is about to arise; until it is imminent.

For the same reasons the second question should not be answered. In addition, Elizabeth B. Dunphy may die before the death of the widow without leaving lawful issue. In that event the provisions of the will are plain as to the disposal of the property in which she is interested.

If after the death of the widow a dispute arises as to the distribution of the residuary estate, all the questions then arising should be determined in a proceeding to which the heirs of Elizabeth G. McCarthy, who are not, and cannot be made parties to the present bill, would be parties.

On report. This is a bill in equity requesting a construction and interpretation of subdivisions (c) and (h) of paragraph two of the will of Charles McCarthy, Jr., late of Portland, deceased. Under paragraph second in the will, a life estate of the entire property of testator was given to the widow, Elizabeth G. McCarthy, and under said paragraph it is further provided that, "At her death, or if she (Elizabeth G. McCarthy) be not living at my decease, said estate to be disposed of as follows." Then follows certain legacies not involved in this proceeding. Under subdivision (c) of said paragraph, a devise of real estate is given to Elizabeth B. Dunphy, with a provision that should she die without issue, said real estate to go to the surviving sons of a nephew, and to issue of a deceased son of such nephew by right of representation, in equal shares. Then under subdivision (h) of paragraph two comes the following residuary clause, viz.: "All the rest, residue and remainder of my estate, etc. . . . shall be disposed of according to the laws of inheritance of the State of Maine in force at the date hereof." Both the widow, Elizabeth G. McCarthy, and Elizabeth B. Dunphy are still living. Bill dismissed.

The case is fully stated in the opinion.

Strout & Strout, for complainants.

Charles L. and Paul E. Donahue, for Elizabeth G. McCarthy and *Louis S. Walsh,* as Conservator.

Cook, Hutchinson & Pierce, for Elizabeth B. Dunphy.

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

HANSON, J. This is a bill in equity to obtain the construction of the will of Charles McCarthy, Jr., brought by certain legatees and heirs of the testator, against the widow, the life tenant, Louis S.

Walsh, conservator of the estate of Elizabeth G. McCarthy, and Elizabeth B. Dunphy, a devisee under the will. All persons interested are parties to the bill.

The clauses of which interpretation is requested are the following: "Second: I give, devise and bequeath to my beloved wife, Elizabeth G. McCarthy, if living at my decease, the income of all my estate of every name and description, wherever and however situate, to be used and enjoyed by her during her natural life. At her death, or if she be not living at my decease, said estate is to be disposed of as follows, viz." Then follows certain legacies which are not involved in the questions presented to the court. And the second paragraph of said will, subdivision 'C', viz.: "I give and devise to Elizabeth G. Dunphy, who has been reared in my family since her childhood, land and buildings at 574 Congress Street in said Portland now under lease to Libby & Chipman, to have and to hold to her, her heirs and assigns forever. If, however, she shall die without leaving lawful issue then I give and devise said land and buildings to the surviving sons of my said nephew Florence J. McCarthy, in equal shares, the child or children of any deceased son to take by right of representation, to have and to hold to them and their heirs and assigns forever." After the provisions regarding said legacies comes the following residuary clause which is designated as subdivision H of paragraph two: "All the rest, residue and remainder of my estate, of every name and nature and wherever and however situate, including any of the foregoing legacies which may lapse or fail for any reason whatsoever, I direct shall be disposed of according to the laws of inheritance of the State of Maine in force at date hereof."

The plaintiffs pray:

1. "That the Court will construe and interpret the provisions of said will and particularly determine whether the said Elizabeth G. McCarthy takes a share in the residue and remainder of said estate in full ownership, in addition to enjoying the income on the entire said estate during her life time."

2. "Whether under said paragraph two, subdivision 'C', Elizabeth B. Dunphy takes a fee simple absolute and unconditional in land and buildings at 574 Congress Street, or whether she takes a lesser estate, and if she takes a lesser estate, the nature and extent thereof, and what person or persons or class of persons are entitled thereto at the termination of her said estate."

It may be mentioned that paragraph second with its eight subdivisions disposes of all the property, real and personal of the testator, and that the last subdivision of paragraph two is the residuary clause.

After a careful examination of the will we are of opinion that neither question should be answered at this time.

No existing conditions, occasion, or emergency is set forth in the bill requiring an answer to the first question; nor can the amount or character of the estate to be "disposed of according to the laws of inheritance of the State of Maine in force at date hereof," be now ascertained.

The fact that a question may arise in the future is ordinarily not enough. Such question should not be decided until the anticipated contingency arises, or at least until it is about to arise; until it is imminent. *Huston* v. *Dodge*, 111 Maine, 250.

For the same reasons we must decline to answer the second question. In addition Elizabeth B. Dunphy may die, before the death of the widow without leaving lawful issue. In that event the provisions of the will are plain as to the disposal of the property in which she is interested.

If after the death of the widow a dispute arises as to the distribution of the residuary estate, all the questions then arising should be determined in a proceeding to which the heirs of Elizabeth G. McCarthy, who are not, and can not, be made parties to the present bill, are parties. R. S., Chap. 70, Sec. 21. See also R. S., Chap. 67, Sec. 2.

Bill dismissed.

CORA M. DENISON et als., In Equity *vs.* ISABELLE A. DAWES.

Cumberland. Opinion June 10, 1922.

Ante-nuptial agreements will not be enforced in equity if the husband is guilty of constructive fraud by not imparting to his prospective wife a full knowledge and understanding of all the facts materially affecting her interests, unless the wife with full knowledge of all the conditions and circumstances subsequently acquiesced in the agreement and waived her rights, or is estopped from setting up constructive fraud as a defense.

Parties to an ante-nuptial agreement, especially if an agreement to marry has already been entered into, occupy confidential relations to each other, and the wife has the right to impose the fullest confidence in her prospective husband, and without seeking outside advice, rely upon his dealing fairly with her.

Where the provisions for the wife as the survivor is clearly disproportionate to the amount of the husband's wealth, it raises a presumption of designed concealment and places the burden on those claiming under it to show that there was full knowledge and understanding on the part of the wife of all facts materially affecting her interests.

In the case at bar the provisions for the wife were clearly disproportionate to the wealth of the husband, and even if the disproportion is not so great as to *ipso facto* render the agreement without the right of being enforced in equity if entered into understandingly, it is sufficient to throw the burden on the plaintiffs in this case to show that the defendant entered into it with a full understanding of the extent of her prospective husband's wealth and the effect of the agreement upon her rights. By reason of the confidential relations existing, it was the duty of the husband to see that she was fully informed, otherwise an implication of bad faith follows.

The plaintiffs failed to show that the husband acted in good faith under such circumstances, and also failed to show that defendant with a full knowledge of all the conditions and her rights later acquiesced in the agreement or is now for any reason estopped from setting up as a defense constructive fraud on the part of her husband.

Acquiescence and waiver are positive acts and the burden of proving it is on the party claiming it. Neither will silence alone constitute an estoppel, unless it appears it was known that it would be acted upon to the injury of the other party, or was maintained with the deliberate intent to deceive or obtain an advantage.

On appeal. This is a bill in equity brought by Cora M. Denison, daughter of Samuel H. Dawes, late of Harrison, deceased, and Herbert H. Dawes, executor of the will of said Samuel H. Dawes, against Isabelle A. Dawes, widow of the said Samuel H. Dawes, to compel performance by said Isabelle A. Dawes of a certain ante-nuptial agreement alleged to have been entered into by the said Samuel H. Dawes and the said Isabelle A. Dawes, under the name of Isabelle A. Gray. The cause was heard upon bill and answer, and the sitting Justice sustained the bill and granted the relief prayed for, and the respondent appealed. Appeal sustained. Decree of sitting Justice reversed. Bill dismissed with one bill of costs.

The case is fully stated in the opinion.

Harry R. Virgin, for complainants.

Gerry L. Brooks and Edgar F. Corliss, for respondent.

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

WILSON, J. A bill in equity to compel the defendant to perform a certain ante-nuptial agreement entered into between her and her husband, the late Samuel H. Dawes, prior to their marriage in 1906, and to restrain her from enforcing her rights as his widow to an allowance from his estate, or from claiming any part of his estate under the statutes of this State, she having waived the provisions of his will which provided for her in accordance with the terms of the alleged ante-nuptial agreement.

The defendant in her answer denied having entered into such an agreement. No copy of it was found among the papers of the deceased, but notice to produce a copy alleged to have been delivered to her at the time of the execution, and its execution having been proved to the satisfaction of the sitting Justice, oral evidence of its contents was properly received. *Camden* v. *Belgrade*, 78 Maine, 204, 209.

The defendant's counsel, however, contends that, admitting the existence of such an agreement, the provisions for the defendant were disproportionate to the wealth of the husband and inadequate, and good faith was not exercised by him toward her, in that under the confidential relations then existing between them, she was not fully apprised of the extent of his wealth, or of her rights in the same as his

survivor, or to what extent and in what manner her rights therein were affected by the proposed agreement; that the agreement was therefore tainted with either actual or constructive fraud and should not be enforced in favor of his representative in a Court of Equity.

The sitting Justice made no specific findings of fact bearing upon these contentions, simply holding that the bill should be sustained.

Such a conclusion, however, must have been based upon a finding that no actual or constructive fraud was shown, and that mere inadequacy of the provisions, if entered into in good faith, was not sufficient to invalidate such an agreement; or that if there was a lack of good faith and actual or constructive fraud at the time of the execution of the agreement, the defendant later was fully apprised of the conditions and of any such fraud, and not having taken any steps to avoid such agreement during the lifetime of her husband, must now be held to have acquiesced in the agreement and waived the fraud, or to be estopped from avoiding it upon this ground.

Parties to an ante-nuptial agreement, especially if the agreement to marry has already been entered into, occupy a confidential relation to each other. After betrothal a woman is presumed to be subject in such matters to the influence of her prospective husband, and has the right to repose the fullest confidence in him, and without seeking outside advice, rely upon him to deal fairly with her in an agreement of this nature. If the husband's estate benefits thereby, there should in good faith on his part be a full disclosure of the nature and amount of his property, and the wife be fully advised of her rights in the premises. Where the provision for the wife as the survivor is clearly disproportionate to the amount of the husband's wealth, it raises a presumption of designed concealment and places the burden on those claiming under it in his right to show that there was a full knowledge and understanding on the part of the wife at the time of execution, of all the facts materially affecting her interests, viz.: the extent of his wealth and her rights in his property as his survivor, and how modified by the proposed agreement. *Achilles* v. *Achilles*, 151 Ill., 136, 139; *Mines* v. *Phee*, 254 Ill., 60; *Spurlock* v. *Brown*, 91 Tenn., 241, 258, 261; *Pierce* v. *Pierce*, 71 N. Y., 154, 158; *Graham* v. *Graham*, 143 N. Y., 573, 580.

In the case at bar the provisions for defendant were clearly disproportionate to the wealth of her husband. At the time of the execution of this agreement, he possessed approximately fifty thou-

sand dollars, and at his death left an estate of over sixty-five thousand dollars. The present worth of an annuity of four hundred dollars, the sum provided for her in the agreement, during the remainder of her life after his decease, based upon their relative expectancy of life according to the Mortuary Tables, was approximately twenty-five hundred dollars, and at his death was only worth about fifteen hundred dollars, or perhaps slightly more owing to the higher rates of interest prevailing at that time.

Even if the disproportion is not so great as to *ipso facto* render the agreement unenforceable in equity, if entered into in good faith, it is sufficient to throw the burden on the plaintiffs who seek to benefit by the agreement, of showing that it was entered into with a full understanding on the part of her who is adversely affected, not only of its provisions, but its effect upon her as the survivor of her prospective husband. Upon this point, we think the plaintiff's evidence manifestly fails.

Mr. Dawes, the husband, at the time of the marriage in 1906, was seventy-eight years of age, and the defendant sixty-five. They had known each other since childhood. He had been twice married. She was a spinster. He sought by letter in the spring of 1906 to renew their early acquaintance, evidently with the purpose on his part of a prospective marriage.

It is a fair inference from the testimony that his plans did not always meet with the approval of his family, and at times, as appears in his letters in the case, he resented the interference; but that finally the marriage was not opposed, but was looked upon with some favor, presumably upon the condition that an agreement of the nature of the one executed should be entered into. So far as the evidence discloses, the defendant faithfully performed her duties as companion and helpmate during the fifteen years of their married life, the last three of which the husband was in a state of almost helpless senility. The agreement was prepared by the daughter's brother-in-law, a practicing attorney in Boston, and by him forwarded to an attorney in Maine, who later brought it to the home of Mr. Dawes for execution on the morning of their marriage.

The case, however, is barren of evidence that it was ever mentioned to the defendant that such an agreement was to be made a preliminary to the marriage, or that she was in any way apprised of the fact that one was being prepared.

On the morning of the marriage, without previous notice to her, the attorney to whom the agreement was forwarded from Boston, appeared at the home of Mr. Dawes, and without any explanation so far as the evidence discloses, except the statement that he had brought the marriage settlement, produced the agreement which was prepared in duplicate, and proceeded to read it. He was stopped by Mr. Dawes, who requested, owing to his not hearing distinctly, that he be allowed to read it himself. A copy was then handed to him and one to the defendant, which after both reading and apparently indicating their assent, it was executed without further explanations or comments.

The evidence does not disclose that the defendant was advised what her rights were, what property her prospective husband possessed, or what rights she was surrendering by the signing of such an agreement. It is not enough that she was an intelligent woman. The confidential relations which then existed between her and her intended husband require the plaintiffs to show that she did know and fully understand not only the nature of the instrument, but its effect upon her in case she survived her husband.

Not only does the evidence fail to show that she had any knowledge of his financial standing, unless by repute, which is not sufficient to sustain the burden imposed upon those seeking to benefit by such an agreement, *Mines* v. *Phee*, 254 Ill., 60, 62; *Hessick* v. *Hessick*, 169 Ill., 486; but her intended husband for some reason had taken occasion to warn her against being misled by reports as to his wealth, saying he was not rich, but only claimed to have enough to keep their children from crying for bread, which the defendant had a right to assume was a jocular way of disabusing her mind of any expectation that she was marrying into affluence, and at the same time assuring her that there was no danger of their being reduced to want in their declining years.

Certainly there was nothing in the letter in which this statement was contained or in the evidence to suggest to the defendant that when she signed the agreement on the morning of her marriage, she was releasing her rights in an estate of fifty thousand dollars, and which at his death amounted to over sixty-five thousand dollars, for an annuity after his death and during the remainder of her life of four hundred dollars and the other consideration of doubtful value,

considering their relative expectancy of life, of a waiver on his part of his rights in her estate, which did not then exceed six or seven thousand dollars.

She was not dealing with him at arm's length and presumed to know the contents and effect of the instrument she was signing, but had the right to rely upon the good faith of the man she had agreed to marry and put her trust and confidence in him, that he would not seek to overreach her on the morning of her marriage. Schouler Dom. Rel., Sec. 183; *Lamb* v. *Lamb*, 130 Ind., 273, 276; *Achilles* v. *Achilles*, supra. She had a right to assume, if she understood the nature of the document at all, which she signed, that he was making such provision for her as was in keeping with his wealth and her age and station in life. The burden was not upon her to inquire, but upon him to inform. Especially is this so where anything said or done by the husband might mislead the wife as to the extent of his property, or the circumstances of the execution were such as to discourage inquiry by her in relation to her rights in the premises. 13 R. C. L., 1034; 21 Cyc. 1249, 1267; *Warner* v. *Warner*, 235 Ill., 448, 462; *Hessick* v. *Hessick*, 169 Ill., 486, 492-3.

If the agreement had been entered into in consideration of the agreement to marry, it might stand upon a more favorable basis as to the representatives of the husband's estate. The agreement to marry, and the consequent legal duties of the husband after marriage might be held to counterbalance the disproportion between the provisions made for her as his survivor and the amount she would otherwise be legally entitled to receive from his estate; and so might be held to remove the presumption of constructive fraud. But from the evidence in the case, an agreement to marry had already been entered into without the rights of the survivor in the property of the other entering in as a consideration. This agreement must, therefore, stand or fall by itself.

Having in mind the rule in equity that upon appeal, a decree so far as based upon facts found by the sitting Justice, will not be reversed or modified unless manifestly wrong, if the decree of the sitting Justice in this case could rest upon the absence of actual fraud shown, and a presumption that the defendant understood the nature and effect of the instrument which she signed, it would not be disturbed. And, too, if the mistake or ignorance of the wife was one of law solely, equity might not relieve. Where, however, it is induced

or accompanied by other special facts giving rise to an independent equity, such as unequitable conduct on the part of the prospective husband, then a Court of Equity will interpose its aid. Pomeroy's Equity Juris., Vol. II, Sec. 842. But by reason of the confidential relations clearly existing between the defendant and her intended husband at the time of the execution of this agreement, and the failure of the plaintiffs to show that good faith required of the husband under such circumstances, we think equity requires that the relief prayed for by those seeking to profit by this agreement should be denied; and if the decree of the sitting Justice was based upon a finding of good faith on the part of the husband and an absence of constructive fraud, it is manifestly wrong and should be reversed; unless, of course, it appears that the defendant later with a full knowledge of the facts, acquiesced in the arrangement and waived the *mala fides* or is now estopped from setting up this defense in this action. Upon this point the sitting Justice makes no finding.

The defendant herself, however, admits that within a few years after their marriage, her husband did inform her that he possessed property of the value of fifty thousand dollars, and the plaintiffs contend that with this information, not having avoided the agreement in his lifetime, she must be presumed to have acquiesced in the arrangements made for her and should not now be permitted to defend on the ground of fraud at the time of its execution.

Acquiescence and waiver, however, are positive acts, the relinquishment of some known right or advantage, the burden of proving which is on the party claiming it. Full knowledge of the rights waived must be shown. *Holt* v. *New Eng. Tel. & Tel. Co.*, 110 Maine, 10. The evidence in this case falls short of such proof. The agreement required no acts by her in his lifetime. There were no benefits accruing to her during his lifetime which she accepted. Nor do we think the conditions made it her duty to speak, and failing to do so, she must be presumed to have acquiesced. He could not then have changed the situation without her consent. He could not revoke the marriage, nor compel her to make a new agreement. He must be presumed to have been cognizant at all times of the lack of good faith on his part at its inception. The duty, if any, was his to repair the wrong he had done. Should those seeking to profit by his wrong now complain because the defendant did not make known to him

during his lifetime what it must be presumed he already knew, that his lack of good faith rendered their agreement voidable by her at any time?

The confidential relations continue after marriage. The wife is still presumed to be under the husband's influence. Equity guards with jealous care the rights of a wife who, without competent and independent advice, surrenders the rights secured to her by statute under an agreement with the husband. Mere silence and lack of protest during his lifetime, considering the ages of the parties and the circumstances shown in the case, should not raise any presumption against her. The peril of inaction, if any, was his. His representatives may not invoke her silence against her under such conditions.

Silence alone will not constitute an estoppel, unless it appears that it is known that it will be acted upon to the injury of the other party or is maintained with a deliberate intent to deceive, or to obtain an advantage. The burden of proving the facts to establish it is upon those who claim it. *Hunt* v. *Reilly*, 24 R. I., 68; 10 R. C. L. 692, Sec. 21. The evidence of the plaintiffs does not sustain this burden. The sitting Justice did not so find. It would be mere conjecture for this court to so hold. The mandate of this court must be

Appeal sustained. Decree of sitting Justice reversed.
Bill dismissed with one bill of costs.

ORLOW WEBBER'S CASE.

York. Opinion June 19, 1922.

The finding of the chairman of the Industrial Accident Commission that the injury complained of arose out of and in the course of the employment, sustained.

In the instant case the sudden, unexpected fall to the floor was the accident, and the injury to the knee or leg, diagnosed by the attending physician as a strain or sprain of the knee, resulted from it.

That the injury was received in the course of the employment is evident.

On appeal. This is a proceeding under the Workman's Compensation Act. Claimant was a night watchman, his chief duties being to make the rounds of the mill where he was employed. He claimed that in making his rounds while walking on a level floor he experienced a sharp pain in his knee or calf of the right leg, and that his leg gave away and he fell over on to the floor. Respondents resisted compensation alleging that the injury did not arise out of and in the course of the employment of claimant, and that claimant had not given to employer the required written notice of the accident. Compensation in the sum of fifteen dollars per week for a period of five weeks and two days was awarded, and respondents appealed. Appeal dismissed with costs. Decree below affirmed.

The case is stated in the opinion.

Petitioner was not represented by counsel.

Andrews, Nelson & Gardiner, for respondents.

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

MORRILL, J. The facts as to the occurrence resulting in the alleged injury appear from the testimony of the claimant alone. The incident happened in the early morning, about one o'clock, of June 8, 1921. The claimant was then, and had been for many years, employed as night watchman by Rogers Fibre Board Company; his duties began at six o'clock at night and continued until six o'clock in the morning; they included the hourly winding of the clocks placed

in different parts of the mill; on this night he had regularly made his rounds, each time climbing seventy-two steps; he was upon his rounds and had just climbed a flight of stairs and proceeded about ten feet inside a room, walking on a level floor, when as he describes the occurrence: "I felt a little pain in my knee below those cords.—I don't know whether it was in the knee or what it was,—it all gave out . . . . I had such a sharp pain I couldn't locate it. Took me here (in calf of the right leg and knee), then my knee let go. . . . It went out from under me as quick as a flash, then I went down. I remember throwing the lantern to one side when I went down."

On cross-examination by a representative of the insurance carrier, he testified:

Q. This night you done your work as usual up to one o'clock A. M.

A. Yes, sir.

Q. And was walking right along a level floor. A. Yes, sir.

Q. And you had a sharp pain in this knee or calf where you had had slight pains before, in your right leg?

A. Yes, sir.

Q. On this sharp pain you went right down on the floor on the left side? A. Yes, sir.

Q. You didn't do anything to that leg going down, it all happened right then, or you didn't do anything to it after you went down? A. Yes, sir—it all happened right then.

Q. In a second? A. Yes, sir.

Q. The pain was so sharp the leg gave way and you fell over on the left side, that is a fair statement of it, isn't it?

A. Yes, sir.

Q. You had a sharp acute pain in that leg, it gave way and after that it bothered you? A. Yes, sir.

Q. You didn't stumble, slip or trip, or anything of that kind? A. No.

He was unable to proceed with his work, but with the aid of boards, used as crutches, he reached the boiler room and remained there until the day man arrived. During the morning the leg began to swell and he was taken home on a truck.

The claimant is a man sixty-three years of age, who had worked for the Rogers Fibre Company as night watchman for about eighteen years; he had laid off on the nights of June 4th, 5th and 6th, complain-

ing that his legs were "bothering" him, more especially the left leg, but on the night in question he testifies that he felt no pain in his legs previous to the sharp pain which caused him to fall.

The physician who attended him found the knee swollen and inflamed; he testified in answer to questions by the chairman;

Q. What did you diagnose the trouble with the knee to be at that time? A. A strain of the knee.

Q. You say the knee was swollen? A. Yes, sir, and inflamed and sprained.

No testimony was introduced by the employer or the insurance carrier; upon the undisputed testimony the chairman awarded compensation, and the respondents appeal. We think that the award should be sustained.

The sudden, unexpected fall to the floor was the accident, and the injury to the knee or leg, diagnosed by the attending physician as a strain and sprain of the knee, resulted from it. The chairman so finds; he says that the claimant received "a personal injury from accident arising etc. to wit: a sudden pain and giving away of something about the right knee and calf of his right leg, causing him to fall, and which was immediately followed by acute inflammation and swelling." This finding supports the claim stated in the petition for compensation.

That the injury was received in the course of the employment, is evident. The claimant was at the time engaged in the work which he was employed to perform; that is the test. *Westman's Case*, 118 Maine, 142.

Did the injury arise out of the employment? This question must also be answered in the affirmative; the chairman has so found upon the undisputed facts. We think that the finding is warranted.

Here there must be some causal connection between the conditions under which the employee worked, and the injury which he received. *Westman's Case*, supra. That the sudden cramp and instant fall of the claimant was caused by the performance of his duty in hourly making his rounds and climbing the stairs, may properly and reasonably be found; it was traceable to his work. *Westman's Case*, supra, and the cases cited in that opinion must govern here.

Appeal dismissed with costs.
Decree below affirmed.

THE PETERSON OVEN COMPANY *vs.* FREEMAN H. FICKETT.

Penobscot. Opinion July 8, 1922.

The findings of a jury on a breach of contract, being a question of fact, is final, if there is any evidence to support it.

The case as it developed involved several collateral matters, but the real issue was based upon a contract by the plaintiff to build a baker's oven for the defendant, and the receipt by the plaintiff of several promissory notes of the defendant in specific payment thereof.

It appearing, by elimination, that the only contract considered in the verdict was the oven contract, the case would seem to resolve itself into the following questions of law and fact: 1. Was there an independent oven contract? That there was appears as a matter of legal construction, and the jury so found. 2. Was there a guarantee of the oven contract? That there was, was a matter of legal construction for the court and question of fact for the jury, and the jury found in the affirmative. 3. Was there a breach of the contract? This was a question of fact and the jury so found.

On motion for new trial by plaintiff. This is an action in assumpsit on twenty promissory notes, aggregating $1,525.00, given to plaintiff by defendant for the construction of a baker's oven for defendant by plaintiff. Defendant filed the general issue with brief statement setting up failure of consideration, in whole or part, but not indicating wherein. The case was tried to a jury and a verdict for $265.04 was returned for plaintiff, and plaintiff filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

C. P. Conners and George H. Worster, for plaintiff.

Fellows & Fellows, for defendant.

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

SPEAR, J. This case involves an action of assumpsit on twenty promissory notes aggregating, besides interest, $1,525.00, given in payment for a baking oven constructed by the plaintiff under contract, guaranteeing its efficiency and that it would bake properly.

The account annexed was abandoned.

The defense was the general issue with a brief statement setting up failure of consideration, in whole or in part.

A verdict was rendered for the plaintiff for $265.04.

The case comes up on motion by the plaintiff.

There is no claim of part payment of any of the notes.

The case as it developed involved several collateral matters, but the real issue was based upon a contract by the plaintiff to build a baker's oven for the defendant, and the receipt by the plaintiff of several promissory notes of the defendant in specific payment thereof. The only detail of the contract it seems necessary to quote is the guaranty clause and the terms of payment, namely: "We guarantee the efficiency of our Ovens, and to bake perfectly in every respect." For the erection of this oven the contract, itself, prescribed: "Terms of payment as follows: 3rd. $1900.00, balance payable in monthly notes of $75.00 each; notes to be dated day of erection and to bear interest at 6%." The notes were executed and delivered according to the terms of the contract, and it is conceded that the notes in suit are part of the notes so given.

The plaintiff in argument raises eight general divisions: I. That questions of law may be raised under a general motion. With certain limitations that is the law. II. That the burden of proof in pleading a total or partial failure of consideration in recoupment of damages rests upon the defendant. That must be conceded. III. That recoupment is limited to damages arising out of the contract upon which the suit is brought. Such is undoubtedly the law. IV. That the plaintiff claims three distinct contracts, (1) As to the notes. (2) No other contract within the pleadings. (3) Foundation contract. V. The oven contract. IV, with its subdivisions, and V, the oven contract, will be considered together in a process of elimination. VI. Waiver and acceptance by the defendant. This was passed upon by the jury upon sufficient evidence to sustain their verdict. VII. Even if all the contracts merged into one, there can be no recoupment because no liability has been proved. This issue does not arise under any phase of the evidence. VIII. That the damages allowed defendant were excessive.

Under division IV the plaintiff claimed three distinct contracts, but the report of the evidence conclusively shows that the only contract for which the notes were given was the oven contract, and no other contract can be considered in connection with them; every

other contract must be eliminated as will be seen, or there was no defense. The plaintiff claims, however, that in the trial of the case the defendant not only undertook to recoup on the oven contract, but on the foundation contract as well, the latter being no part of the oven contract, nor in consideration of any part of the notes. The plaintiff's division III, that recoupment can arise only out of the contract sued, is sound, and, therefore, any attempt on the part of the defendant to combine the two contracts in recoupment, or in reduction of damages for partial failure of the consideration for the notes, would prove futile. But upon the charge of the presiding Justice, which, in the absence of exceptions, must be assumed to be correct, the jury found a verdict, deducting damages for a breach of the contract. But this could have been done only on the assumption that the jury, observing the instructions, considered the oven contract alone. Accordingly, under the law and the evidence as presented in the report, the instructions in law being reposed in the presiding Justice, and it being presumed that he instructed the jury that they could consider only the damages arising out of the oven contract; and the questions of fact, under the instructions, being for the jury who found such damages; we are of the opinion that there is sufficient evidence to sustain the conclusion that the verdict was founded upon the sole consideration of the oven contract.

It appearing, by elimination, that the only contract considered in the verdict was the oven contract, the case would seem to resolve itself into the following questions of law and fact. 1. Was there an independent oven contract? That there was appears as a matter of legal construction, and the jury so found. 2. Was there a guarantee of the oven contract? That there was, was a matter of legal construction for the court and question of fact for the jury, and the jury found in the affirmative. 3. Was there a breach of the contract? This was a question of fact and the jury so found.

Upon all the foregoing questions of fact, under legal instructions presumed to be correct, the verdict sustained the contention of the defendant. 4. Notwithstanding the force of the findings of the jury upon the law as given and the facts as presented, upon the foregoing issues, the plaintiff claims, nevertheless, that the notes are not so connected and interwoven with the oven contract as to constitute a transaction in which they may be construed together; but that the notes constitute an independent contract, by themselves, entirely collateral to the oven contract and guarantee, for which by the

written terms of the contract, they were specifically given, to pay; that the breach of the contract cannot be shown in total or partial defense to the notes, and can be made available to the plaintiff only by a separate special action on the alleged breach of contract. This contention raises a question of law, based upon the terms of the contract and the relation of the notes thereto.

We do not deem it necessary to analyse the plaintiff's citations upon this issue, as the cases to which we shall refer clearly show that the doctrine invoked by it has been long since supplanted, on the ground that the old rule, as we may call it, was too narrow and too technical for the practical attainment of direct and final results, the most urgent desideratum of modern legal procedure. The first case to which attention may be called is *Pratt* v. *Johnson*, 100 Maine, 443, which is clearly in point. This was an action of assumpsit on two promissory notes. The action was heard by the presiding Justice with the right of exceptions. The plea, note, was the general issue, only. The notes are given in payment of goods sold under a contract, containing the terms of sale, certain exchange agreements, a memorandum of items of the goods sold, and the price. There was also a written warranty on each package of the goods. The contract was executed on the fourth day of August, and the goods shipped and the notes given on the seventh day of August. At the trial the defendant claimed that the agreement and warranty were a part of the consideration of the notes, and that the whole transaction constituted one contract, and that there had been a breach thereof by the plaintiff and that the defendant was not liable on the notes, and should be allowed to set up this breach in defense of the action. The plaintiffs on the other hand contended that there was no breach and that said notes and agreement were independent and collateral, and that said agreement could not be construed with the notes as a part of one and the same transaction, as claimed by the defendant, and the breach of said agreement and warranty could not be set up in defense.

The presiding Justice held that said agreement and warranty were independent and collateral to said notes, and could not be construed with said notes as part of one and the same transaction, and that the breach of said agreement and warranty could not be set up in defense. Exceptions were taken. The court sustained the exceptions, saying: "The warranty and guaranty related to the goods for which the notes

were given, bore the same date as the notes, and must be regarded as in part consideration for the notes. Any breach thereof by the plaintiffs to the detriment of the defendant may be shown in defense to a suit upon the notes by the original payee. This is not a case of an independent warranty as to another and different transaction, but related to the particular goods for which the notes were given. The defendant had the option to sue upon the warranty, or, to avoid circuity of action, set up a breach thereof in defense to the suit. He elected the latter course, and should be allowed to make the defense. Such is the settled rule in this state."

The precise issue is raised by the plaintiff in the present case that was raised by the plaintiff in the case cited.

In the present case, as in that case, the notes arose out of the contract and guarantee. The guarantee was a part of the consideration of the notes. A breach of the guarantee was a total or partial failure of the consideration as the case might be. It was not an independent warranty, but relates to the guaranteed oven, in payment for which the notes were given. We are unable to distinguish it from the Pratt case. *Harrington* v. *Stratton*, 22 Pick., 510, is an early case which discusses the old doctrine that reduction of damages could not be allowed in partial failure of the consideration of a note, and adopts the modern rule, even at the early date of 1839. Justice Dewey says: "But upon the points of reducing the damages by a partial failure of the consideration of a note, upon evidence of the bad quality of the article sold, and for which the note was given either on a warranty, or false representation and deceit, the adjudicated cases conflict." He then discusses the cases that hold to the old doctrine, and then says: "On the other hand, this distinction as to promissory notes, has been entirely repudiated by other judicial tribunals." He then proceeds to discuss the cases that sustain the new doctrine as we may call it for the sake of distinction and declares: "It only remains to be settled which of these conflicting opinions is the better sustained. It is difficult to perceive why the great principle upon which the necessity of a cross action was originally urged, in such a case, that the defense was founded upon an independent cause of action, is not substantially disregarded as much in the rule admitting evidence of a breach of warranty or fraudulent representation, in reduction of damages, in case of an action of assumpsit on a contract to pay for an article at an agreed price, as in a suit upon a promissory note given for the same article." The foregoing quotation states the broad

fundamental principle upon which evidence in reduction of damages in all cases growing out of the same transaction is admissible, namely, to avoid the necessity of a cross action, and, conversely, whenever a cross action in such a case would lie, reduction of damages might be shown. The reason for the rule is also stated as follows: "The strong argument for the admission of such evidence in reduction of damages in cases like the present, is that it will avoid circuity of action, ... As it seems to us the same purpose will be further advanced, and with no additional evils, by adopting a rule on this subject equally broad in its application to cases of actions on promissory notes, between the original parties to the same as to actions on the original contract of sale." In *Herbert* v. *Ford*, 29 Maine, 546, the foregoing doctrine is ably discussed and fully sustained. The court cite the above case as follows: In the case of *Harrington* v. *Stratton*, 22 Pick, 510, when a note was given upon an exchange of horses, and the payee represented his horse to be sound, when he was not, the defendant was allowed to prove in reduction of damages the defect in the horse received by him without returning or tendering it to the plaintiff." Again the court say: "By the allowance of such defenses, in those cases, when the defendant would have the right to maintain a cross action and recover damages, an unnecessary circuity of action is avoided." . . . . There is no reason of public policy, which would shut out this defense, or that would require a party should recover today, what it is conceded he must pay back tomorrow. . . . The tendency of decisions in this country has been to allow a broader latitude of defense than was permitted by the rigid rules of the common law to bills of exchange and promissory notes, when the justice of the case requires it, and a circuity of action could be avoided.

In *Morse* v. *Moore*, 83 Maine, 473 is found an exhaustive opinion by then Justice Peters approving and sustaining the principles of law as above declared. *Hathorn* v. *Wheelwright*, 99 Maine, 351, holds that "Whenever a promissory note is given for two or more independent considerations . . . or when there is a breach of warranty or a misrepresentation as to quality, for the purpose of avoiding circuity of action, the law will allow the defendant, in an action between the original parties, to show such partial failure of consideration in reduction of damages."

See Public Laws 1917, Chap. 257, Sec. 28, the Uniform Negotiable Instrument Act.

We are of the opinion that the breach of the warranty on the oven contract was clearly admissible in reduction, by way of damages, of the amount due upon the face of the notes. The plaintiff has, indirectly at least, raised a question as to the sufficiency of the pleadings, based upon the well-established rule that in recoupment for damages, notice of such defense must, in some form, be given the plaintiff. But if no notice had been given, the case having been heard without raising the issue, the requirement of such notice must be deemed to have been waived in the present case, as in *Pratt* v. *Johnson*, supra; *McCormick* v. *Sawyer*, 108 Maine, 405. Moreover, a proper defense was pleaded. The brief statement was failure of consideration, total or partial. As the only failure of consideration there could be was based upon a breach of the oven contract; and as that contract and guarantee were the only consideration for the notes, therefore, a plea of failure of consideration in whole or in part, put in direct issue a breach of the guarantee, in whole or in part. The plaintiff also raises the point that the defendant accepted the contract and waived the breach. But the evidence does not sustain the claim. As soon as the defendant found that the oven was defective and faulty he notified the plaintiff and by mutual endeavor with the plaintiff, tried to discover and remedy the defects, but such conduct could not be construed into an acceptance and waiver that would or did bar the defendant of his right to recoup. Moreover, it is optional with a party who claims to have been injured by a breach of warranty to accept the subject matter of the breach and seek redress in an action upon the warranty or breach of contract. And there is no waiver in retaining it. This doctrine is too elementary for citation.

We discover no insurmountable obstacle in the way of the defendant's course of procedure in the present case.

The plaintiff further claims that the damages allowed the defendant were excessive. The assessment of damages is peculiarly within the province of the jury. Unless they have plainly erred in the amount they have allowed their judgment cannot be revised. Upon the theory of the defendant in the present case, that the oven is practically a total failure, with more or less evidence to support his contention, the court is unable to find any legal justification for disturbing the amount of the verdict.

Motion overruled.

ANNIE M. RODERICK *vs.* HORACE M. PAINE.

Kennebec. Opinion July 8, 1922.

An agreement made in consideration of marraige not in writing is in violation of the statute of frauds and is void.

An oral promise by a man to a woman, to whom he has proposed marriage, to purchase and give to her an automobile in consideration of marriage, followed by purchase by him, and gift by him to her, of said automobile after marriage, is void under R. S., Chap. 114, Sec. 1, Par. III, and will not support an action by the woman against the man, after dissolution of the marriage by divorce, to recover an amount which the woman paid to redeem the automobile from a mortgage given by the donor to the dealer of whom the automobile was purchased.

On exceptions by plaintiff. This is an action to recover the amount paid by plaintiff to redeem a certain Ford automobile. The plaintiff, a widow, was living with her brother in Lewiston and in the autumn of 1919 became acquainted with the defendant, who proposed marriage, and before the marriage was consummated, promised the plaintiff that he would buy and give to her as a gift an automobile, which he did do, but gave at the time of its purchase a mortgage to the party of whom he made the purchase, the plaintiff not having knowledge of the mortgage. Afterwards a divorce was granted, and the automobile was taken from the plaintiff on a writ of replevin by the mortgagee who instituted foreclosure proceedings, and the plaintiff to redeem the automobile paid to the mortgagee the money sued for in this action. Counsel for defendant moved for a directed verdict for defendant. The promise was not in writing, being an oral one only, and the presiding Justice granted said motion, and directed a verdict for defendant, and plaintiff excepted. Exceptions overruled.

The case is stated in the opinion.

G. R. Grua, Andrews, Nelson & Gardiner, for plaintiff.

F. W. Butler, for defendant.

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

MORRILL, J. The parties were formerly husband and wife; during that relation the defendant gave to the plaintiff an automobile, which, unknown to plaintiff, was subject to a mortgage given by the husband to the party of whom he purchased the car. After the marriage relation had been terminated by decree of divorce, the mortgagee took the car from the possession of plaintiff and began foreclosure proceedings; she then paid him $981.36 to redeem the car. This action of assumpsit was brought to recover the sum so paid, with interest. At the conclusion of the plaintiff's case the presiding Justice directed the jury to return a verdict for defendant. The case is before us upon exceptions to this ruling.

The ruling was clearly right. As between the parties the car was a gift from the husband to the wife. There was no implied warranty that the car was free from encumbrance.

The defendant's liability, if any, must rest upon some contract between the parties. The only contract between them, from which an undertaking on his part could arise that the car would be free of incumbrance, is thus stated by the plaintiff: "If I should marry him, it (the car) was mine and he would give it to me, and he agreed that if I would marry him that he would give me the car as mine, for me to go and come with as I wanted to." This agreement was made in January 1920; the parties were married February 7, 1920. The car was purchased in May following.

The agreement was unquestionably made in consideration of marriage, and not being in writing, was void under R. S., Chap. 114, Sec. 1, Par. III. *Lloyd* v. *Fulton*, 91 U. S., 479. Law. Ed. Book 23, Page 363. In re Willoughby, 11 Paige Ch. 257.

Exceptions overruled.

WILLARD P. HAMILTON et als.

vs.

CARIBOU WATER, LIGHT & POWER COMPANY.

Aroostook. Opinion July 8, 1922.

The Public Utilities Commission is not a court, though clothed with certain judicial powers. Its functions are mainly legislative and administrative. Acting within its powers its orders and decrees are final except as a review by the regularly constituted courts is authorized by the act creating it, and which under the act only relate to questions of law. This court will not review the evidence on which the findings of the commission are based unless it is claimed that a finding of the commission is without any substantial evidence to support it.

The bill of exceptions filed in this case does not conform to the practice established in this court, nor have the commission found the facts upon which its rulings were based. The question argued in the brief of counsel cannot, therefore, be fully determined in these proceedings.

The commission having found that the water furnished by the utility in this case was unfit for drinking purposes this court cannot say as a matter of law that the rates fixed by the commission are unreasonable and unjust. They may be all that the service is reasonably worth to the consumer.

It is clearly the duty of the commission under the act to set forth the facts, at least, if requested by any interested party, upon which its rulings are based; otherwise the remedy provided by the statute in case of erroneous rulings may be rendered futile.

The commission not having made any findings as to the value of the property, the income and operating expenses of the utility, this court cannot determine upon the bill of exceptions in this case that the rates are confiscatory. In case they prove to be confiscatory they may be corrected upon a new petition. Courts of equity in such cases have also furnished relief.

On exceptions. *Willard P. Hamilton et als.* v. *defendant.* Re Investigation by the Public Utilities Commission. And *H. H. Whitney* v. *defendant,* were the three matters in which the Commission rendered decisions, and the Caribou Water, Light & Power Company in each instance alleged exceptions, and the matters went to

the Law Court for determination. The petitioners alleged that the water supplied by said Company was impure and unfit for domestic use; that the present source of supply was contaminated by surface drainage and sewage, and that there was no efficient system of purification, yet the Company continued to supply water and to charge the same rates as if the water were pure. The Caribou Water, Light & Power Company filed with the Commission its schedule of rates, effective January 1, 1919, whereby certain increases were proposed to be made in the schedule of rates and charges of that Company on file with the Commission at that time. Exceptions overruled.

The case is fully stated in the opinion.

W. K. Hamilton, Cyrus F. Small and Pattangall & Locke, for complainants.

Powers & Guild, for respondents.

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

WILSON, J. This case comes before this court on exceptions to an order and decree of the Public Utilities Commission.

Questions are raised and argued in the briefs of counsel which are not properly before this court upon the bill of exceptions presented or cannot be determined upon the facts found by the Commission. But since the practice in such proceedings has not become established, the questions raised will be considered so far as the case before us will permit.

Though clothed with certain judicial powers, the Public Utilities Commission is not a court in the strict sense of the term. Its functions are mainly legislative and administrative and not judicial. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 225-227. Acting within its powers, its orders and decrees are final except as a review thereof by the regularly constituted courts is authorized under the Act creating the Commission.

Such and the only power of review is found in R. S., Chap. 55, Sec. 55, as amended by Chapter 28, Public Laws 1917, and relates only to questions of law. "Questions of law may be raised by alleging exceptions to the rulings of the Commission on an agreed statement of facts, or on facts found by the Commission."

The facts on which the rulings of the Commission are based must be either agreed to by the parties or be found by the Commission. Facts thus determined upon are not open to question in this court, unless the Commission should find facts to exist without any substantial evidence to support them, when such finding would be open to exceptions as being unwarranted in law.

A bill of exceptions under this statute should accord with the general practice in the courts and comply with the requirements laid down in *Jones* v. *Jones*, 101 Maine, 447, 450; *Feltis* v. *Power Co.*, 120 Maine, 101. It should not be general, but should specifically set out in what respect the party excepting is aggrieved.

An examination of the findings and orders of the Commission and the bill of exceptions shows that neither has the requirements of the statute in respect to findings by the Commission, nor the practice in the courts in the making up the bill of exceptions, been complied with.

The only facts found by the Commission were, that the water supplied by the Utility was not suitable for drinking by reason of pollution, and that the rates filed by the Company with the Commission were unreasonable, unjust and unlawfully discriminatory, the reasonableness of rates being a mixed question of law and fact.

To this order the Company filed its exceptions alleging generally that it was erroneous in law. Counsel in their brief, however, argue as grounds for their exceptions: (1) that there is no evidence justifying the rates fixed by the Commission; (2) that in fixing the rates the Commission disregarded certain requirements of the statutes upon which its authority to fix rates is based; (3) that the rates fixed by the Commission are so low as to be confiscatory and therefore unlawful.

The exceptions cannot be sustained on the first ground. The findings of the Commission upon questions of fact must be given the weight and effect due to the decisions of a tribunal authorized by law and qualified by training and experience. This court will not review the evidence upon which such findings are based. Only in case its findings of fact are unsupported by any substantial evidence may the court hold them erroneous as a matter of law and subject to exceptions. The Commission having found that the water furnished by the Company is unfit for drinking purposes, this court cannot say as a matter of law that the rates filed by the Company

were reasonable and just and those ordered by the Commission are unreasonable and unjust. The latter may be all the service is reasonably worth to the consumer.

Neither can we say upon its findings that the Commission disregarded any of the elements prescribed by the statute as the basis for determining what are reasonable rates. While their findings of fact do not show what the facts were on which their order was based, except the impurity of the water, we cannot assume that they disregarded plain requirements of the law.

Since the burden is upon the Utility which sets up and relies upon such a contention, it is clearly the duty of the Commission under the statute, at least, if requested by any of the interested parties, to set forth in its orders and decrees the facts on which its order is based, otherwise the remedy provided by the statute for any erroneous rulings of law may be rendered futile.

As to the third objection raised by counsel that the rates fixed by the Commission are confiscatory, the court is confronted by the same conditions. The Commission not having made any findings as to the value of the property devoted to the public use, or determined the amount of its income and operating expenses, upon the case as presented by the findings of the Commission and the respondent's bill of exceptions we are unable to say that the rates are confiscatory. Evidence was introduced as to values, income and operating expenses, but this court has no power to determine facts, nor do we think it warranted in assuming that the Commission disregarded the evidence in arriving at its conclusions.

This court and the Federal Supreme Court, however, have repeatedly said that the rates charged by a Utility must be reasonable both to the Utility and to the consumer. The public is entitled to demand that no more be exacted for the service of a public utility than the services rendered are reasonably worth. *Smyth* v. *Ames*, 169 U. S., 466, 547; *Kennebec Water Dis.* v. *Waterville*, 97 Maine, 185, 202. The reasonableness of rates relates both to the company and to the customer. "Rates must be reasonable to both, and if they cannot be to both, they must be to the customer." *Water Dis.* v. *Water Co.*, 99 Maine, 371, 380.

It would be quite as objectionable to take from the consumer more than the service was reasonably worth, as it would to deprive the Company of a fair return upon a fair value of its property. If the

rates established represent the maximum reasonable value of the service to the consumer, it cannot be said that they are confiscatory as to the Company, whatever may be the result upon its returns.

Since the findings of the Commission do not disclose any facts on which the exceptions filed by the respondent company can be sustained, the exceptions must be overruled. In case the rates established by the Commission prove in practice to be confiscatory, they may be corrected upon a new petition under R. S., Chap. 55. Courts sitting in equity have also in such cases granted relief. *Prentis* v. *Atlantic Coast Line*, supra; *Smyth* v. *Ames*, supra; *Bronx Gas & Electric Co.* v. *Pub. Service Commission*, 180 N. Y., Supp. 38.

Exceptions overruled. The Clerk of this Court to so certify to the Clerk of the Public Utilities Commission.

In Re Caribou Water, Light and Power Company.

Aroostook. Opinion July 15, 1922.

The Public Utilities Commission may order an increase of rates over those fixed in a contract between a water, light or power company and the inhabitants of a town, consumers, which would not ipso facto amount to an impairment of the contract nor a taking of property "without due process" in violation of the constitutional provisions. In this State the Public Utilities Commission has no authority to measure in any part the rates that should be paid by a municipality, by the amount of taxes assessed upon the property of the utility company.

In the instant case the Commission not having found as a matter of fact that the contract was in part executed by the compromise or release of the claim of the town against the Company, and this court having no power to review the evidence and determine facts, the issues raised by the town in its brief cannot be fully determined upon its bill of exceptions.

The Commission where the rates fixed by contract are not discriminatory within the definition of the statute, in determining whether they are unjust and unreasonable should take into consideration the full sum paid for the service: not only the annual payments, but also any sum or consideration paid in advance at the inception of the contract.

On exceptions. The Caribou Water, Light and Power Company, is a corporation for furnishing water, light and power to municipalities and their inhabitants for domestic purposes, and for fire protection. In 1903, the town of Caribou entered into a contract with the corporation for water for fire protection. Under this contract hydrant rentals were fixed at a certain amount for a period of forty years, and as a further consideration, the town should pay annually such sum as might be assessed against the company as taxes. In January, 1921, the corporation filed a petition with the Public Utilities Commission, claiming that by increased cost of operation and maintenance, the rates fixed under the contract were insufficient to enable it to continue to furnish water in accordance with the conditions of the contract. Upon a hearing the Commission ordered an increase of one thousand dollars in the contract rate, and that in addition thereto ordered that the town should pay each year a sum equal to the amount assessed for such year as taxes against the company. To this order of the Commission the town of Caribou excepted. Exceptions sustained.

The case is fully stated in the opinion.

Powers & Guild, for the Caribou Water, Light & Power Company.

Pattangall & Locke, Cyrus F. Small and W. P. Hamilton, for the town of Caribou.

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

WILSON, J. On bill of exceptions of the town of Caribou to rulings by the Public Utilities Commission. According to the facts found by the Commission and the bill of exceptions, the rulings excepted to involve the reasonableness of rates for public hydrants and other municipal service, and particularly the effect of a contract entered into between the town of Caribou and the Water Company in which the rates for such service were fixed for a period of practically forty years from March 24th, 1903, and also the authority of the

Commission, as a part of the rates for such service, to order the town to repay to the company such sums annually as are assessed against it for taxes.

As in the recent case of *Hamilton* v. *Caribou Water, Light and Power Co.*, the facts found by the Commission are insufficient for a full determination by the court of the main issues raised by counsel, nor does the bill of exceptions comply with the established practice in this court. The court will, however, as in the case referred to, consider and dispose of the case as presented so far as the facts found by the Commission will permit.

From the findings of the Commission it appears that a contract was entered into by the town and Water Company in 1903, under which the company agreed to furnish water for a certain number of hydrants at a fixed annual sum and additional hydrants at fixed annual rates, and also to furnish water free for certain public buildings, street sprinkling and other public purposes. The Commission also find that the rates established in said contract are unreasonable, unjust and inadequate, in that the amount received for fire protection and other municipal purposes is too small and does not bear a proper relation to the total revenue of the company.

The town contends, however, that the evidence discloses that a part consideration for the rates established in the contract of 1903 was the release of a claim which the town had against the company under a prior twenty-year contract entered into in 1889, which claim had been judicially determined, though not reduced to an amount certain, *Caribou* v. *Caribou Water Co.*, 96 Maine, 17; that in settlement of this claim or in consideration of the waiver thereof by the town the present contract was entered into, in which the rates for the municipal service were measurably lower than those provided for the same service in the prior contract of 1889, under which the claim arose, and which the present contract superseded; that the effect of such release or waiver was that of a part payment in advance for the service to be rendered by the company under the present contract, and to this extent, the contract being in part executed, the rates established therein cannot be disturbed and new rates fixed by the Commission without violating the State and Federal constitutions.

Though essential to the full determination of this case, the Commission makes no findings upon this point except to say: "Counsel for the Town urges that this contract ought not to be disturbed

because as he alleges the Town surrendered certain valuable property rights at the time the contract was made. The facts alleged, however, if proved, are not in our opinion sufficient to remove this contract from the effect of the decision of this Commission in the Lincoln Water Co., case sustained by our Court in 118 Maine, 382."

An examination of this statement, however, shows that it does not fully state the contention of the town, which is, that it not only surrendered up a valuable property right, but that such surrender or release constituted a part payment in advance for the service to be furnished under the new contract.

The question may be raised as to whether the evidence before the Commission would have warranted a finding that the waiver or release of its claim by the town under the old contract amounted to or was understood by the parties to be of the nature of a part payment in advance for the service to be furnished by the company under the present contract, or whether the town in view of the nature and origin of its claim simply waived it in consideration of the execution of a new contract under which it was to have additional service at reduced rates, which contract it must be held to have entered into with the full knowledge that if at any time the rates therein fixed become unjust and unreasonable, the State in the exercise of its police powers might fix new rates.

Upon this point the court expresses no opinion, as it is not its province to determine facts in this class of cases. But conceding for the moment, as the Commission apparently intended in its ruling upon this point, the full contention of the town, would the order by the Commission increasing the rates over those established in the contract of 1903 necessarily amount to an impairment of that contract nor the taking of property without "due process" in violation of the constitutional provisions?

We think not. Assuming for example, that the town at the execution of the contract had actually paid in advance in consideration of the service to be furnished by the company the sum of ten thousand dollars, and also obligated itself to pay annually in addition thereto a stated sum per unit of service, the mere fact that it had paid in advance a part of the agreed price for the service to be furnished would not deprive the State from considering all the circumstances and determining upon all the facts whether the total amount received

by the Utility under the contract constituted reasonable and just rates for the service furnished.

While there are cases where the courts have held that a release of a right or claim, or the compromise of a suit, or even the transfer of property rights, as a right of way, have not prevented the State from establishing new rates without regard to the claim released or the property conveyed, *Louisville etc., Rwy.* v. *Mottley*, 219 U. S. 467; *Gas Co.* v. *Public Service Com.*, 73 W. Va., 57; *Seaman* v. *Rwy. Co.*, 127 Minn., 180; *Hite* v. *C. I. & W. R. R. Co.*, 284 Ill., 297, 299; in all these cases, however, the rates established in the contract were clearly discriminatory, and there was in each case either a State or Federal statute declaring all such discriminatory rates to be unlawful.

But where, as in the case at bar, the rates established in the contract are not discriminatory within the definition of our statute, and the contract is valid until the Commission shall first have determined after hearing that the rates fixed therein are unjust and unreasonable, In re *Lincoln Water Co.*, 118 Maine, 382, when they then become unlawful, R. S., Chap. 55, Sec. 6, the Commission in determining whether they are unjust and unreasonable should, we think, take into consideration the full sum paid for the service, not only the annual payments, but also any sums or consideration paid in advance at the inception of the contract. Once determined to be unreasonable they become unlawful and the contract cannot be enforced, whereupon the Commission may establish such new rates as it determines upon all the facts to be reasonable and just.

But again assuming as contended by the town that the release or waiver of its claim under the prior contract was in the nature of an advance and partial payment, the findings of the Commission do not show whether it took it into consideration in determining whether the rates under the present contract were unreasonable, unjust and inadequate. The inference, perhaps, is strong that it did not, but as the exceptions must be sustained on another ground, if it failed to do so, it may correct the error upon another hearing, provided, of course, it first determines that the release or waiver of its claim by the town was intended by the parties as in the nature of part payment for the service to be furnished under the present contract, or that such was its legal effect.

In arriving at these conclusions we have not overlooked the cases of *Schiller Piano Co.* v. *Ill. Utilities Com.*, 288 Ill., 580; *Village of*

Long Beach v. *Long Beach Power Co.*, 171 N. Y. Supp., 824, or the decisions of the Ohio Court, the constitutional provisions of which State in some particulars differ from ours. We think these cases may be differentiated from the case at bar, or so far as they are in conflict with our conclusions should not be followed.

In fixing the new rates to be paid by the town, however, the Commission in addition to the specific sums ordered to be paid annually for hydrants, street sprinkling and other public uses, also ordered the town to repay to the Company the amount annually collected by it as taxes upon the property of the Company.

The town contends that the Commission is without authority to establish rates which are determined in this manner. We think there is force in this contention. Although relief from taxation by agreement for a consideration has been upheld by this court, *Water Co.* v. *Waterville*, 93 Maine, 586, it does not follow that a rate-making body has authority to measure in any part the rates which should be paid for the municipal service by the amount of the taxes assessed upon the property of the Utility, even though it undertakes to do so under the guise of making it a part of the amount to be paid by the town for the service furnished by the Utility.

The determination of what are reasonable rates under the Act creating the Public Utilities Commission in this State contemplates, we think, certain and definite rates, and not rates which may fluctuate from year to year by reason of the acts of some other body, as in this case the town and its Board of Assessors. The difference in the amount paid by the taxpayers according to such method and what we conceive to be the correct method may be small and in most cases very likely would be negligible, as the Utility is ordinarily entitled to receive from reasonable rates sufficient to meet its operating expenses including taxes, but in strict theory such sum should not come from the municipal rates alone, but from all classes of service. Taxes are always recognized as a part of the necessary operating expenses of a Utility to be borne by all the consumers in proportion to the value of the service received by them, and not by all the taxpayers of the town or city whether users of the service or not, as it must be, if the entire tax is taken out of the municipal rates in accordance with the order of the Commission in this case.

It may be a practical and effective way of restraining what we have no doubt is a natural tendency of municipal officials of meeting

increased municipal rates by increased valuation of the Utility's property, a practice which while it should be condemned, may not be legally circumvented by any automatic arrangement of elastic rates which contract and expand with the valuation and tax rate. A notice to the municipality that increased valuation and taxes will only produce further increase in rates, if requested by the Utility, would probably be just as effective. At least, it would be within the law.

The order of the Commission, therefore, in effect making the amount of the taxes collected of the company by the town each year in part a measure of what are reasonable rates to be paid by the town, being, as we think, unauthorized under the Public Utilities Act of this State, the exceptions by the town to the order of the Commission in these proceedings must be sustained.

Exceptions sustained. The Clerk of this Court to so certify to the Clerk of the Public Utilities Commission.

WILLIE E. CROSBY *vs.* CHARLES H. HILL.

Cumberland. Opinion July 19, 1922.

There is no common law lien for storage of an automobile, where the possession of the automobile is the result of a special contract. There is a common law lien for repairs on an automobile, unaffected by R. S., Chap. 96, Secs. 56 and 57, but such lien may be destroyed by mingling a lien claim with a non lien claim and demanding payment of both before releasing the property.

In the instant case the Holmes' note was not valid except as between the parties thereto, but this fact is not controlling, and is not essential except as giving the payee the right to sue.

The defendant did have a common law lien for repairs, which was not superseded or destroyed by the provisions of R. S., Chap. 96, Secs. 56 and 57. No new right is created by said sections. A new and additional remedy is created, and may be used by those persons, who, for their own reasons, do not wish to employ the remedy now provided by R. S., Chap. 96, Sec. 67 et seq.

The defendant mingled his lien claim and his non lien claim, and would not release the car without payment of both. In so doing he destroyed his right to detain the property, and relieved the plaintiff of the necessity of offering to pay the claim for repairs. The law does not require the useless act of tendering a part which the defendant says he will not receive.

On exceptions. This is an action of replevin to recover possession of an automobile. Defendant pleaded the general issue and title under a brief statement. The action was brought in the Northern Cumberland Municipal Court, where it was tried and judgment rendered for defendant, and plaintiff took an appeal to the Superior Court of Cumberland County, where it was tried at the October Term, 1921, before the presiding Justice without a jury and judgment rendered for the plaintiff. The defendant requested certain rulings which were refused by the presiding Justice and defendant excepted. Defendant also excepted to certain rulings made by the presiding Justice. Exceptions overruled.

The case is fully stated in the opinion.

Ralph M. Ingalls and D. Eugene Chaplin, for plaintiff.

Edgar F. Corliss, for defendant.

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

HANSON, J. This is an action of replevin, commenced in the Northern Cumberland Municipal Court, which came to the Superior Court for the County of Cumberland on appeal by plaintiff. The case was heard by the Justice of that court without the intervention of a jury.

The defendant filed a plea of the general issue, and by brief statement sets up title to the property in himself.

The presiding Justice found for the plaintiff, and the case is before the Law Court on defendant's exceptions.

The facts found by the sitting Justice are as follows:—

"On the thirteenth day of July, A. D. 1920, the plaintiff, Willie E. Crosby, was the owner of a certain motor vehicle, described in the writ, perhaps by way of euphemism, as 'one five passenger touring automobile of Ford make.'

"On that day he sold the car to one Harry Chaplin, receiving in payment therefor a certain amount in cash and a Holmes' note, in

the usual form, for one hundred and fifty dollars. This note was recorded August 2, A. D. 1920, in the office of the Town Clerk of Bridgton, Maine, but Chaplin, the maker of the note, was not at that time a resident of Bridgton.

"The defendant, Charles H. Hill, is and was at the time, the owner and proprietor of a garage in Harrison, Maine, and does a general garage business, including the operation of a repair shop for automobiles, and in addition thereto, makes a practice of storing automobiles, so far as the capacity of his premises may admit, for such owners as may from time to time have occasion to ask that their automobiles be stored, for longer or shorter periods. I do not understand that this latter phase of the business is conducted in any different manner or on any different basis from what it is by practically every similar garage in the State of Maine. The defendant does not in any other sense than above recited hold himself out as a warehouseman; nor does he keep separate books of account or volunteer the statutory formalities incident to the business of a warehouseman.

"At some time, after the sale of the automobile above recited, Chaplin, the purchaser, took it to the garage of the defendant and ordered certain repairs done upon it, which were done and which consisted in the furnishing of labor and materials by the defendant. After the repairs were completed, Chaplin, not being in funds for the payment of the bill, consented that the car should remain in the defendant's garage and promised that he, the said Chaplin, would pay the defendant reasonable storage thereon until such time as he might find himself able to pay the charges for the repairs.

"The defendant did, accordingly, retain the car in his garage for a period of about five months, at which time the plaintiff, still in possession of his unpaid Holmes' note, which stipulated that the automobile remain his property until paid for, went to the defendant, informed him thereof, and demanded possession of the car, which demand was refused, the defendant then informing him of his bill for repairs and storage and making claim of a lien therefor. Whereupon this action was commenced.

"At the time of the commencement of the action the defendant had taken no steps, in accordance with the provisions of Sections 56 and 57 of Chapter 96 of the Revised Statutes to perfect his lien."

The defendant's attorney requested the presiding Justice to rule as to matters of law as follows:—

1. That the Holmes' note not being recorded in the town in which the purchaser resided at the time of the purchase, it was not valid except as between the plaintiff and Harry Chaplin.

2. That the defendant has a common law lien for storage of said automobile prior to the commencement of this action.

3. That the lien of the defendant on this automobile is sufficient to maintain a defense under the pleadings of the defendant.

4. That before this action was commenced, payment or tender of payment of said lien of the defendant was an essential prerequisite to the plaintiff's maintaining this action.

5. That Chap. 96, Secs. 56 and 57, of the R. S., do not supersede and destroy the common law lien.

The presiding Justice declined to rule as requested in each instance and the defendant excepted.

The Justice presiding ruled as follows:—

(1) "That, whether or not at the time of completing the repairs upon the automobile the defendant might have lawfully claimed and had a lien upon the automobile therefor, the lapse of five months thereafter, without his taking any steps to perfect a lien, operated to invalidate and extinguish any such lien.

(2) "That, since the contract made between the defendant and Chaplin for the storage of the car was merely that it should be stored and storage paid, and not that there should be a lien for storage, no such lien accrued.

(3) "That no such title in the defendant existed by virtue of any lien, either for repairs, or for storage, as would support the defense herein set up."

The sections of the statute relied upon by the plaintiff read as follows:

"Sec. 56. Whoever performs labor by himself or his employees in manufacturing, or repairing the ironwork or woodwork of wagons, carts, sleighs, and other vehicles, by direction or consent of the owner thereof, shall have a lien on such vehicle for his reasonable charges for said labor and for materials used in performing said labor, which takes precedence of all other claims and incumbrances on said vehicles, not made to secure a similar lien, and may be enforced by attachment at any time within ninety days after the labor is performed and

not afterwards, provided, that a claim for such lien is duly filed as required in the following section; said lien, however, shall be dissolved if said property has actually changed ownership prior to such filing."

"Sec. 57. The lien mentioned in the preceding section shall be dissolved unless the claimant within thirty days after the labor is performed, files in the office of the clerk of the town in which the owner of such vehicle resides, a true statement of the amount due him for such labor and materials, with all just credits given, together with a description of the vehicle manufactured or repairs sufficiently accurate to identify it and the name of the owner, if known, which shall be subscribed and sworn to by the person claiming the lien, or by some one in his behalf, and recorded in a book kept for that purpose by the clerk, who is entitled to the same fees therefor as for recording mortgages. No inaccuracy in such statement relating to said property, if the same can be reasonably recognized, or in stating the amount due for labor or materials invalidates the proceedings, unless it appears that the person making it wilfully claims more than his due."

The exceptions involved were argued ably and at length by counsel on each side of the case. The points raised, and necessary for a solution of the contentions of the parties are summarized and decided as follows:—

Held:

1. The Holmes' note was not valid except as between the parties thereto, but this fact is not controlling, and is not essential except as giving the payee the right to sue.

2. The defendant had no common law or other lien for storage. According to the facts found by the sitting Justice, that, "after the repairs were completed, Chaplin, not being in funds for the payment of the bill, consented that the car should remain in the defendant's garage and promised that he, the said Chaplin, would pay the defendant reasonable storage thereon until such time as he might find himself able to pay the charges for repairs," the rights of the parties were governed by the special contract.

In such circumstances there could be no lien. *Lewis* vs. *Gray*, 109 Maine, 128. 39 L. R. A. (N. S.) 1164.

3. The defendant did have a common law lien for repairs, which was not superseded or destroyed by the provisions of R. S., Chap.

96, Secs. 56 and 57, *supra*. No new right is created by said sections. A new and additional remedy is created, and may be used by those persons, who, for their own reasons, do not wish to employ the remedy now provided by R. S., Chap. 96, Sec. 67 et seq.

4. But in the instant case the defendant mingled his lien claim and his non lien claim, and would not release the car without payment of both. In so doing he destroyed his right to detain the property, and relieved the plaintiff of the necessity of offering to pay the claim for repairs. In the circumstances the plaintiff had the right to take the defendant at his word, that he would not deliver the car without payment of both charges. The law does not require the useless act of tendering a part which the defendant says he will not receive.

5. The plaintiff, the true owner, therefore had a right to replevin his car. It is unnecessary to discuss the other exceptions, or pleadings.

The entry will be,

Exceptions overruled.

STATE

vs.

INTOXICATING LIQUORS, VINO MEDICAL COMPANY, INC.
Claimant, Appellant.
(3 cases)

Androscoggin. Opinion July 26, 1922.

Chapter 235 of Public Laws of 1919, so far as it purports to incorporate by reference into the section thereby amended, future enactments of Congress establishing a rule, test, or definition of intoxicating liquors, and declaring such liquors to be intoxicating within the meaning of Chap. 127 of the R. S., is invalid. A question propounded to experts, which combines two inquiries and calls for two opinions, is rightly excluded, if either part of the question is not a proper subject of expert inquiry. Such questions must contain an assumption of facts upon which the desired opinion can be based.

Under a constitution in which the legislative power is vested as provided in the Constitution of Maine, such legislation constitutes an unlawful delegation of legislative power, and an abdication by the representatives of the people of their power, privilege and duty to enact laws.

Whether either inquiry in the following question propounded to an expert: "In your judgment is it practicable for an ordinary person to commonly and ordinarily drink Vino Tonic as a beverage and in such quantities as to produce intoxication?"—is within the field of expert testimony, quaere. The question, however, was rightly excluded; it did not contain any assumption of facts upon which the desired opinion could be based; nor does the entire record disclose a statement of facts as to the ingredients of the liquor in question, except its alcoholic content, upon which an opinion of value could be based.

That portion of the charge to which claimant excepted is unobjectionable.

On exceptions. This is an action in which the Vino Medical Company, Inc., of New York filed its claim for some 2,210 bottles of "Vino Tonic" seized by the deputy sheriffs of Androscoggin County as an intoxicating liquor, intended for unlawful sale. The contention of the claimant was that the preparation so seized was not an

intoxicating liquor within the meaning of the statute. The State, on the other hand, contended that it was an intoxicating liquor within the meaning of that particular provision of the statute providing that "this enumeration shall not prevent any other pure or mixed liquors from being considered intoxicating." Claimant called two expert witnesses, and asked of each as an expert a question, both of which the presiding Justice excluded, and claimant excepted. Claimant excepted also to a part of the charge. Exceptions overruled. Judgment for the State. Liquor forfeited.

The case is fully stated in the opinion.

Benjamin L. Berman, County Attorney, for the State.

George S. McCarty, for claimant.

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

MORRILL, J. The facts are stated in the bill of exceptions, as follows:

"This was an action in which the Vino Medical Company, Inc. of New York, sought to have returned to it, as owner, some 2,210 bottles of "Vino Tonic," seized by the Deputy Sheriffs of Androscoggin County as intoxicating liquor intended for unlawful sale. "Vino Tonic," the alleged intoxicating liquor, contained 18.3% of alcohol, by volume, according to Mr. Andrews, a state witness. The amount of alcohol in the preparation was not seriously disputed. In addition to alcohol, an undetermined amount of cascara and aloes were among the remaining ingredients. The claimant contended that the preparation was not an intoxicating beverage under the law. Whether the preparation was an intoxicating beverage or not was practically the only question involved in the hearing."

An expert witness, called by the claimant, who had been a druggist since 1894, and was familiar with drugs, their preparation and their effects upon the human system, was asked the following question:

"In your judgment is it practicable for an ordinary person to commonly and ordinarily drink Vino Tonic as a beverage and in such quantities as to produce intoxication?" which question was excluded, and to the exclusion thereof exception was duly and seasonably taken.

Another expert witness, called by the claimant, who had had experience in the analysis of preparations containing alcohol, was familiar by experiments with its effect upon the human system, and particularly familiar with the action upon the human system of cascara and aloes, was asked the following question:

"With your familiarity with those experiments, your knowledge of the effects of alcohol, your knowledge of the drugs cascara and aloes, I will ask you, if, in your judgment, it is practicable for an ordinary person to commonly and ordinarily drink Vino Tonic as a beverage and in such quantities as to produce intoxication?" The question was excluded and to the exclusion thereof exception was duly and seasonably taken.

In his charge to the jury, the presiding Justice gave the following instruction:

"Here is the bare fact before you for consideration, the bare issue of fact. Under the rules of law that I have given you, was this, in fact, an intoxicating liquor, a liquor containing alcohol, or a sufficient quantity to produce intoxication, and if containing alcohol of the quantity stated, was it capable of being used for tippling purposes or as a beverage and was it also capable of being used for such purpose to the extent of producing intoxication? It is not a question of whether ordinary persons that are not drinking persons would find it an agreeable drink or would refuse to use it. It is a question whether any person who wanted to use it, wanted to use it for intoxication, was able to drink it, to use it as a beverage to the extent of intoxication." To this instruction the claimant seasonably excepted.

The entire charge is made a part of the bill of exceptions.

It is apparent that the questions propounded to the witnesses and excluded, and the instructions to which exceptions were taken, were not based upon Chap. 235 of the Public Laws of 1919, amending R. S., Chap. 127, Sec. 21. Prior to the passage of that amendment, the court had held that as to the liquors enumerated by name in Section 21, including cider when kept and deposited with intent to sell the same for tippling purposes or as a beverage, the actual intoxicating quality of the liquor is not an issuable fact. When it appears that a liquor comes within the scope of the forbidden enumeration, its intoxicating character becomes fixed by law and its non-intoxicating character, as a matter of fact, becomes entirely immaterial with

respect to the application of the statute. *State* v. *Frederickson,* 101 Maine, 37. As to other liquors containing alcohol, not within the enumeration, the intoxicating quality of the liquor is an issuable fact for the determination of a jury. *State* v. *Piche,* 98 Maine, 348.

But the amendment of 1919 changed the phraseology of Section 21, to read as follows:

"No person shall at any time, by himself, his clerk, servant or agent, directly or indirectly, sell any intoxicating liquors, of whatever origin; wine, ale, porter, strong beer, lager beer and all other malt liquors, and cider when kept or deposited with intent to sell the same for tippling purposes, or as a beverage, and all distilled spirits, as well as any beverage containing a percentage of alcohol, which by federal enactment, or by decision of the Supreme Court of the United States, now or hereafter declared, renders a beverage intoxicating, are declared intoxicating within the meaning of this chapter; but this enumeration shall not prevent any other pure or mixed liquors from being considered intoxicating."

This act was approved April 4, 1919. The eighteenth amendment to the Constitution of the United States had been proposed to the states by resolve of December 18, 1917, had been ratified by the legislature of this State, January 8, 1919, and its ratification by the requisite number of States had been proclaimed January 29, 1919.

On October 28, 1919, the Congress enacted the Volstead Act designed to provide effective enforcement of the 18th Amendment, and saw fit to adopt therein the following definition:

"When used in Title II and Title III of this Act the word 'liquor' of the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spiritous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one half of one per centum or more of alcohol by volume which are fit for use for beverage purposes."

It is thus clear that, if the amendment of 1919 is valid, the intoxicating quality of liquor not among those enumerated in R. S., Chap. 127, Sec. 21, but containing one half of one per centum or more of alcohol by volume, is immaterial as an issuable fact, (*Ruppert*

v. *Caffey*, 251 U. S., 264) and the exceptions must be overruled; upon such an hypothesis the only disputed issue of fact in the present case was whether the liquor in question was "fit for use for beverage purposes"; this question the presiding Justice fairly submitted to the jury. True the presiding Justice included the element of the intoxicating quality of the liquor, which the jury found in favor of the State; but this part of the charge imposed an unwarranted burden upon the State, as to which the claimant cannot be heard to complain. The questions propounded to the experts would likewise be objectionable and properly excluded; because each included the element of the intoxicating quality of the liquor.

The validity of Public Laws 1919, Chapter 235, although frequently challenged, has not been heretofore authoritatively declared, and Justices sitting at nisi prius have very properly instructed juries upon the assumption of its validity. It now becomes necessary to consider the question with a view to an authoritative decision of that question.

It is clear upon reading the Act of 1919 that the legislature intended thereby to adopt, and incorporate into the statute law of the State, any definition of the term "intoxicating liquors," based upon the presence of a specified percentage of alcohol, then or thereafter declared by congressional enactment or by decision of the Supreme Court of the United States. Whether it was intended that such definition should change from time to time, automatically, as the federal enactment might change, need not be decided.

We are not aware of any objection on constitutional grounds to the adoption, by legislative enactment, of any existing definition or standard enacted by Congress, by which the intoxicating character of liquor shall become fixed by law in this State. *State* v. *Holland*, 117 Maine, 289. But we have been unable to ascertain that such definition or standard had been declared prior to April 4, 1919, either by Congress or by the Supreme Court of the United States; the test of one half of one per cent. of alcohol by volume for intoxicating liquor was first enacted by Congress in the Volstead Act, which was passed over the President's veto on October 28, 1919, a statement in chronological order of the facts relating thereto will be found in *Ruppert* v. *Caffey*, supra.

The precise question presented for our decision, therefore, is whether the Act of April 4, 1919, so far as it purports to incorporate

by reference into the section thereby amended, future enactments of Congress establishing a rule, test or definition of intoxicating liquors, and declaring such liquors to be intoxicating within the meaning of Chap. 127 of the Revised Statutes, is valid.

We have no hesitation in answering the question in the negative. Under a constitution in which the legislative power is vested, as in the Constitution of Maine, "in two distinct branches, a House of Representatives, and a Senate, each to have a negative on the other and both to be styled the Legislature of Maine," subject to the reservations of the initiative and referendum amendment, such legislation constitutes an unlawful delegation of legislative power, and an abdication by the representatives of the people of their power, privilege and duty to enact laws. The authorities are so unanimous on the question that extended citation is unnecessary. Cooley's Const. Lim. 6 ed. p. 137. *Brodbine* v. *Revere,* 182 Mass. 600, and cases there cited. Opinion of the Justices. (Mass.) 133, N. E. 453.

It remains for us to consider the exceptions without reference to the amendment of 1919.

The exceptions to the exclusion of the questions propounded to the experts must be overruled. Both questions combined two inquiries and called for two opinions: Whether it was practicable for an ordinary person to commonly and ordinarily drink Vino Tonic as a beverage, and secondly, whether it was practicable to so drink it as to produce intoxication. If either part of the question is not a proper subject for expert testimony, the exclusion was right. It may well be doubted whether either inquiry was within the field of expert testimony. "The opinions of experts are not deemed admissible where the subject of the inquiry is one of general observation or experience, and not such as require any peculiar habits or study in order to qualify a man to understand it." *Pulsifer* v. *Berry,* 87 Maine, 405. In the case last cited the court quoted the following language from *Ferguson* v. *Hubbell,* 97 N. Y., 507; 49 Am. Rep., 544:

"It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of the inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction the subject of the inquiry must be one relating to some trade, profession, science or art in which persons

instructed therein by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence."

This seems to us to be the true rule, and applying it to the questions here propounded, it is difficult to discover any substantial reason why the jury could not draw correct inferences on the subject matter from the testimony of witnesses testifying to facts as to the use of Vino Tonic, both as to its fitness for use as a beverage and its qualities to produce intoxication. See note to *Ferguson* v. *Hubbell* in 49 Am. Rep. 544.

But we do not deem it necessary to place our decision on that ground. The witnesses were not asked to testify as to facts; they were asked to give opinions as to Vino Tonic, without any apparent knowledge of its contents except the knowledge of Mr. Jordan as to its alcoholic content, referred to in the charge; the questions did not contain any assumption of facts. Indeed upon examination of the entire record there is no statement of facts as to the ingredients of this liquor, except its alcoholic content, upon which an opinion of value could be based. "In addition to alcohol, *an undetermined amount* of cascara and aloes were among the remaining ingredients." What those "remaining ingredients" were does not appear. "Cascara," from the Spanish, means bark; but whether the ingredient was cascara amarga (Honduras bark) or cascara sagrada, both of which are used in medicine, the record does not disclose. This court has said: "Concerning the form and scope of the hypothetical question and the extent and limitation of its assumption of facts and circumstances much must be left to the discretion of the presiding Justice. In framing a hypothetical question the practice is for the question to contain the assumption of the existence of such facts and conditions as the jury may be authorized to find upon the evidence as it then is, or as there may be good reason, to suppose it may thereafter appear to be." *Reid* v. *Steamship Co.*, 112 Maine, 34, 49. 3 Chamberlayne on Ev., Sec.

2461. We think that the rulings of the presiding Justice excluding the questions propounded were right.

In framing the third exception counsel has taken a portion of the charge consisting of four sentences and treated it as one instruction, to which he takes exceptions. In his brief he quotes the first part of that excerpt ending with the interrogation, and says that he has no fault to find with so much of the instruction quoted. The last two sentences he criticizes as not in harmony, in using the phrase "any person," with the rule laid down for the guidance of the jury in *Heintz* v. *Lepage*, 100 Maine, 545, and because "logically pursuing the court's instruction, it is not difficult to conclude that the intoxicating qualities of a questioned preparation are to be determined by the hazardous standard created by the misconduct of the most debauched and confirmed toper." We think that the passage is not fairly susceptible of such interpretation. In a charge occupying seven pages of the record the presiding Justice several times stated the issue in terms substantially identical with those which counsel now accepts as accurate. We do not think that the last two sentences declare any principle in conflict with the preceding sentences. The presiding Justice contrasted "ordinary persons who are not drinking persons" with "any person who wanted to use it, wanted to use it for intoxication." It seems to us hypercritical to say that the sentences criticized, taken in connection with the whole charge, could have misled the jury. It is men who want to use liquor, want to use it for intoxication, who commonly and ordinarily drink it as a beverage.

In each case the entry will be,

Exceptions overruled.
Judgment for the State.
Liquor forfeited.

CLARA E. SCOTT'S CASE.

Washington. Opinion September 8, 1922.

Method "C" in the Workmen's Compensation Act properly adopted for computation. On the facts there was evidence competent to sustain the award as to amount.

Appeal under Workmen's Compensation Act. The employee, one Leavitt, entered the employment of the St. Croix Paper Company on June 22, 1921, and worked until August 1, 1921, when he was injured, his weekly wages being $19.50. During the previous season he had worked for the same Company from August 1, 1920, to December 4, 1920, at which time the saw mill was closed until it reopened June 22, 1921. His wages during that season were 53 cents per hour for a ten-hour day. It was a seasonal employment. The chairman of the Industrial Accident Commission applied method "C" of Public Laws 1919, Chap. 238, Sec. 1, Par. IX in determining the "average weekly wages" and fixed the amount of compensation at two thirds of $19.50, or $13 per week for a period of 300 weeks from the date of the injury.

On appeal. The claimant is a dependent of William E. Leavitt deceased, who was what is known as a resaw man in the employment of the St. Croix Paper Company of Woodland. Death resulted from an injury received by him on August 1, 1921, in the course of and arising out of his employment. The chairman of the Industrial Accident Commission granted compensation under method "C" of the Workmen's Compensation Act, and the employer appealed. Appeal dismissed. Decree of sitting Justice affirmed with costs.

This case is fully stated in the opinion.

H. H. Murchie, for claimant.

Curran & Curran, for respondent.

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

CORNISH, C. J. This is an appeal by the employer from a decree awarding compensation under the Workmen's Compensation Act.

The facts are agreed upon. The claimant is a dependent of William E. Leavitt deceased, who was what is known as a resaw man in the employ of the St. Croix Paper Company of Woodland. Death resulted from an injury received by him on August 1, 1921, in the course of and arising out of his employment.

The single issue before this court is whether the Chairman of the Industrial Accident Commission erred as a matter of law in determining the compensation to be paid. This problem necessarily comprises two elements, first, the proper method to be adopted for computation, which is a question of law, and second, the amount awarded under such adopted method, which is a question of fact.

The Workmen's Compensation Act provides, generally speaking, for three different methods of computation, depending upon the facts arising under the particular claims. Public Laws 1919, Chap. 238, Sec. 1, Par. IX.

The facts of this case are that Mr. Leavitt entered the employ of the St. Croix Paper Company on June 22, 1921, and worked until August 1, 1921, the date of the injury, and for that period was paid the sum of $3.25 per day or a weekly wage of $19.50. During the previous season he had worked from August 1, 1920, to December 4, 1920, for which period he was carried on the payroll at the wage of fifty-three cents per hour for a ten-hour day. It was not a continuous but a seasonal employment, the mill in which Leavitt worked being closed from December 4, 1920, until it reopened on June 22, 1921. The average season for similar mills in that vicinity is seven months, from the first day of May to the first day of December.

1. The first prescribed method of computation is to be adopted when the injured employee has worked in the same employment in which he was working at the time of the accident during substantially the whole of the year immediately preceding his injury. It then becomes a mere problem in mathematics. "The average weekly wages" are determined by multiplying the average daily wage by three hundred, the number of working days in a year, and dividing by fifty-two, the number of weeks in a year. Public Laws 1919, Chap. 238, Sec. 1, Par. IX (a).

That method was not and could not be adopted here because Mr. Leavitt had not worked in this employment during substantially the whole year immediately preceding the injury.

2. The second prescribed method applies when although the injured employee has not worked the required time, the same mathematical computation can be made based upon the wages of some other employee of the same class who has worked substantially the whole of such immediately preceding year in the same or a similar employment, in the same or a neighboring place. Public Laws 1919, Chap. 238, Sec. 1, Par. IX, (b). *Thibeault's Case,* 119 Maine, 336.

This provision also is inapplicable in the pending case because the employment being seasonal, no employee can be found who will meet the requirement of substantially a whole year's work immediately preceding the accident.

3. This leaves the third method for consideration, which was obviously prescribed to meet the varied situations which paragraphs (a) and (b) could not fit. Paragraph (c), transposing the clauses for the sake of clarity, provides as follows: "In cases where the foregoing methods of arriving at the 'average weekly wages, earnings or salary' of the injured employee cannot reasonably and fairly be applied, such 'average weekly wages' shall be taken at such sum as shall reasonably represent the weekly earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time, having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar employment in the same or a neighboring locality."

The distinctions between method "c" and the previous "a" and "b" are clearly marked. In "a" and "b" the "average weekly wages, earnings or salary" are determined with mathematical exactness. It is a matter of multiplication and division. The quotient represents the weekly average in fact as well as in name. The factors are all present from which such accurate reckoning can be made. But in many cases, where those factors are lacking, as in the case at bar, some other method needed to be devised in order to fairly compensate injured workmen. The average weekly wage could not be computed in fact from actual earnings of a year, and therefore an arbitrary method must be found, and "c" is that arbitrary and, in a sense, artificial method. In "a" and "b" the average weekly wage is positively ascertained from given data. In "c" such wage is "taken" or assumed on an entirely different

basis. In "a" and "b" the basis of the average weekly wage is actual earnings for a year; in "c" the basis is the weekly earning capacity in the same employment at the time of the accident. Such earning capacity in "c" is substituted for actual earnings under "a" and "b", and is made to arbitrarily stand for and represent the average weekly wage called for by the act as the basis of recompense. It is average weekly wage in name but not necessarily in fact.

The chairman adopted method "c" in the case at bar, and there was no error in law in so doing. It was the only method applicable.

4. In applying this method the statute calls attention to certain possible factors but leaves the determination as to earning capacity to the sound judgment of the chairman.

Those factors are the previous wages of the injured employee in the same employment, but not for any stated period; the previous wages of other employees in the same or most similar employment in the same or a neighboring locality, but again not for any specified time; and of course the chairman should have regard for the actual wages of the employee at the time of his injury. From all these he is to fix a sum which shall "reasonably represent the weekly earning capacity at the time of the accident" in this employment. This calls for the exercise of judgment and discretion upon proven facts.

Such conclusion is not a matter of law reviewable on appeal if there is some competent evidence to support it. In the case at bar it appears that during the sawing season of 1920, Mr. Leavitt received $5.30 per day in the same employment. In the season of 1921 he had received $19.50 per week during the six weeks of his labor up to the time of the accident. It is further agreed by the parties that the wage being paid Mr. Leavitt at the time of the injury was a fair estimate or average of the wages paid men working in that employment in similar kinds of mills in Woodland during the season of 1921. All the facts, for which the statute says the chairman shall have regard in making up his estimate, were in evidence here, and from them all he fixed the weekly earning capacity at the time of the accident in this employment as $19.50, two thirds of which or $13 per week for a period of 300 weeks beginning August 1, 1921, he awarded as the amount of

compensation to which the claimant was entitled. There was certainly competent evidence warranting this conclusion.

Appeal dismissed.
Decree of sitting Justice affirmed with costs.

WILLIAM A. MCKENNEY et als.

vs.

ALTON B. FARNSWORTH et als.

York. Opinion September 9, 1922.

The last clause of Sec. 3 of Chap. 293 of the Public Laws of 1917 is unconstitutional, but the valid part of said Section 3 may be separated from the invalid part. The valid part of Section 3 does not delegate to the Commission powers that belong to the Legislature, nor deprive persons of their property without due process of law.

The real question in issue in this case is the constitutionality of Sec. 3 of Chap. 293 of the Public Laws of 1917.

This is a bill in equity and went to the Law Court on an agreed statement of facts. The plaintiffs are lobster fishermen of Kennebunkport, and the defendants are Alton B. Farnsworth, Harry C. Wilbur and E. W. Gould, Commissioners, constituting the Commission of Sea and Shore Fisheries of this State.

On the 28th day of July, 1921, the Commission gave notice of a hearing upon the advisability of a close time, within certain defined limits. The plaintiffs thereupon brought a bill in equity to restrain the Commission from giving effect to the proposed close time, upon the contention that the proposed action of the Commission "is based upon a statute which is unconstitutional and void, namely, section 3 of chapter 293 of the Public Laws of 1917," for the following reasons: "First,—Because said section would deprive persons of their property without due process of law. Second, Because by said section the Legislature has attempted to delegate

to said Commission powers that belong to the Legislature alone. Third, Because by said section the Legislature has attempted to delegate to said Commission powers to make rules and regulations which shall take precedence over provisions of existing statutes." Bill dismissed without costs.

The case is fully stated in the opinion.

John P. Deering, for plaintiffs.

Harry C. Wilbur, for the defendants.

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

SPEAR, J. This is a bill in equity and comes up on an agreed statement of facts, the salient points of which are as follows:

The plaintiffs are lobster fishermen of Kennebunkport, and the defendants are Alton B. Farnsworth, Harry C. Wilbur and E. W. Gould, Commissioners, constituting the Commission of Sea and Shore Fisheries of Maine. They will hereafter be called the Commission.

On the 28th day of July, 1921 the Commission gave notice of a hearing upon the advisability of a close time, within certain defined limits, upon lobster fishing along the coast near Cape Porpoise. The limits are immaterial to the issue.

The plaintiffs thereupon brought a bill in equity to restrain the Commission from giving effect to the proposed close time, upon the contention that the proposed action of the Commission "is based upon a statute which is unconstitutional and void, namely, section 3 of Chap. 293 of the Public Laws of 1917," for the following reasons: "First,—Because said section would deprive persons of their property without due process of law. Second,—Because by said section the Legislature has attempted to delegate to said Commission powers that belong to the Legislature alone. Third,—Because by said section the Legislature has attempted to delegate to said Commission powers to make rules and regulations which shall take precedence over provisions of existing statutes." Under these contentions the real question in issue is the Constitutionality of Section 3 of Chapter 293.

The last clause of Section 3 provides that the Commission may make rules and regulations which may "take precedence over any

then existing statute inconsistent therewith." There can be no controversy regarding the unconstitutionality of the last clause of that section and the defendants make none. The Legislature alone can make and repeal statutes. It cannot delegate its power to do so to any other authority. But it does not necessarily follow, because part of a statute is unconstitutional, that the whole is. Where the statute can be divided, and the valid separated from the invalid, it may be done. Such is the result of the unconstitutional clause in the present statute. This rule of construction is too familiar to require extended citation. *State* v. *Robb*, 100 Maine, Page 194.

The only unconstitutional act contemplated by the last clause of Section 3 is entirely independent of the rest of the section and will arise only when the Commission undertakes to promulgate a rule or regulation that is inconsistent with an existing act of the Legislature. It is only in such case that any rule or regulation of the Commission can come in conflict with any existing statute. Accordingly, whenever the Commission issues a rule or regulation that contravenes any existing act of the Legislature, such rule or regulation will be promptly declared invalid. It is evident, however, from an examination of the statutes relating to the subject matter of this case, that the proposed action of the Commission in the present case is not inconsistent with any existing statute. We are unable to find any statute that fixes a definite close time on lobsters within the proposed locality or in any other locality. The reason for the absence of such Legislation is apparent. It would be quite impracticable for a large body like the Legislature to gain that intimate information, which can be acquired only by practical experience and personal contact, with the numerous phases of the business which the great sea and shore fisheries involve, and which is patently essential to intelligent action in such matters as fixing close times, the locality, and the season of the year they should be applied to a particular locality; the times, manner or conditions of taking many kinds of fish; and the numerous other important things which only the man on the spot can fully understand. We are accordingly of the opinion that the last clause of Section 3 does not affect the constitutionality of the rest of the section except in the possible conflicts already mentioned.

We have considered the third reason first, since, if Section 3 were entirely unconstitutional, that would be the end of the case. For the same reason we consider the second contention before the first. This involves the right of the Legislature to delegate authority to the Commission to make rules and regulations concerning the sea and shore fisheries. Section 3 confers upon the Commission the following authority in this regard: Authority to make rules and regulations governing the time, manner and condition of taking fish, shell fish and lobsters, and declaring close time on such varieties and in such localities as they may determine. It also provides that such rules and regulations shall be made and such close time shall be declared after hearing, reasonable notice of which shall be given by publication to all parties concerned. The language of that section presupposes a close time on fish, shell fish and lobsters, but does not define when or where it shall be imposed. It has left the determination of those details to the Commission. And it seems to us that it was the only practicable way in which the Legislature could accomplish the end in view. The authority conferred is not a delegation of the legislative power. 11 R. C. L. 1042, Sec. 29. In the premises the Legislature declares without limitation or specification that within the coast line waters of the State, a close time may be necessary for the protection and preservation of fish, shell fish and lobsters. But from the very nature of the business it is unable to anticipate and specify the time and place when and where such close time should be imposed, in order to do no injustice to fishermen and at the same time protect the fishing industries. For it is as much in the interests of the fishermen, in the long run, to have the lobsters and other fish protected and preserved as it is of the people. Hence, the Legislature has delegated to the Commission the ministerial duty of ascertaining the fact, circumstances and conditions, as a proper and intelligent basis upon which to declare the close time already anticipated and provided for in the general terms of the act creating the Commission. In other words, the Legislature has deemed it wise to provide for a close time on the kinds of fish named, when the facts and conditions require it, and has appointed the Commission as its agent to ascertain the facts and conditions, and, when so found by them, has given them authority to fix and declare it. Hence, it is the facts and conditions that determine the close time and not

the close time that determines the facts and conditions. It is therefore obvious that the declaring of a close time by the Commission is only giving effect to the act of the Legislature, when the facts and conditions require it. It is undoubtedly true that the Commission cannot impose new duties and obligations upon the fishermen. It can, however, under legislative direction, ascertain and determine, in any given case, what duties are already imposed by the statute and do the ministerial acts necessary to the performance of those duties.

While the power to make laws may not be delegated to a board or commission, it is nevertheless true, a general policy of regulation and control having been adopted by the Legislature, that the delegation of the power to promulgate rules and regulations in accordance with the spirit and purpose of the leigslative will has long been held to be proper and no infringement on Constitutional limitations. 11 R. C. L. 1042, Sec. 29. In support of the above conclusion may also be cited *State* v. *Dodge,* 117 Maine, 269, in which a lucid exposition of the general doctrine may be found. Kindred cases may also be cited in *Brodbine* v. *Revere,* 182 Mass., 598. *Commonwealth* v. *Crowninshield,* 187 Mass., 225. *Commonwealth* v. *Sisson,* 189 Mass., 247. *Commonwealth* v. *Staples,* 191 Mass., 384. *Portland and Oxford Central R. R. Co.* v. *Grand Trunk Ry. Co.,* 46 Maine, 69. *Wadleigh* v. *Gilman,* 12 Maine, 403.

In view of the great importance of the sea and shore fisheries it clearly appears that no question can be raised concerning the reasonableness of the action proposed by the Commission in advertising the hearing for the proposed close time. We are accordingly of the opinion that the power delegated to the Commission was properly granted.

The first claim of the plaintiff is that Section 3 is unconstitutional as its execution would "deprive persons of their property without due process of law." This contention is clearly unsound. It is erroneous first because the plaintiffs have no property in the fish, shell fish or lobsters in the waters within the jurisdiction of the State. The State holds them in trust for the benefit of all the people. *Parker* v. *Cutler Mill Dam Co.,* 20 Maine, 353. *State* v. *Leavitt,* 105 Maine, 76. Upon this question 11 R. C. L., Section 2, under caption Property in fish, contains the

following statement: "Their ownership, while they are in a state of freedom, is in the State, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of its people in common; in other words the right of property in fish, so far as any can be asserted before they are taken and reduced to possession, is common to all the people and cannot be claimed by any particular individuals. Upon this fact of public ownership rests to a large extent the governmental power regulation of fishing." *State* v. *Snowman*, 94 Maine, 99. It is evident, therefore, that the people through the Legislature could declare a perpetual close time if they saw fit as a matter of law. It is an easy corallary that they could do it as a matter of expediency. It is erroneous in the second place because the act does not authorize the taking of property, but the regulation of the taking of property by those to whom the privilege of taking is granted by the will of the people through the acts of the Legislature. Under Section 3 no person has or can be deprived of property without due process of law as he has no individual property in the fish named in that section of which he can be deprived.

Bill dismissed without costs.

GUY L. MITCHELL'S CASE.

Androscoggin. Opinion September 22, 1922.

Differentiation between "casual employment" and employment within the purview of the Workmen's Compensation Act. Also what constitutes an "independent contractor."

Employment cannot be regarded as "casual" when one is hired to do a particular part of the service connected with the usual business of the employer, which part is sure to occur and reoccur from time to time, not perhaps on fixed dates, but with some degree of regularity in the usual and necessary conduct of affairs and when such contract of employment is entered into with a fair expectation on the part of both employer and employee that it shall continue for a reasonable period of time.

The determination of the question whether claimant was "an independent contractor" depends upon the question as to who had the right to control the work claimant was doing at time of injury.

On appeal by defendant. This is a proceeding under the Workmen's Compensation Act, and the questions involved are as to whether claimant at the time of the injury was an employee within the purview of the Act, or, as claimed by defendant, was either within the exceptions as a casual employee, or was an independent contractor. The claimant, a farmer, lived near to the quarry of the Maine Feldspar Company, and for the past six years, had been in the employ of that company, to a certain extent, under an oral understanding that whenever in the carrying on of the business it should become necessary to move a boiler from place to place in the quarry he should with the aid of other employees of the company take his team and move it.

Furthermore, the claimant agreed to haul water for the company whenever required. The claimant held himself in readiness to respond to the company's call at any time and did so respond. The labor was intermittent. On January 20, 1921, while engaged in moving the boiler he received an injury to his foot. The Chairman of the Industrial Accident Commission held that the facts brought the claimant within the purview of the Act as an employee, and awarded him compensation, from which finding the defendant appealed. Appeal dismissed. Decree of sitting Justice affirmed.

The case is fully stated in the opinion.

George C. Wing and George C. Wing, Jr., for plaintiff.

Hinckley & Hinckley, for defendant.

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

CORNISH, C. J. The only issue in this case is whether the claimant at the time of the injury was an employee of the defendant within the purview of the Workmen's Compensation Act or, as claimed by the defendant, was either within the exceptions as a casual employee or was an independent contractor.

The undisputed facts are these. The claimant is a farmer living next to the quarry of the Maine Feldspar Company. For the past six years he has been in the employ of that company to a limited extent, under an oral agreement that whenever in the carrying on of the business of the company it should become necessary to move a boiler from place to place in the quarry he should take his team and with the aid of other employees of the company should move it. It is necessary in the operation of the plant to have the boiler at or near

the point of drilling and as these points are changed from time to time it becomes also necessary to change the position of the boiler. In addition the claimant agreed to haul water for the company whenever required. In the Spring the pits in the quarry were filled with water and that could be used for the purposes of the business. When this failed the claimant hauled what was necessary.

The wage agreed upon was eighty cents per hour for himself and team and he held himself in readiness to respond to the company's call at any time and did so respond. The labor was intermittent. At times he has worked for the defendant three or four days in succession, and again there might be an interval of two weeks when he was not needed. The superintendent testified that the claimant moved the boiler every two or three weeks and as a rough average during the year 1920 he might have worked six hours every three weeks over a period of six months, with the exception of the last two weeks in December, the total amount of wages being $44.52.

For a period of six years prior to the accident Mitchell had worked for the defendant under this general arrangement and in this general manner. It was while engaged in moving the boiler on January 21, 1921, that he was injured.

1. "EMPLOYMENT BUT CASUAL."

The language of the Maine statute upon which our decision is based is this. "Employee shall include every person in the service of another, under any contract of hire express or implied, oral or written, except . . . . (d) person whose employment is but casual, or is not in the usual course of the trade, business or occupation of his employer." Public Laws, 1919, Chap. 238, Sec. 1, Par. II.

It is not disputed that Mitchell was engaged in the usual course of the company's business at the time of the accident and therefore the second clause has no application. Our discussion is concerned with the first clause, pertaining to the casual employee.

In seeking for precedents on this point we must be careful to select decisions based on statutes identical in this respect with our own. Neither the English decisions nor the decisions in this country based upon statutes exactly like the English afford us any authority. The exception in the English statute reads as follows: "Whose employment is of a casual nature and . . . . otherwise than for the

purpose of the employers trade or business." Under this provision it is not enough that the employment be of a casual nature. It must also be outside the ordinary business of the employer in order to take a person out of the ranks of employees. *Hill* v. *Bogg*, K. B., 1908, 802. The same construction under the same statutory phraseology has very properly been held in several American States, as in Minnesota under Public Laws of 1913, Chap. 467, Sec. 8; *State* v. *District Court*, 131 Minn., 352, 155 N. W., 103; and in Connecticut, under Public Laws, 1915, Chap. 288, Sec. 22; *Thompson* v. *Traviss*, 90 Conn., 444.

In Maine, however, the words are: "person whose employment is but casual," and then in place of the conjunctive "and" as in the English and similar acts, follows the disjunctive "*or* is not in the usual course of trade, business or occupation of his employer." In this respect the Maine statute is precisely the same as that enacted in Massachusetts, and to those of Michigan and Illinois. The decisions of these states under the same statute are therefore directly in point, and in these states the decisive test has been held to be not necessarily the nature of the work to be performed but the nature of the contract for service itself, that is, the contract of hiring. "The phrase of our act tends to indicate that the contract for service is the thing to be analyzed, in order to determine whether it be casual, while in the English act the nature of the service rendered is the decisive test." *Gaynor's Case*, 217 Mass., 86; *Cheever's Case*, 219 Mass., 244.

A casual employee under this definition is well illustrated by the Illinois case of *Smith* v. *Industrial Accident Com.*, 299 Ill., 377, 132 N. E., 470, where the claimant testified: "I just came through that (the employers lumber yard) and he asked me if I wanted to work. I had been working for the Chicago Stove Works for years and years." He also testified that he had worked for this employer before on ten or fifteen occasions but only for a half day or a day or two at a time. The court in holding the contract of service to be casual said: "The ordinary definition of the word 'casual' is that which comes without regularity and is occasional as distinguished from its antonyms which are, 'regular', 'systematic', 'periodic' and 'certain'. Where the employment for one job cannot be characterized as permanent or periodically regular but occurs by chance or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual. . . . . It is evident from

the record that Murowski's employment by plaintiff in error was not regular but occurred by chance. There is no evidence of any arrangement between him and plaintiff in error that he should have the work of helping to unload cars whenever they came in, but on those instances when he did work for plaintiff in error it was because he happened to be out of employment and was called upon to help on that particular job." See also *Aurora Brewing Co.* v. *Industrial Board*, 277 Ill., 207, 115 N. E., 207, and *Scully* v. *Industrial Board*, 284 Ill., 567, 120 N. E., 492, cited in *Smith* v. *Boiler Co.*, 119 Maine at 565.

Applying the same test the contract of service was held to be casual where a waiter was employed by a caterer to serve at a single banquet, *Gaynor's Case*, 217 Mass., 86, and where a teamster was employed at odd jobs in hauling coal by the proprietor of a retail coal business, the employment being for no fixed period of time and for no specified job, *Cheever's Case*, 219 Mass., 244.

On the other side of the line of cleavage a typical illustration of employment of service not casual, although for an uncertain period, may be found in *Dyer* v. *Black Masonry and Contracting Co.*, 192 Mich., 400, 158 N. W. 959, where the complainant was employed to oversee the unloading of glass brought to a building under construction, as the work progressed, the service being sure to recur but not at regular intervals. The court in discussing this point laid down the distinction under consideration in these words: "It became necessary in the interest of the business of the general contractor to have the delivery of the glass looked after and supervised and claimant was employed for that purpose; that, as the glass was to be delivered as the work progressed on recurring occasions, it certainly cannot be said any of the necessary work to be done in furthering the job or enterprise was casual, for it was sure to occur and reoccur in the operation of the job. There was an element of certainty in the work recurring at times, which though they could not be fixed definitely, yet were fixed generally by the agreement to look after and assist in unloading the glass as it arrived from time to time. In our opinion the employment of the claimant was not casual."

It would be difficult, if not impossible, to formulate a hard and fast inclusive and exclusive definition of "employment but casual" under the Maine statute, but it may be safely said that the employment cannot be regarded as casual when one is hired to do a particular part

of the service connected with the usual business of the employer, which part is sure to occur and reoccur from time to time, not perhaps on fixed dates but with some degree of regularity in the usual and necessary conduct of affairs, and when such contract of employment is entered into with a fair expectation on the part of both employer and employee that it shall continue for a reasonable period of time.

Constant employment does not necessarily mean constant service. The employment as continuing is certain. The work itself is certain as something that will need to be done. The exact time of its performance may be uncertain, but that does not render either the contract of hiring or the work itself casual. "The employment is not to be deemed casual . . . . when it is for a part of the employee's time at more or less regularly recurring periods." 28 R. C. L., 707.

In the case at bar the work for which Mitchell was employed was a necessary incident of the successful operation of the quarry. The moving of the boiler to accompany the change of drill from place to place was indispensable. So at times was the hauling of water.

The claimant's testimony is that for six years prior to the accident there had been an understanding or agreement between the parties that he should do this work, whenever needed, and he had done it. The price was also agreed upon, eighty cents per hour for self and team. The contract of hiring was not for each period of work at the end of which the contract should cease. It was a continuing contract covering the future occasions as they should in turn arise.

Moreover, the average amount paid the claimant could, if desired, have been ascertained for each year and might be included in the basis of wages to employees for the computation of insurance premiums, which is a part of the scheme of the Compensation Act, with nearly as close accuracy as though the contract of employment covered every day.

In view of all these facts we find that the claimant was not a casual employee within the meaning of our statutory exception.

2. INDEPENDENT CONTRACTOR.

This point was not set up by the defendants in their answer and strictly speaking should not be open to them now. No amendment was made or asked for. Public Laws 1919, Chap. 238, Sec. 32.

It may be added, however, that in our opinion the relation of master and servant existed between the parties and not that of an independent contractor. The determination of this question depends upon who had the right to direct and control the work of the claimant. Was he a law unto himself responsible only for results, or was he subject to the dictation of the superintendent of the quarry? Clearly the latter. He hauled the boiler from whatever place and to whatever place the master directed. He hauled the water in the same way. He obeyed orders. He was not working for himself but for the Quarry Company, and he was paid not by the job but by the hour like any other employee. Under the well-settled principles of law he could not be regarded as an independent contractor. *McCarthy* v. *Second Parish*, 71 Maine, 318; *Keyes* v. *Baptist Church*, 99 Maine, 308.

The entry must be:

Appeal dismissed.
Decree of sitting Justice affirmed.

THOMAS M. HOYT *vs.* NORTHERN MAINE FAIR ASSOCIATION.

Aroostook. Opinion September 23, 1922.

The driver of a racing horse which has been advertised and accepted by a Fair Association to furnish entertainment for its patrons on a given day, is entitled to a reasonably safe track upon which to drive said race horse at speed, and also during the time necessarily employed in "working out" the horse.

In the instant case was the plaintiff at the time of the accident a mere licensee or an invitee.

If an invitee, was the defendant's negligence the proximate cause of the accident.

If so, was the plaintiff guilty of contributory negligence.

Held:

That Willard, the driver, was an invitee while working out his horse and entitled to a reasonably safe track.

That the defendant's negligence was the proximate cause of the accident.

That Willard, the driver, was not guilty of contributory negligence.

On general motion for a new trial. This is an action on the case to recover damages for injuries sustained by one John N. Willard, the driver of a trotting horse in races held by defendant on the fourth day of September, 1919, who was at the time of the injuries in the employ of plaintiff, who was an assenting employer under the Workmen's Compensation Law of Maine, having paid compensation, claimed to be subrogated to the rights of said John N. Willard, alleging negligence on the part of defendant. The case was tried before a jury and a verdict in the sum of forty-eight hundred dollars was returned for plaintiff, and defendant filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

W. R. Roix and Charles P. Barnes, for plaintiff.

W. R. Pattangall and Herbert T. Powers, for defendant.

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

SPEAR, J. This is an action on the case brought to recover of the defendant, the Northern Maine Fair Association, damages for injuries alleged to have been inflicted upon and suffered by John N. Willard, the driver of a trotting horse entered for the races on the fourth day of September, 1919, and in the employ of the plaintiff, through and owing, to the negligence of the defendant corporation, or its servants and agents.

The plaintiff, as employer of the injured John N. Willard, and an assenting employer under the Workmen's Compensation Law of Maine, having paid compensation, and having become liable for compensation to the said John N. Willard, claims to be subrogated to the rights of said John N. Willard, his injured employee, to recover by this action for said injuries, under Sec. 26 of Chap. 238 of the Public Laws of 1919, the Workmen's Compensation Law of Maine as in force on the day of the accident.

The plaintiff in this case, Thomas M. Hoyt, of Presque Isle, on the fourth day of September, 1919, the date of the accident as alleged in the writ, was the proprietor of a large stable of racing horses, among which was a horse known as Royal McKinney, quartered at the track of the defendant corporation, and entered for a race to be run at one o'clock P. M. on said fourth day of September.

John N. Willard was a driver and trainer of race horses, a man of long experience in that line of work, a resident of Presque Isle and familiar with everything connected with the Presque Isle race track and the fairs conducted on that race track.

The defendant corporation was the owner of the race track and fair grounds at Presque Isle and conducted fairs and race meetings there.

The injury complained of was caused by Willard while exercising or "working out" a horse called Royal McKinney coming in collision, on the track, with an automobile which was on its way, across the track, to the inner enclosure of the park.

The arrangement of the grounds was as follows: A fence enclosed the whole area of the fair ground; inside that, a circular fence enclosed the race track, this fence following the outer edge of the track; inside of that another circular fence, following the inside edge of the track enclosed the oval which made up the larger part of the fair ground not devoted to track, grand stand and other buildings. It was the custom on fair days to park autos in this oval until it was filled. In order that autos and foot passengers might reach the oval there were two sets of gates provided one at each end of the grounds. First, a gate through which access was had to the fair ground; second, a gate in the outer circular fence; third, a gate in the inner circular fence. The track was oval rather than circular and the gates were at the ends of the oval.

Willard collided with the automobile at a point between the two gates in the circular fences at the end of the oval between the first and second turns on the track about half way from the starting wire and the quarter pole. The collision occurred at approximately 12:30 P. M., the time of racing being set at 1:00 P. M. Prior to the accident, Willard had jogged his horse five or six times around the track, the wrong way of the track, that is, in the opposite direction to that taken when racing. He had then turned and started working his horse somewhat more rapidly, the right way of the track. On the third time around he approached the first turn in the track, going at the rate of about a mile in 2.25 and occupying a position about ten feet from the pole or inside edge of the track.

The gate in the outside circular fence had been opened to admit autos. The defendant had a man named Greenwood stationed near the first turn, where he could observe both the horse coming down

the stretch and the gates at end of the oval. Greenwood was provided with a flag and his duty was to signal the gate keeper with it so that the gates might be closed when necessary. Greenwood saw Willard and Royal McKinney coming toward the turn and signalled to close the gate. When he signalled an auto was partly or wholly through the gate and on the track. Other autos were so close behind it that it was impossible for it to back up. It stopped. James Burgoine, another employee of defendant was tending the inside gate. He signalled the auto to stop. It did stop. Willard saw it standing near the outside edge of the track about two hundred feet away. He had room enough to go between the auto and the inside fence and kept on driving. His horse was notoriously hard to control so far as stopping him was concerned and he knew that fact. He was travelling at the rate of approximately thirty-six feet per second. The track where the auto was standing was forty-three feet in width. The automobile occupied the space of its length, of course, or approximately ten feet. It was just inside the outer circular fence when Willard saw it. If it remained stationary he had room to pass between it and the inside fence. But just before he reached that point and when it was too late for him to stop his horse, the auto started up and although he pulled in close to the pole it closed up enough of the gap so that he could not get through, he struck it, was thrown out and received the injuries, which are the basis of the suit.

Upon the foregoing statement of facts the plaintiff claims that the driver of a racing horse advertised and accepted by the defendant Fair Association to furnish entertainment for its patrons on a given day, is entitled to a reasonably safe track upon which to drive said race horse at speed, not only during the few minutes of a heat, but during all the time necessarily employed to work out the horse, and that the track between the gates, during such times as the drivers of race horses must of necessity be driving them at speed, shall be so guarded as to be and shall be reasonably safe for such drivers. On the other hand the defendant contends that at the time the plaintiff was exercising his horse on defendant's track, prior to the race, he was a mere licensee. Thus the issue is joined. There is no conflict of the evidence upon the decisive points in the case, nor has any law been found bearing directly upon the state of facts here involved.

Under the above contentions three principal questions arise:

1. Was the plaintiff at the time of the accident a mere licensee or an invitee?

2. If an invitee, was the defendant's negligence the proximate cause of the accident?

3. If so, was the plaintiff guilty of contributory negligence?

Under the circumstances of this case can it be properly held that Willard, with the horse McKinney, was a mere licensee? We think not. To determine this question it may be useful to take into consideration a general view of the scope, purpose and management of the occasion, in connection with which this accident occurred, all of which may be regarded as matters of common knowledge. That occasion was the holding by the defendant of an agricultural fair on its grounds and premises in the town of Presque Isle. Similar fairs for similar purposes under similar auspices are held in a large number of towns each year in this State. Everybody knows what an agricultural fair means and how it is conducted. Its scope is an advertised invitation for the whole countryside to attend. Its purpose is to invite and induce exhibits of the products of the farm, including the dairy, live stock, poultry, vegetables of all kinds, embroidery of the housewife, viands of the culinary department, inventions, machinery, musical instruments and many other things raised upon the farm or manufactured in the shops.

Usually farm exhibits are examined by committees and classified for premiums offered by the proprietors of the fair. It is a matter of common knowledge that all these farm exhibitors are invitees. They are not only invited, but receive a reward for premium exhibits, and all those who enter the grounds for an admission fee are invitees. *Thornton* v. *Agri. Soc.*, 97 Maine, 108.

Within the scope and purpose of the larger fairs is included another class of exhibitors invited for precisely the same purpose as those named, and, an important purpose of inviting this class is to offer such attractions and exhibitions as will appeal to the sporting sense of the public and to allure them to the fair grounds to witness the sports of the day. This class of exhibitors is composed of the horsemen, who come to exhibit their horses in the races and unquestionably furnish by far the most attractive display of the entire exhibition and become the most important source of revenue, a consideration not only desirable but essential to the success of most large fairs.

While the exhibition of farm products, dairy products and the other results of good husbandry and of the equestrian department,

including draught, family and trotting horses, for premiums are the visual features of the fair, it is nevertheless true that the underlying conception is the establishment and operation of these institutions for the purpose of stimulating an interest and arousing increased activity in all the departments of agricultural opportunity, including all classes of horses as well as all classes of other live stock. Of all these exhibitions good, clean contests of speed between well-prepared horses, are among the most wholesome and satisfactory and easily the drawing card.

The owner of every horse entered in a race is required to pay an entrance fee based upon a certain percentage of the premium for which his horse competes. In the present case the entrance fee was twenty-five per cent. of the stake. The people who are invited and pay their money for entrance to the fair and, in addition to the grand stand, are entitled to the right as well as the privilege of witnessing a genuine contest of speed. They are entitled to a guarantee on the part of the management that it will use every reasonable effort to promote such a contest. It is, therefore, evident that it is incumbent upon the management to furnish every reasonable facility the grounds and track will admit, not inconsistent with the successful operation of the fair, for the preparation of the horses for the races.

We are inclined to the opinion that it is a matter of common knowledge, that the management of all fairs where racing is a feature sanction, as a common custom, the practice of the drivers "to work out" their horses, at all times before and after the racing periods. Whether it be so or not, it is proved beyond controversy in this case that it was, and has been the common custom, upon the Presque Isle track for at least twenty-five years "to work out" the horses for a race just as Willard was working out McKinney.

Before quoting Willard upon this point it may be observed that no witness, expert or lay, and no member of the corporation or management of the fair, took the stand to contradict or modify his testimony in any respect in regard to the custom and manner of using the track before, during or after a race. With reference to the manner and time of the use of this track Mr. Willard testified as follows:

"Q. Which race was to be called at one o'clock? A. The fourteen class. The class that this horse was to go in. . . . . .

"Q. With this knowledge how did you prepare Royal McKinney that day for the 2.14 class race? A. Had him fed at eleven

o'clock. Told the man that took care of him to have him ready to go out from ten or fifteen minutes past twelve, so that I could commence to work him, and he was hitched to the sulky about that time, and I went out with him. I usually jog such a horse as him about three miles or three and one half before I turn them to go the other way of the track. I jogged the horse about three miles at this time. . . . Q. How many years have you raced on the Presque Isle track? A. Well, I have raced every year but two for twenty-seven or eight years. . . . Q. What has been the custom for drivers in all these years that you have raced on the track about going on the track before the races and working out their horses? A. Well they have always gone out the same as I told you, and stayed." The phrase "as I told you" evidently refers to the previous answer in which he said at the beginning "had him fed at 11 o'clock," and ordered him to be ready a few minutes past twelve. In this connection he further testified: "Q. Now on this day of the accident, did any official of the Northern Maine Fair Association object to your driving on the track before the races? A. No, they didn't object to my driving there that I know of. Q. I mean in working out. Now in all your experience of the number of years you stated that you have driven on that track, has there ever been any objection to driving horses and "working out" just before the races? A. No."

In the present case it then appears that it has been the common custom upon this track for the drivers to "work out" their horses before the races in which they were engaged, for a period of twenty-seven years at least with the full knowledge and acquiescence of the management.

At this point it may be proper to add that we do not wish to be understood as saying that the managers of fairs are under obligation to allow or continue a custom even of so many years. They have the control of the track and can make such reasonable rules and regulations as they see fit. But, when they have made no prohibitive rule or objection to the observance of a custom for a period of twenty-seven years and have allowed and sanctioned it without question, verbal or written, but on the other hand have made regulations in support of it, by stationing guards at the gates and a signal man to give notice, they must be held to have acquiesced in such use. Mr. Willard also testified that it was necessary to give a horse a fast mile before he goes into the regular race.

We are of the opinion that under the circumstances of this case the exhibitors of horses for the race should be classed in the same category as the exhibitors of live stock for the premium and must be regarded as invitees under the rules of law, not only while engaged in the regular race but when working out their horses in accordance with the usual practice and common custom observed upon this track. We cannot avoid the conclusion that Willard was lawfully upon the track, as an invitee, when he was injured.

But, notwithstanding the foregoing facts, the defendant contends that Willard was a mere licensee. The distinction between a licensee and invitee is clearly drawn, both in our own and other jurisdictions. One of the earlier cases that most fully and clearly discusses the question is *Sweeney* v. *Old Colony and Newport Railway Co.*, 10 Allen 368, in an opinion by Chief Justice Bigelow in which he said:

"In order to maintain an action for an injury to person or property by reason of negligence or want of due care there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfill. . . . . So a licensee, who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damage for injuries caused by obstructions or pitfalls. . . . On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. . . . . The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own con-

venience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." *Graffam, Admx.* v. *Saco Grand Patrons of Husbandry*, 112 Maine, 508, is an action for the death of a boy brought against the defendant, alleging that defendant while conducting an agricultural fair on the fair grounds, allowed a person to erect and run a shooting gallery in which a 22-calibre repeating rifle was used and by the alleged negligent use of which the boy was killed. In this case the court says: "It is too well settled to need the citation of authorities, that if the owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended. . . It was its (the defendant) duty to use reasonable care that there should be no traps or pitfalls into which the invited might fall, and that there should be no dangerous plays or sports, or exhibitions, by which the invited might be injured."

We are of the opinion that the evidence clearly and fully brings this case within the rule of invitee under the distinction between a licensee and invitee as laid down in the *Sweeney Case*, 10 Allen, 368, and followed by our own court in several cases. Paraphrasing the language of Page 373 under what is called the "gist of the liability," the plaintiff in the present case "did not act merely for his own convenience and pleasure and from motives to which no act or sign of the owner or occupant contributed, but that he was working out his horse because he was led to believe that the management intended the track to be so used by the horsemen and that such use was not

only acquiesced in by the management but that it was in accordance with the intention and design with which the track was adapted and prepared or allowed to be used."

Upon the conclusion that the plaintiff was an invitee it then follows that the defendant owed him the duty of reasonable care while he was working out his horse as it did to every other invitee. In *Thornton* v. *Agricultural Society*, 97 Maine, 108, speaking of the duties of the proprietor of a park to which the public had been invited and for entering which an admission fee was charged it was held "Having invited the public to its park, it was chargeable with the duty of using reasonable care to see that the premises were kept in a safe condition for the use of its guests; and if the exhibition, although given by an independent contractor, was of a character to jeopardize the saftey of those who were present on the defendant's invitation, the duty was cast on the latter of taking due precautions to guard against injury." There are also numerous citations to the same effect.

The defendant further contends, however, even admitting that the plaintiff was an invitee and lawfully upon the track that there was not sufficient evidence to warrant the jury in the finding that the defendant was negligent. In determining this question the jury of course, had a right to give full credit to the plaintiff's evidence and to rely upon it in arriving at a conclusion. In fact, however, there is no appreciable discrepancy between the plaintiff's testimony and that of the few witnesses put on for the defendant. Accordingly the unquestioned evidence shows that the defendant knew that the plaintiff was upon the track somewhere from fifteen to twenty minutes past twelve o'clock, working out his horse according to the usual custom; and for the purpose of protecting him and the public, who had been admitted to the premises, against danger while the horses were upon the track, had established sliding gates at the upper turn and the lower turn of the track and stationed guards at the lower gates at least, and a flagman at the sharp turn in order that he might observe the horses as they approached the wire and signal the gatemen in appraisal of the fact that a horse or horses were coming. The plaintiff's driver, Willard, had full knowledge of these precautions and their purpose and had a right to rely upon the fidelity of the gatemen to protect him against injury from negligence in opening the gates. That the management of the fair clearly understood the

purpose of the gates and recognized the necessity of properly attending them is clearly shown by one of the defendant's witnesses, who substituted for another gateman at the dinner hour, who testified as follows: "Q. Why were you there while somebody went to get his dinner? A. I think I was. Q. Who placed you there? Who stationed you there? A. Mr. Merritt. Q. What instructions did he give you about the gate? A. He told me to keep the gate shut during the horses' working on the track."

THE COURT: Who is this Merritt? "Q. Mr. Merritt is superintendent of the horse racing? and is that Mr. Merritt a marshal that is on horse back? A. Yes, sir."

It should be here noted that this instruction was to keep the gate shut during the horses working out. His evidence further shows that the gateman at this particular gate was at his place and the flagman at his station. They were cognizant or in the exercise of due care should have been, of the presence of Willard with the horse McKinney upon the track; and Willard says that he noted that the gatemen were at their places. Everything, therefore, seemed to be in perfect working order. Under these conditions, Willard having jogged this horse for three or three and one half miles, then prepared as was the practice for entering the regular race, to drive him a couple fast miles as he calls them. In jogging the horse he went the wrong way of the track, but going the fast miles he turned his horse and went the right way of the track. When he concluded to turn his horse for the fast miles he took the precaution of notifying the gatemen that he was going to make the fast miles. He then made the first mile without any interference; the track being a half mile, had to be circled twice to make a full mile. After having gone the full mile this is what happened, as stated in the language of Willard: "I went down and turned the horse around and when I went back to go the one towards the second mile I says, 'We are going again' when I went by the gate. I went down and turned the horse around, and when I got up it was all clear, and I was out in about second horse place. I went around once and when I come around again I heard a horse behind me, which made my horse take hold more."

In order to determine just what the character of the gateman's act was in letting an automobile upon the track when he did, it is necessary to analyze the time of the mile, the position of the plaintiff when the gate was opened, the distance between the horse and the gate at

that time, and the time the gateman would have been required to wait for the horse to have passed the gate in making a second circuit of the track. The horse was going at the rate of a mile in 2.25; that is a little over thirty-six feet per second. It is already stated by Willard he went up above the wire, turned his horse taking a position about ten feet from the fence, and started his second fast mile, driving directly past the flagman and the gatemen on each side of the track. They knew he had gone by for a fast mile heat. In circling the track for the first half mile and coming to the wire he met with no impediments. When he passed the wire, he was on the second half mile. If his time was even throughout the heat, he would have consumed about a minute and twelve seconds in coming to the wire, a fact which the gatemen, both upon the outside and inside knew, or should have approximately known. But within six seconds of that time when they knew that this horse was making a fast mile, and when the horse was then within six seconds of the gate, this outside gateman opened the gate and let two automobiles at least, past in upon the track.

The defendant, however, contends that it was not the opening of the gate, but the stopping and starting of the automobile after it had been let in upon the track which was the proximate cause; but this is too fine a refinement. If the gate had not been opened at this critical moment, all would have gone well. We are of the opinion that the jury had sufficient affirmative evidence to warrant them in finding that the defendant's agent at the gate was guilty of negligence.

Admitting the negligence of the defendant, the defendant again claims that the plaintiff should not recover because the driver of the horse was guilty of contributory negligence. This claim is based upon the contention that the driver after he first saw the automobile standing upon the track, just inside the gate about one hundred and fifty feet away, could have stopped his horse before reaching the automobile if he had made an effort to do so. This presented a question of fact to the jury and we think they are warranted in finding from all the evidence, first, that this horse as described by the plaintiff could not have been stopped within that distance. On direct examination, instead of saying that the horse could have been stopped as defendant claims in his brief, the plaintiff testified, "A horse like him, if you took right into him, you wouldn't get him slacked away any before he went eight or ten rods. I couldn't do it anyway." But upon

cross examination he finally says that it would be his best judgment that he could have stopped the horse within the distance. Upon this testimony alone, however, considered in connection with the other testimony describing the horse in the language of the defendant's brief, "as the horse notoriously hard to control so far as stopping him was concerned," the jury could not be said to be without sufficient evidence to warrant the conclusion that the horse could not be stopped in the distance stated. But even if that was so, we think the plaintiff's statment of what happened when he saw the automobile was sufficient to authorize the jury in finding that the driver was not guilty of contributory negligence. With reference to a question of whether he could have stopped the horse, he answered yes, and then follow these questions and answers: "Q. And got rid of any accident, but in your opinion as you viewed it the auto was standing still and you thought it was going to continue stand still? A. Yes, I thought they was holding it for us to work. There was two of us working, one behind the other, and they knew we was working. Q. What? A. And the men at the gate knew we were working."

We think there was sufficient evidence to warrant the jury, if it was their judgment, to find that Willard had a right to believe that the gateman, knowing that he was coming, had stopped the auto for the express purpose of enabling him to pass. Upon the evidence we are of the opinion that the verdict cannot be disturbed upon the question of contributory negligence.

This brings us to the question of damages. This is a question peculiarly within the province of the jury. The evidence shows that Mr. Willard was severely injured and endured great pain and suffering. These constitute elements of damage which it is always difficult to assess, and unfortunately, there is no fixed rule or regulation upon which they can be determined. We think the jury were authorized to find in addition to his pain and suffering that Mr. Willard, to a certain extent, was permanently injured. We do not feel authorized to say that our judgment should be substituted for that of the jury.

Motion overruled.

EUGENE H. FLETCHER *vs.* STEPHEN E. LAKE.

Somerset. Opinion September 27, 1922.

The vendee cannot invoke the Statute of Frauds, in a parol contract for the sale of land, when the vendor is ready and willing to perform the contract and seeks to recover on a note given by vendee in payment therefor.

It is necessary for the maker of such a note, in order to avoid payment of it, to aver and prove the same facts that he must prove if he had brought an action to recover money paid by him to the vendor.

The person advancing money under an oral contract for the purchase of lands, or an interest in lands, cannot recover it back so long as the other party is able, ready and willing to perform the contract on his part.

A verbal contract, not enforceable under the Statute of Frauds, is voidable only, and is a sufficient consideration for a note given by reason of the agreement, providing the payee of the note is ready and willing to be bound by the agreement.

Under the express stipulation in the agreed statement of facts that the plaintiff was ready and willing to sell and convey his farm to the defendant in accordance with an oral agreement made between the parties, which agreement the defendant failed to carry out, the plaintiff's action to recover on the promissory note of the vendee, given by reason of the oral contract as above set forth, must prevail.

On agreed statement of facts. This is an action of assumpsit to enforce payment of a promissory note given by defendant to plaintiff as part payment of the purchase price of a farm. The plaintiff and defendant entered into an oral agreement under the terms of which plaintiff agreed to sell and convey to defendant his farm situate in Pittsfield, and certain personal property about and upon said farm, defendant to pay him $5,400, by giving the note of $400 declared upon in this action, and to pay $5,000 more in two months. Defendant never carried out the conditions of the contract or agreement, although plaintiff was ready and willing to do and perform all the conditions of the contract to be performed by him. Judgment for plaintiff.

The case is fully stated in the opinion.

H. R. Coolidge, for plaintiff.

W. S. Lewin, for defendant.

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

PHILBROOK, J. This action is brought to enforce payment of a promissory note, given by defendant to plaintiff, dated June 25, 1920, due two months after date, the principal of the note being four hundred dollars. On said twenty-fifth of June the parties made an oral contract whereby plaintiff agreed to sell, and defendant agreed to buy, certain real estate, the note in suit being given as part payment of the purchase price of the property.

The defendant claims that he ought not to be required to pay the note, as he has not received any consideration for the same; that at the time of the giving of the note it was in the minds of the parties that upon the payment thereof he would receive a deed of the farm from the plaintiff; that he had at no time any contract in writing, nor had any acts been performed by him under which he could go into equity and ask for a specific performance of a contract to convey real estate by virtue of the oral agreement; that the note was given as a part payment of the price of purchase; that he ought not to be called upon to pay it unless the farm was actually conveyed to him; that the plaintiff has refused to convey the farm and does not set out in his pleadings or brief statement that he is now, or was when suit was brought, ready or willing to convey the farm to the defendant upon the payment of the note and the carrying out of the remainder of the verbal contract made in June, 1920; that defendant never was in possession of the farm, never was in control of it, never was in a position where he could exercise any of the rights of an owner; that he did not receive any of the benefits of the crops raised thereon nor of the personal property consisting of live stock, farming utensils and growing crops that were included in the sale; that he ought not to be required to pay the note and the plaintiff retain title to the farm; and, finally, that in order to recover on this note the action should be brought upon the entire contract and the plaintiff offer to convey the farm

to the defendant upon the carrying out of the terms of the agreement, which act of conveyance the plaintiff has refused to perform.

The case is reported upon an agreed statement of facts, including four letters from defendant to plaintiff, one from plaintiff to defendant, and one from plaintiff's attorney to defendant. This court, upon this agreed statement, is to render such judgment as the law and the evidence require. If defendant is liable then judgment is to be rendered for the plaintiff for the amount of the note and interest; otherwise judgment is to be rendered for the defendant. As to the facts, therefore, we are confined to the statement thereof signed by the parties, thus admitting the truth and accuracy of such statement.

A careful examination of the statement, comparing it with the claims of the defendant as above set forth, shows that he is laboring under a misapprehension of the statement to which he agreed. No where in that statement does it appear that the plaintiff is not ready and willing to be bound by the oral agreement. On the contrary in the final letter of the correspondence, that written by plaintiff's attorney to the defendant on September 11, 1920, seventeen days after the maturity of the unpaid note, appears this language "He (the plaintiff) has been ever since the trade was made and is now ready to perform his part of the contract and will continue to be ready to do so for ten days from this date." If defendant claims that this language is to be interpreted as meaning that at the expiration of ten days the plaintiff would not perform, then we must observe the most significant language of the agreed statement that "The plaintiff continued in the occupation of said farm and was ready and willing to sell and convey said farm to the defendant in accordance with said oral agreement." There is no restriction of time nor refusal to convey in this statement, neither is there any evidence to show that plaintiff ever conveyed the premises to any other person. Therefore, the doctrine in *Little* v. *Thurston*, 58 Maine, 86, and kindred cases cited by defendant, is not applicable to the case at bar.

On the other hand it has been repeatedly held that as between the parties to a parol contract for the sale of land the vendee cannot invoke the Statute of Frauds when the vendor is ready and willing to perform the contract and seeks to enforce the note of the vendee

given in payment therefor. 29 Am. and Eng. Ency. of Law, 808, 2d Edition and cases there cited; *Niles* v. *Phinney*, 90 Maine, 122, and cases there cited.

Moreover, it is necessary for the maker of such a note, in order to avoid payment of it, to aver and prove the same facts that he would have to prove if he had brought an action to recover money paid by the vendee. *McGowen* v. *West*, 7 Missouri, 569; 38 Am. Dec. 468. But the party advancing money under an oral contract for the purchase of lands, or an interest in lands, cannot recover it back so long as the other party is able, ready and willing to perform the contract on his part. *Gammon* v. *Butler*, 48 Maine, 344, *Niles* v. *Phinney*, supra. Finally it should be said that under the authority of 8 C. J., 231, and cases there cited, a verbal agreement, not enforceable under the Statute of Frauds, is avoidable only, and is a sufficient consideration for a note given by reason of the agreement, providing the payee of the note is ready and willing to be bound by the agreement.

Under the terms so explicitly set forth in the agreed statement, upon which both parties rely, it is the opinion of the court that plaintiff must prevail.

Judgment for plaintiff for $400 and interest thereon from August 25, 1920.

THE HINES & SMITH COMPANY *vs.* HARRY GREEN.

Aroostook. Opinion September 27, 1922.

Whether a promise to pay the debt of another is that of an original debtor or a guarantor, depends upon the question as to whom credit was given. The obligation is original if the promise is made at the time or before the debt is created, and the credit is given solely to the promisor; but is collateral if the promise is merely super-added to the promise of another to pay the debt, he remaining primarily liable; if any credit whatever is given to the third person, so that he is in any degree liable, the oral promise is not valid.

In ascertaining to whom the credit was extended the intention of the parties must govern, and this intention should be ascertained not only from the words used in making the promise, but also from the situation of the parties and all the circumstances surrounding the transaction; and the question is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise.

The rules of construction relative to guaranties are the same as those applicable to other contracts; viz., in cases of ambiguity the language is construed most strongly against the guarantor; it is the duty of the court to ascertain and give effect to the intention of the parties; in order to arrive at the intention of the parties the circumstances under which, and the purposes for which, the contract was made, may be proved and must be kept in view in its construction.

While the manner in which the account has been charged by the creditor in his books of account, is very strong evidence and entitled to great weight in arriving at the intention of the parties to a promise, yet the fact that the account is charged to the debtor is not generally held to be conclusive evidence that credit was extended to him, and the reason for so making the charge is open to explanation, the weight of which is for the jury to determine.

When there is no substantial conflict in the evidence as to the precise terms of the alleged promise, that the court should decide, as a matter of law, the meaning of the words used and whether the alleged promise is original or collateral; but where the language used, together with the surrounding facts and circumstances, makes it doubtful whether the parties intended to create an original or a collateral obligation; then the intention should be determined by the jury under proper instructions by the court.

In the case at bar all the conflicting testimony as to what was said and done, the book charges in the light of the attending facts, the nature of the contract, the acts to be done, the time, place and manner of performance, the situation and relation of the parties, and their subsequent statements and conduct, were all heard by the jury under appropriate instruction and they determined, as matter of fact, that the intention of the parties was to enter into an original promise and so held the defendant liable.

On motion for new trial by defendant. This is an action of assumpsit to recover for automobile tires, shipped by plaintiff to one J. M. Agel, upon his written order, and charged to said Agel. Plaintiff seeks to recover of defendant as the original promisor, which defendant denies, and alleges that if he made any promise, it was a collateral one, and not an original promise, hence not enforceable under the Statute of Frauds. A verdict was rendered for plaintiff and defendant filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

O. L. Keyes, for plaintiff.

W. R. Roix, Cook, Hutchinson & Pierce and Jasper Hone, for defendant.

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

PHILBROOK, J. Action of assumpsit to recover the price of automobile tires which, upon the written order of one J. M. Agel, were, by the plaintiff, shipped and charged to Agel. It is not claimed that the delivery of the merchandise to Agel contained any element of benefit to the defendant, but it is claimed by the plaintiff that the defendant is an original promisor to pay for the merchandise. This the defendant denies and says that if he made any promise, which he strenuously insists he did not, that such promise was a collateral one and not enforceable because of R. S., Chap. 114, Sec. 1, Par. II, commonly known as the Statute of Frauds. A verdict was rendered in behalf of the plaintiff. No exceptions to any rulings or instructions of the presiding Justice are presented, but by motion, based upon the customary grounds, the defendant seeks to have that verdict set aside and a new trial granted.

The test to decide whether one promising to pay the debt of another is an original debtor, or a guarantor, is whether the credit

was given to the person receiving the goods. *Doyle* v. *White*, 26 Maine, 341; *Fairbanks* v. *Barker*, 115 Maine, 11. It is well understood that the obligation is original if the promise is made at the time, or before the debt is created, and the credit is given solely to the promisor, but is collateral if the promise is merely superadded to the promise of another to pay the debt, he remaining primarily liable. *Security Bank Note Co.* v. *Shrader Ann. Cas.* 1914 A, note at Page 490. If the merchandise be sold in any part upon the credit of the third person to whom it was delivered, and the promise of another to pay, upon which the vendor relies, is an oral one, then such promise is collateral, is within the statute, and cannot be enforced. *Starkey* v. *Lewin*, 118 Maine, 87; The court of South Dakota, in *Wood* v. *Dodge*, a case frequently cited, reported in 120 N. W. 774, says, "The rule in this class of cases seems to be well settled. An oral promise to pay for goods furnished at the promisor's request to a third person is not valid if the transaction is wholly or partly upon the credit of the third person so as to create a debt against him to which the oral promise is merely collateral. If any credit whatever is given to the third person, so that he is in any degree liable, the oral promise is not valid."

INTENTION.

In ascertaining to whom credit was extended, the intention of the parties must govern. This intention should be ascertained from the words used in making the promise, the situation of the parties, and all the circumstances surrounding the transaction. The real character of the promise does not depend altogether on the form of expression, but largely on the situation of the parties; and the question is, always, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. *Davis* v. *Patrick*, 141 U. S., 479; 35 U. S. (Lawyer's Ed.), 826; *Johnson* v. *Bank*, 55 S. E., 394; *Security Bank Note Co.* v. *Shrader*, 74 S. E., 416. Our own court, in *Smith* v. *Loomis*, 72 Maine, 51, states the principle thus: "Whether the engagement was original or collateral must be determined by the contract itself; although if doubt remains, the particular words which import the promise may be interpreted in the light of attending facts, the nature of the contract, the acts to be done, the time, place and manner of performance, the situation and rela-

tions of the parties, and sometimes even by the aid of the subsequent conduct of the parties showing a practical construction put upon doubtful terms by themselves." In the same case our court declared that the law is well settled by cases in this State, in Massachusetts and Connecticut, and in the Supreme Court of the United States, first that guaranties are governed by the same rules of construction as other contracts; second, that in cases of ambiguity the language is construed most strongly against the guarantor; third, that it is the duty of the court to ascertain and give effect to the intention of the parties; and, fourth, that in order to arrive at the intention of the parties the circumstances under which, and the purposes for which, the contract was made may be proved and must be kept in view in its construction.

INTENTION AS SHOWN BY BOOK CHARGES.

In the note to *Mankin* v. *Jones*, 15 L. R. A. (N. S.) 224, the writer, fortifying his statement with many citations, says, "It is well settled that while the manner in which the account has been charged by the creditor in his books of account is very strong evidence, and entitled to great weight in arriving at the intention of the parties to a promise, yet the fact that the account is charged to the debtor is generally held not to be conclusive evidence that credit was extended to the debtor, and the reason for so making the charge is open to explanation."

"Evidence that the goods sold were charged to the person to whom they were delivered strongly tends to show that the vendor gave credit to him, and relied upon him for payment, and therefore that the promise of another to be answerable for the debt was at most a collateral undertaking. However, this evidence is not conclusive but is open to explanation, and the weight of it is for the jury." *McGowan Commercial Co.* v. *Midland Coal & Lumber Co.*, (Mont) 108, Pac. 655; *Wood* v. *Dodge*, supra; *Security Bank Note Co.* v. *Shrader*, supra.

QUESTION OF LAW OR FACT.

The issue being based upon an alleged contract, it is generally admitted that when there is no substantial conflict in the evidence

as to the precise terms of the alleged promise, then the court should decide, as a matter of law, the meaning of the words used which are alleged to constitute the promise, and to decide, as a matter of law, whether the alleged promise is original or collateral. But where the language used, together with the surrounding facts and circumstances, makes it doubtful whether the parties intended, by the promise, to create an original or a collateral obligation, then the intention should be determined by the jury, under proper instructions by the court. 25 R. C. L., 490, and cases there cited; note on *Security Bank Note Co.* v. *Shrader*, supra.

The claims made by the parties, as to the facts in the case at bar, somewhat briefly stated, are as follows: The plaintiff corporation, testifying through Mr. Wellington, its manager, says that it does business at Caribou; that just after dinner on the 13th of March, 1919, a stranger, who turned out to be J. M. Agel, came to the store of the plaintiff; that as a result of conversation with Mr. Agel he made up a list of the automobile tires charged in the writ; that, upon request of Mr. Agel, he called the defendant, at Presque Isle, by telephone, and told him that a relative of his was there, that he wanted to buy some tires, also that Mr. Agel wanted to know if defendant would be at home that night, as Mr. Agel desired to make a call upon him; that Mr. Agel signed a written order for the tires, taking a copy of the order with him, and left the store; that in the later hours of the same afternoon Wellington was called by telephone from Presque Isle; that he recognized the calling voice as that of the defendant, who said, "This is Harry Green talking, ... Mr. J. M. Agel is here . . . . he is an uncle of my wife, he is all right, he is good." To this Wellington replied, "I don't know anything about him. We have have never had any dealings with him." And then the defendant said, "Well, you let him have the tires and you can look to me for your pay," and to this Wellington replied, "All right, Harry." After this second telephone talk, and before the tires were shipped, Wellington and the defendant met at a fraternal order meeting when the defendant asked if the tires had been shipped and, upon receiving a negative answer, said "This fellow is all right, he has got a store in Fitchburg, Massachusetts, and he has got another store in Bangor. You ship the tires to him and you can look to

me for the pay." The tires were shipped to Mr. Agel on March 21, 1919. Upon the books of the plaintiff they were charged to the latter, and an invoice sent him, but no further bill or statement was so sent. About the first of July, 1919, plaintiff learned that Mr. Agel had filed a petition in the bankruptcy court. This fact was brought to the attention of Mr. Green, by Mr. Wellington, and Mr. Green said, "You don't have to worry any about it. I am going to pay you for them—for these tires." Mr. J. A. Parker, a clerk in plaintiff's employ in the year 1919, corroborated Wellington as to the conversation held after plaintiff had learned of the Agel proceedings in the bankruptcy court.

The defendant does not exactly remember the conversations as stated by Wellington and repeatedly claimed that whatever he did say was not with reference to J. M. Agel but was with reference to a firm in which one Sam Agel was a partner. He strongly urges that the promise relied upon by plaintiff, being an oral one, is within the Statute of Frauds and not enforceable, as being a collateral promise and not an original one. He claims that the book charges, made to J. M. Agel, are strong evidence of a collateral promise, within the appropriate rules of law, and that the delay of plaintiff in making demand for payment until after Agel had filed his petition in bankruptcy, together with all other facts and circumstances in the case, unquestionably point to a promise which is well within the statute.

But all the conflicting testimony as to what was said and done, the book charges, in the light of the attending facts, the nature of the contract, the acts to be done, the time, place and manner of performance, the situation and relation of the parties, and their subsequent statements and conduct, were all heard by the jury, under appropriate instructions, and they determined, as matter of fact, that the intention of the parties was to enter into an original promise and so held the defendant liable. We cannot say that the jury were manifestly wrong in that finding.

Motion overruled.

WILLIE C. CHARLES *vs.* SAMPSON H. HARRIMAN.

Oxford. Opinion September 27, 1922.

Exceptions to a ruling directing a verdict necessarily bring up the whole record, and the record controls statements in the bill of exceptions. Whether the employer has exercised reasonable care to provide a reasonable safe place in which, and a reasonable safe machine upon which, the employee was to work, is a question for the determination of the jury. To recover damages for personal injuries against a non-assenting employer under the Workmen's Compensation Act, to exclude the defenses mentioned in section two of the Act, it must be alleged that plaintiff belongs to the class of employees who are within the Act. An objection that the declaration failed to allege that the plaintiff was an employee within the statute, not made until after the evidence was closed, comes too late and should be overruled.

In the instant case the court finds no evidence in the record which would justify a jury in finding the defendant guilty of negligence in respect to the construction, or condition of the machine, neither in the want of a guard for the saw, nor in the position of the spreader, nor in the use of the sawdust board.

The plaintiff, however, also charges negligence either in failure to equip the machine with a loose pulley or in not shutting down the mill when the machine needed oiling. A jury might well find that the mill foreman knew of the necessity of oiling the machine during each half day run, and upon this issue it was a question for the determination of the jury whether, under existing conditions, the defendant had exercised reasonable care to provide a reasonably safe place in which, and a reasonably safe machine upon which, the plaintiff was to work.

The case being rightfully understood at the trial, and the allegations clearly indicating the intention of the pleader to institute an action against a non-assenting employer by an employee under the statute, the amendment offered should have been allowed; it simply made the declaration more formal.

Whether the injury was sustained by the plaintiff in the course of his employment was a question for the determination of the jury.

On exceptions by plaintiff. This is an action to recover damages for personal injuries sustained by plaintiff while in the employment of defendant. The first count in the writ states a cause of action at common law, and the other five counts set out causes of

action against a non-assenting employer under the Workmen's Compensation Act. The defendant pleaded the general issue, and the case was tried to a jury. At the close of evidence by defendant, his attorney moved for a directed verdict on the ground that the declaration showed only an action at common law, and that the evidence of plaintiff showed an assumption of risk and contributory negligence on his part, and further that plaintiff's employment was but casual. Counsel for plaintiff filed a motion to amend each count in the declaration, alleging continuous employment of plaintiff by defendant for a long time prior to the day of the injury. The presiding Justice refused to allow the amendment and plaintiff excepted. The presiding Justice then granted defendant's motion for a directed verdict for the defendant and and plaintiff excepted. Exceptions sustained.

The case is fully stated in the opinion.

Hastings & Son and Ralph Parker, for plaintiff.

Bradley, Linnell & Jones, for defendant.

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

MORRILL, J. This case is before us upon exceptions to a ruling directing a verdict for defendant. The plaintiff seeks to recover damages for personal injuries received by him on January 8, 1921, while employed by defendant. The declaration contains six counts; the first count contains an allegation of due care on the part of the plaintiff, and states a cause of action at common law; the other five counts are framed to state causes of action against a non-assenting employer under the Workmen's Compensation Act, who regularly employed more than five employees in the same business in which the plaintiff was employed and who is limited in his defense by the limitations prescribed in section two of that Act; the intention of the pleader in that respect is perfectly apparent. Such joinder of counts is not objectionable. *Nadeau* v. *Caribou Water, Light and Power Co.*, 118 Maine, 325, 331.

The correctness of the ruling as to the count at common law is not challenged. The bill of exceptions states that "the evidence showed the plaintiff to have no action maintainable at common law due to his contributory negligence or to his assumption of risk."

The bill of exceptions presents the following concise statement of the contentions of the parties at nisi prius:

"The defendant pleaded the general issue and the case was tried to a jury. No testimony offered by either side was excluded during the trial. At the close of the defendant's evidence, the defendant's attorney moved for a directed verdict on the ground that the plaintiff's declaration showed only an action at common law and that his evidence showed an assumption of risk and contributory negligence on his part. The particular ground on which the defendant based his motion was that the plaintiff's declaration, in any of the counts, alleged facts sufficient only to show that the plaintiff's employment was but casual; that it devolved upon the plaintiff, if he desired to take advantage of the Workmen's Compensation Act, to allege facts sufficient to show that his employment at the time of the injury was not casual within the meaning of Section 1 of the Act, as amended. The plaintiff claimed that his declaration was sufficient to maintain an action under R. S., Chapter 50, as amended, under which the defendant was deprived of the various defenses as set forth in Section 2 of said chapter as amended. The evidence showed that on the day of the accident, the defendant operated a mill for the manufacture of dowels and regularly employed eight or ten employees in said manufacturing, and that the plaintiff had been regularly employed in said business for about six weeks prior to the accident, and was so employed on the day of the injury. There was evidence for the jury of the negligence of the defendant as alleged in the writ."

The presiding Justice having indicated that he should sustain the motion of defendant's counsel and direct a verdict in favor of defendant, plaintiff's counsel presented a motion to amend each count in the declaration, alleging continuous employment of plaintiff by defendant for a long time prior to the day of the injury. As to this amendment the bill of exceptions states:

"The presiding Justice refused to allow the amendment and the plaintiff excepted. After further argument, the presiding Justice granted the defendant's motion for a directed verdict for the defendant on the ground that the plaintiff's declaration showed only an action at common law, and that the evidence showed contributory negligence and assumption of risk by the plaintiff, and the plaintiff excepted, on the ground that his declaration was sufficient

to bring him within the Workmen's Compensation Act, and particularly that his declaration disclosed facts sufficient to show that the plaintiff's employment was not casual within the meaning of Section 1 of the Act, as amended."

In addition to his contention that the declaration is insufficient to sustain an action other than at common law, as stated in the above quotation from the bill of exceptions, the counsel for defendant now contends that plaintiff's injury was not received in the course of his employment, and that the defendant was not negligent.

It is apparent that if the last contention is well founded, the plaintiff was not prejudiced by the ruling and the other contentions become immaterial. True, the bill of exceptions states that "there was evidence for the jury of the negligence of the defendant as alleged in the writ."

The defendant's counsel challenges the truth of this statement; he is within his rights in so doing. Exceptions to a ruling directing a verdict necessarily bring up the whole record, and the record controls statements in the bill of exceptions. *Williams* v. *Sweet*, 121 Maine, 118. *Tower* v. *Haslam*, 84 Maine, 86, 89.

We therefore proceed to examine the record to determine whether it presents any evidence of negligence of the defendant causing the injury. This inquiry must be entirely independent of negligence on the part of plaintiff and his assumption of risk.

On the day of the injury and for some weeks before, the plaintiff was employed in the saw room of defendant's dowel mill in operating a machine known as a "stripper"; his part in such operation was to feed the lumber into the machine. Back of him, as he stood at his machine, and a little at his left, about three feet distant from him, was another machine called a "bolter" operated by one Potter; as the logs or bolts were delivered in the saw room, they were first sawed into boards upon this machine with a circular saw. Both the stripper and the bolter required oiling four times a day, before starting in the morning, about the middle of the forenoon, during the noon hour, and about the middle of the afternoon. The bolter was not equipped with a loose pulley, and could not be shut down without shutting down the mill. A jury would be warranted in finding that for sometime prior to the day of the injury the plaintiff had oiled both stripper and bolter, at least in

the middle of forenoons and afternoons. On the day in question, in the forenoon, he oiled his machine and proceeded to oil the bolter, while the saw was running, as he had frequently done before; in some way, which he does not very clearly explain, his left hand came in contact with the saw and he lost substantially three fingers. In the fifth count in the writ plaintiff charges negligence on the part of defendant, in the construction, maintenance and use of the bolter, in several particulars. Without quoting the evidence at length it is sufficient to say that we find no evidence in the record which would justify a jury in finding the defendant guilty of negligence in respect to the construction, or condition of the machine, neither in the want of a guard for the saw, nor in the position of the spreader, nor in the use of the sawdust board; the relative positions of the spreader and sawdust board did not constitute a trap; the plaintiff had worked in the mill during the previous season, was familiar with the machine and its equipment. The plaintiff also charges negligence either in failure to equip the machine with a loose pulley or in not shutting down the mill when the machine needed oiling; he charges that he was required to oil the bolter while the saw was in motion. While there is no evidence that he or anybody else was expressly required to do so, it is evident, and a jury might well find, that the mill foreman knew of the necessity of oiling the bolter during each half day run, and that the mill was not shut down for that purpose. The bolter was oiled through a box equipped with a metal cover fitted level with the top of the saw table; the box was located opposite the middle of the saw and in size was about five and one half inches by six inches across the table; from the centre of the oil box to the saw was six inches, or three inches from the edge of the box to the saw; and the centre of the box was about fifteen inches from the edge of the saw. In the space, about ten inches wide, (according to the testimony of a builder of such machine) between the saw and the sawdust board, sawdust, and sometimes boards, accumulated from the operation of the bolter, and into that space and close to the saw, the employee before oiling was obliged to reach over the board, and remove the accumulated sawdust from the cover of the oil box, brushing it to either side. We think that under such conditions it was for the jury to say whether reasonable care for the safety of his employees did not require the employer to equip the

bolter with a loose pulley, or otherwise provide for shutting down the machine for the necessary oiling. True, the plaintiff says, "I thought there was no danger of taking the risk of dealing with the saw." This expression goes to the question of defendant's contributory negligence or his assumption of risk, with which we are not now concerned. But the facts of the case present the other issue whether under existing conditions the defendant had used reasonable care to provide a reasonably-safe place in which the employee was to work, and a reasonably-safe machine, so that "the risk of dealing with the saw" might be materially reduced or become non-existent, when the machine required oiling. We think that this issue was for the determination of the jury.

We must, therefore, consider the ruling in relation to the other points raised by defendant against the maintenance of the action. The defendant contends that none of the counts are sufficient to support an action against a non-assenting employer under the Workmen's Compensation Act, and to deprive the employer of the defenses named in the second section of the Act, because none of them allege that the plaintiff was an employee within the meaning of the Act, and because the facts show that the injury was not received in the course of plaintiff's employment. The first contention presents a question of pleading; the second, one of fact.

It is only in actions to recover damages for personal injuries sustained "by an employee in the course of his employment," or for death resulting from personal injury so sustained, that certain defenses are excluded by section two of the Act. Not all employees are "employees" within the meaning of the Act; there are numerous exceptions, among them, persons "whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer." The word "or" is here used in its ordinary sense and accurate meaning as a disjunctive particle; *Guy L. Mitchell's Case*, 121 Maine, 455; it is not to be construed as "to wit," thus serving to explain what precedes by what follows; it rather indicates one or the other of two or several persons, things or situations and not a combination of them. So, although the injury may have been received in the usual course of the trade, business, profession or occupation of the employer, yet if the employment of the injured person was but casual, he is within the excepted class and is not an employee under the Act. *Gaynor's*

Case, 217 Mass., 86. The statute of Massachusetts now differs from our own. Mass. St. 1914, c. 708, Sec. 13.

The defendant contends "that the plaintiff's declaration in this case does not show him to be a regular employee, it does not even negative the exception that he is a casual employee, in fact it describes him as one." We think that, following the rule applied in *Nadeau* v. *Caribou Water, Light & Power Co.*, supra, the declaration must allege that the plaintiff belongs to the class of employees who are within the Act. The rule laid down in *Hight* v. *Quinn*, 86 Maine, 491, applies: "If the exception is descriptive of the class of persons who may sue, or is descriptive of the cause of action, or is descriptive of the class of persons who may be sued, such descriptive exceptions should be stated in the declaration, to show affirmatively that the plaintiff, the cause of action, and the defendant are all within the statute."

In the last five counts the plaintiff alleges in each count "that the said defendant on the eighth day of January, 1921, owned and operated a mill for the manufacturing of dowels, located in said Fryeburg, and regularly employed therein more than five employees for the purposes of said manufacturing, and that the said plaintiff on said eighth day of January, 1921, was employed in said mill by the said defendant." Of this allegation defendant's connsel says: "It simply alleges that the plaintiff was working for defendant on one single day which, of course, would make him only a casual employee." This is clearly a wrong conclusion; the plaintiff might have begun work on the morning of that day under a contract of continuous employment for the season; certainly we cannot say that, because the declaration alleges that the plaintiff was at work on a particular day, his employment was but casual.

Further examination of the same counts shows that no one contains an allegation of due care on the part of the plaintiff, and that each alleges that the injury was received while the plaintiff was in the scope and course of his employment, and was due to the negligence of defendant. The counts in such form clearly indicate the intention of the pleader to institute an action against a non-assenting employer and to deprive the defendant of the defenses mentioned in section two. The plaintiff upon the facts was a regular employee; the defendant knew that to be true, and could not be misled by the pleadings or surprised by the proof; it was con-

ceded. The defendant pleaded the general issue and went to trial; his counsel did not raise the question that the declaration failed to sufficiently set out that the plaintiff was an employee within the statute until the evidence was closed. We think that the objections made at the time and under such circumstances should have been overruled. The objection was purely technical and was made after a trial in which the case was rightly understood. *Moody* v. *Inhbts. of Camden*, 61 Maine, 264, 265. *Mitchell* v. *Chase*, 87 Maine, 172, 176. In *Sposedo* v. *Merriman*, 111 Maine, 530 at Page 542, Mr. Justice KING said: "Since the statutes were enacted allowing much freedom as to amendments it has been the general rule that no variance between the allegations and proof is to be deemed material unless it is such as must have reasonably misled the adverse party to his prejudice in maintaining his action or defense." And in the law court, after verdict, an amendment has been considered as made when the case has been fully understood and tried without surprise to either party. *Wyman* v. *American Shoe Finding Co.*, 106 Maine, 263. *Clapp* v. *Cumb. Co. Pow. & Light Co.*, 121 Maine, 356.

It is a fair construction of the language used in the declaration to say that it sufficiently alleges that on the day named the plaintiff was one of the employees then regularly employed; we think that ordinarily read, it would be so understood. Insert the word "so" before the word "employed" in the last clause quoted and the allegation would meet the most technical criticism. The statute is remedial and procedure should be in accordance with such construction.

Inasmuch as the case had been rightly understood at the trial, and the allegations clearly indicated the intention of the pleader to institute an action against a non-assenting employer by an employee under the statute, we see no objection to the amendment offered; it simply made the declaration more formal. *Mitchell* v. *Chase*, supra. *Moody* v. *Inhbts. of Camden*, supra.

The defendant also contends that the injury was not sustained by the plaintiff in the course of his employment. If this is true, the plaintiff was not prejudiced by the ruling.

In *Westman's Case*, 118 Maine, 133, 142, an employee was said to have received injuries in the course of his employment where he "was doing, at a time, at a place, and of a nature, the duties which his employment reasonably called him to perform."

In *White* v. *Ins. Co.*, 120 Maine, 62, 68 the rule is stated: "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 *Fournier's Case*, 120 Maine, 236, 240, it is said: "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."

The plaintiff testifies: "My duties were to look after the stripper and keep the saws sharp and look after the machines, do the oiling, both stripper and bolter, and feed the boards into the stripper."

The defendant testifies:

"Q. Did you hire Mr. Charles to work for you?

"A. I did.

"Q. What did you engage him to do?

"A. To run the stripper.

"Q. Did he have any other duties than to run the stripper?

"A. No, he did not.

* * * * * * * * * *

"Q. Did you ever see Mr. Charles oil the bolter?

"A. No, sir; I never did.

"Q. Did you ever give him permission to oil the bolter?

"A. No, sir; I never did.

"Q. Whose duty is it to oil the bolter?

"A. It is the man that runs the saw, that runs the bolter saw."

Around these squarely contradictory statements is much evidence supporting one contention or the other. We think that in the present case it was peculiarly a question for the jury to decide, under the rule as stated, whether plaintiff received his injury in the course of his employment. There was much evidence on the point for the consideration of the jury.

Exceptions sustained.

TEMPLE E. SPAULDING *vs.* AMERICAN REALTY COMPANY.

Androscoggin. Opinion October 2, 1922.

The terms of a written contract, if the language is clear, definite, and free from ambiguity, are not to be varied, modified, or contradicted, in absence of proven fraud, except where convincing and cogent proof establishes the fact that a change or modification of such written contract was made by a subsequent agreement.

It is the general rule that oral evidence of preceding or accompanying negotiations is not admissible to vary or to contradict, or to subtract from or add to, the language of a written instrument which speaks for itself in definite and final terms; fraud not being advanced and proved.

The writing is supreme, not because it is a writing, but because it is the perceptible and self-speaking incorporation of the terms agreed to.

While the terms of one agreement may be abrogated, modified, or waived by another subsequently made, yet nothing short of cogent proof will establish the fact of a change in that which originally was reciprocally done.

On report. This is an action in assumpsit on an account annexed. The general issue was pleaded. In June, 1920, plaintiff entered into a written agreement with defendant to cut on Township 4, Range 5, in Oxford County, 7500 cords of rough pulp wood, to land same on the banks of Moose Brook and to drive and deliver same into pocket booms on Parmachenee Lake, during the season of 1920-1921. Under this contract plaintiff was to be paid $9.50 per cord for all pulp wood delivered under it, with advances of $6.00 per cord for all pulp wood cut and yarded, and $2.50 additional when the pulp wood was landed on the bank of Moose Brook. For every increase of $1.00 per month, average, in woodsmen's wages, from $65 to $78 per month, during the continuance of the contract, defendant agreed to increase the price to be paid the plaintiff ten cents per cord, not to exceed $10.80 in the whole. After the agreement was signed and the plaintiff entered upon the performance of it, the price of labor increased, and plaintiff claims that in several conversations that he had with defend-

ant's agent, Robert A. Braman, an agreement was reached under which plaintiff was to receive more than was stipulated in the written contract. Judgment for defendant.

The case is fully stated in the opinion.

Pulsifer & Ludden and Frank A. Morey, for plaintiff.

Ryder & Simpson, for defendant.

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

DUNN, J. Whether, as a result of new undertakings by its parties, a certain written contract was later abandoned for a new agreement, orally expressed, is a question vital in this controversy.

The systematic industry of counsel has collected a wealth of material either directly apropos of or having close analogy to the principle that, while the terms of one agreement may be abrogated, modified, or waived by another subsequently made (*Storer* v. *Taber*, 83 Maine, 387; *McIver* v. *Bell*, 117 Maine, 495), yet nothing short of cogent proof will establish the fact of a change in that which originally was reciprocally done. *Liberty* v. *Haines*, 103 Maine, 182; *Chaplin* v. *Gerald*, 104 Maine, 187; *Johnson* v. *Burnham*, 120 Maine, 491; *O'Keefe* v. *St. Francis Church*, 59 Conn., 551, 22 Atl., 325; *Ashley* v. *Henahan*, 56 Oh. St., 559, 47 N. E. 573; *Caldwell* v. *Schmulbach*, 175 Fed., 429; *James Riley Co.* v. *Smith*, 177 Fed., 168; *McKinstry* v. *Runk*, 12 N. J. Eq., 60; *Woarms* v. *Baker*, 82 N. Y. Supp. 1086; *Huntsville Club* v. *Building Co.*, (Ala.), 57 So., 750. Any other theory would be contrary to the common sense of judicial decisions. Even the free and easy liberty of general logic, which is prone to accept any and all evidence from whatever source and in whatever form, leaving the factor of error to be corrected, if at all, by a process of rebuttal, would regard the recognition of a superseding agreement, in the absence of evidence irresistible in character, as coming into conflict with its uncritical methods of reasoning.

The whole situation in the instant case is virtually an array of facts of varying degrees of importance. To begin at the beginning, under date of a day in May, 1920, (though the actual signing was somewhat later), these present litigants, in the renewal of a relationship first known between them in 1915, entered into a contract evidenced by writing, having chiefly to do with the cutting and the

hauling, by this plaintiff, of pulp wood from Oxford County land, and the driving of the wood by him into a boom in Parmachenee Lake, on the promise of being paid a definite price for every cord; plus the promise of an increase over that, graduated and limited with reference to possible advances in labor costs. The plaintiff started in on a performance before the terms of the agreement were written. When a written draft of the contract had been prepared, both parties signed it, and continued on thereunder. The plaintiff is insisting that, preliminarily to the meeting of the minds, as expressed in the writing, one Braman, a manager of the defendant corporation, represented to him that, through the next ensuing logging season, in connection with logging operations to be carried on by the defendant adjacently to where the plaintiff might operate, a greater rate than $3.25 a cord would not be paid to choppers; whereas, after the making of the agreement the defendant advanced its rate, at the first to $4.00, and eventually to $5.00.

The writing having been executed and delivered, but a short time elapsed, says the plaintiff, when it became manifest to him that the soaring of costs impended his financial disaster, and this in consequence of the high labor price being paid by the defendant, which occasioned an increase in the wage demanded at his own camp. Accordingly, runs the contention, on or about July 12th, 1920, when about 500 of a contemplated 7,500 cords of wood had been cut, the plaintiff telephoned Mr. Braman. Plaintiff tells the story of that conversation, the first between them on the topic, in these words:

"I asked Mr. Braman if the price they were paying crews there was so, and he said it was; he said it was local there. But the others down to Portland were paying that and he had to get the pulp. I says what about my paying more when it is going slow. I says I can't do it because I would have to pull out, I couldn't pay so much. And he said you go ahead the best you can. I will see no job go broke."

It is upon the asserted assurance: "you go ahead . . . I will see no job go broke," which it is urged has a background in the earlier inducing representation of Braman, that the plaintiff would build his case. Thereafter, on the plaintiff's version, the operation was conducted, not by the written contract, but under the new oral one. On this the plaintiff relies to recover the sums of money alleged to have been paid by him to finance the operation, in excess of what he had received; and also he relies on it to recover wages for his personal services in supervision.

It is unnecessary to inquire whether a representation regarding the wage of choppers was made. Were it made, it would lack merit. The plaintiff, it is true, quotes decisions in his effort to sustain his proposition that the evidence, which he introduced in this behalf against objection, was competent. He points, as with an index finger, to the case of *Neal* v. *Flint*, 88 Maine, 72, and stresses its directing sway. But, in comment on that decision; in *Burnham* v. *Austin*, 105 Maine, 196, this court has clearly stated an unwillingness "to extend the (its) doctrine of independent collateral agreements."

Few rules in the law of evidence are of wider application than that declaring extrinsic evidence of preceding or accompanying negotiations inadmissible to vary or to contradict, or to subtract from or add to, the language of a written instrument which speaks for itself in definite and final terms; fraud not being advanced and proved. The reason of the rule is, that as the parties have constituted the writing to be the only outward and visible expression of their meaning, no other words can be added to it, or substituted in its stead. 1 Greenl., 277. Says Dean Wigmore, in characteristic clearness:

"The so-called parol evidence rule is attended with a confusion and an obscurity which make it the most discouraging subject in the whole law of Evidence. . . . . First and foremost, the rule is in no sense a rule of evidence, but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. . . . What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all." Wigmore on Evidence, Section 2400.

In easy paraphrase of the text writer, it is to be expected that negotiations both went before and went with the integration or embodiment of their net effect in a signed or otherwise adopted document. Because of the embodiment, the scattered parts that led up to it, however consequential they may have been before, have no longer any legal effect, for they have been reduced into and replaced by a single memorial. Wigmore, Section 2425. So is the modern general rule. The essence of our own related decisions is laid down in *Bassett* v. *Breen*, 118 Maine, 279, Mr. Justice MORRILL speaking:

"When parties put their contracts in writing, the writing must be considered as expressing the ultimate intentions of the parties to it,

and, in the absence of fraud, parol evidence is not admissible to alter or modify the terms or legal effect of it. All prior negotiations, or so much of them as the parties see fit, are merged in the written contract."

Butterick Publishing Company v. *Fisher*, 203 Mass., 122, is in point. There, during the trading which led up to the making of a written contract, a representative of one of the parties orally stated that it was its policy to have but a single "agency" in a particular town, and indicated its intention of ending the already existing one (as it had a right to do), at the time that its contract with the other party went into effect, so the latter might have an exclusive right of selling a particular kind of garment patterns in the community; but it did not terminate the existing agency. Nor did the other party perform his part. In a suit against him for specific performance, he invoked the oral statement. Said the court:

"But the plaintiff came under no obligation to that effect in the signed contract. . . . . Where the trade finally struck between the parties is put in writing, the writing sets forth the trade which is struck. For that reason evidence that during the negotiations the plaintiff agreed by word of mouth that the defendant should be its sole "agent", although not objected to, is not of consequence."

The supremacy of the writing, not because it is a writing, but because it is the perceptible and self-speaking incorporation of the terms agreed to, is the controlling idea. Of course there are exceptions to the parol evidence rule (*Gould* v. *Boston Excelsior Company*, 91 Maine, 214; *Vumbaca* v. *West*, 107 Maine, 130), but the instant case is not within them.

Plaintiff is positive in saying that the telephone conversation occurred as related. Indirect support of a new promise to the plaintiff is given by his brother Hosea. The support, however, is vague. Hosea testified that, about June 6, 1921,—(the telephone conversation, if had, was in July before)—"although Mr. Braman didn't say so in so many words," yet he inferred from what Braman said that an adjustment saving his brother from a loss would be made. Again, that in December, 1920,—five months after the insisted-upon telephone conversation—he heard his brother and Mr. Braman say, each to the other in turn, that a performance of the contract would be exacted, and that he, the witness, supposed this to refer to the claimed superseding contract.

Dim as this testimony is, it is darkened by a letter that Hosea wrote. The letter, bearing date of June 16, 1921, primarily relates to work that Hosea himself had done for the defendant. But the writer mentioned other matters. In it he speaks of his brother's operation, of the resulting indebtment on the part of the latter to the other contracting party, and of his own unpaid wages for services there.

The past and present attitudes of the plaintiff are at variance. Without extending a detailed analysis of the evidence, it may be said that between August and the middle of December, 1920, the wage of logging labor had steadily and essentially advanced, and that the plaintiff frequently asked Braman if by conference with officers of the company outranking himself in authority, he would not endeavor to get an increased price for the operation. Plaintiff was not asking this as of right; rather was he seeking a concession in an exigency greater than the written contract's sliding scale had anticipated.

Braman denies that he agreed to make the endeavor. He denies the telephone conversation. He is emphatic that a new promise never was made, asserting his want of authority. Other witnesses, employees of the defendant, who had dealt with the plaintiff with respect to payments and related matters, while the operation was going on, say that no mention of the oral promise, now set up, was ever made by the plaintiff to either of them. Still another witness adds, that, about August 5th, 1920, plaintiff said: "things were going hard . . . . wanted to see if Mr. Braman couldn't intercede to get him a little more money." An interview between the plaintiff and Mr. Braman, on December 7, 1920, was taken down in shorthand. At that time,—if this present demand of the plaintiff be well-founded,—several thousand dollars were due and owing to him. The stenographer testified from her notes. Plainly, from her unshaken testimony, the plaintiff was regardful of the binding force of the written contract. He made no claim for payment. On the contrary, said he:

"I have run behind a good deal. I do not see what I shall do. It has been a harder job than I thought it would be. . . . Make me a different contract."

Thus much is not all. An identifying or file number had been given the written contract by the defendant. All payments made

by the defendant to the plaintiff and receipted for by the latter, as the checks and vouchers show, have explicit reference both to the contract's number and its date. Correspondence between parties mentions the number. In August, 1921, the plaintiff distinctly asserted the existence of an oral agreement, in a letter. But in February before that, the plaintiff borrowed money from the defendant, to pay for horses worked in the operation, giving a mortgage of the beasts as a security for the payment of the loan.

Beyond this, so far as the asserted modifying oral agreement is concerned, it went only to the doing by the plaintiff of that which he already was legally bound to do. Therefore, the point of its nullity, for the want of a consideration, might becomingly be addressed against the present claim. *Wescott* v. *Mitchell*, 95 Maine, 377; 1 Williston on Contracts, Section 130; 1 Page on Contracts, Section 312. But decision is not hinged on this. Plaintiff's case does not meet the test in a subjective weighing of clear, convincing and conclusive proof. The disposing entry must be,

Judgment for Defendant.

JAMES GRANEY'S CASE.

Cumberland. Opinion October 2, 1922.

Workmen's Compensation Act as amended. If an employer and employee do not agree respecting compensation, or if such agreement is made but fails of the approval of the Commission, in each of such cases, within two years of date of injury, either party may institute original proceedings by petition to have compensation determined. In case of an agreement respecting compensation approved by the Commission, or a decree determining it, a review may be had, if the petition therefor is filed within the time such payment is to be made, and within two years from date of approval or entry of decree. Section 16 of said Act applies only to those cases which it definitely mentions.

Maine Laws of 1919, Chap. 238, Secs. 30, 39; Sec. 36; Sec. 16; Workmen's Compensation Act.

If an employer and his employee do not reach an agreement respecting the compensation to be paid, or, if an agreement arrived at by them fails of the Labor Commissioner's approval, then, and in each of these instances, within two years of the day of the date of the injury, either employee or employer may make application that the amount of compensation be fixed. Proceedings of this nature are called original.

If there be an officially-approved agreement, or a fixing decree, then, within both, the time which the one or the other assigns for the payment of compensation and two years from the date of approval or entry of decree, there may be a reconsideration of the situation with regard to the question of whether incapacity for work has ended, increased, or diminished. A petition of this kind is known as one for a review.

Section 16 deals with what, in named instances, shall be deemed the duration of presumed total disabilities for working, reserving questions of partial disabilities, remaining after the presumed total ones, to be decided conformably to the provisions of another section. Section 16 lays down a prevailing definition as to those, and only those, cases which it definitely mentions.

On appeal by defendants. This is an appeal from the decision of the Industrial Accident Commission, granting to claimant com-

pensation for partial disability in the sum of $14.89 per week, commencing from the date of the last payment of the specific compensation and to continue according to the provisions of Sections 16, and 15 of the Workmen's Compensation Act in effect at the time of the accident. The question involved is whether an original petition for compensation will lie after the expiration of the period set by an approved agreement, or by a decree, for the payment of compensation. Appeal sustained. Petition dismissed.

The case is fully stated in the opinion.

C. L. & P. E. Donahue and William H. Looney, for plaintiff.

Robert Payson, for defendants.

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

DUNN, J. The staple of the story of this case may be presented briefly: Arising out of his employment by the Kennebec Wharf & Coal Company, and in the course of that employment, a personal injury befell James Graney, involving his right hand and incapacitating him for work. He and his employer agreed upon the amount of a weekly stipend allowable under the Workmen's Compensation Act. Their agreement being approved by the Labor Commissioner, payments were made accordingly, for a time, by the employer's insurance carrier.

Later on, at the instance of Graney; the Industrial Accident Commission determined the extent of "permanent impairment" to his injured hand, and entered a decree defining the compensation payable to him for a specified period of time, which decree was duly performed. Somewhat more than two weeks after the running of the assigned period, Mr. Graney advanced to the Commission another petition. This petition, as eventually amended, asked for a finding and order concerning an alleged partial disability to labor, still continuing. Decision thereon was favorable to the petitioner. A supporting decree was entered, and an appeal was made. The appeal must be sustained.

The provisions of the Workmen's Act may not be invoked without regard to time. Limitations are laid down in that law itself. First, and within thirty days of its happening, a notice of the injury must be given to the employer. Laws of 1919, Chap. 238, Sec. 17. Though knowledge otherwise of the injury may be tanta-

mount to notice; also, accident, mistake, or unforseen cause may excuse its giving. Laws of 1919, Chap. 238, Sec. 20. *Wardwell's Case*, 121 Maine, 216. Next, within one year after the occurrence of the injury, a claim for compensation must be made, (Section 17); but this may be the subject of a waiver. *Smith* v. *Boiler Company*, 119 Maine, 552. The fact remains, however, that there must be a compliance, or the equivalent of a compliance, with these conditions precedent.

Now, the conditions mentioned out of the way, if an employer and his employee do not reach an agreement respecting the compensation to be paid, or, if an agreement arrived at by them fails,—on the ground of nonconformity to the statute,—of the Labor Commissioner's approval, then, and in each of these instances, either employee or employer may, within two years after the day of the date of the injury, apply to the commission to fix the amount of compensation. Sections 30 and 39, the two in concert. Proceedings of this nature are called original.

If there be an officially approved agreement, or a fixing decree, then, within, both the time which the one or the other assigns for the payment of compensation and two years from the date of approval or entry of decree, there may be a reconsideration of the situation with regard to the question of whether incapacity for work has ended, increased, or diminished. Section 36. A petition of this kind is known as one for a review.

Other provisions of the statute, indulging a mental or physical incompetency, and providing for the modification of one agreement by another, do not here claim more than this passing notice.

The plaintiff is in full accord with what has been said to now. His advanced reliance, however, is Section 16. That section, so far as its provisions are material here, is in this tenor:

"In cases included in the following schedule the disability in each such case shall be deemed to be total for the period specified and after such specified period, if there be a partial incapacity for work resulting from the injury specified, the employee shall receive compensation while such partial incapacity continues under the provisions of section fifteen, ... The compensation to be paid . . . . shall be" (as defined in fourteen different cases, beginning with one dealing with the loss of a thumb).

It will be seen, by reference to the section, that the first part of its opening paragraph is positive and direct as to what, in named instances, in virtue of a legislative conclusion, shall be deemed the duration of presumed total disabilities for working, and that the section leaves its rule unrelaxed by the circumstances of actual fact. In the second part of the paragraph, questions of partial disabilities, remaining after the presumed total ones, and resulting therefrom, are referred to be decided under the supervision and sanction of the Commission, conformably to the provisions of an immediately preceding section.

Let it be observed that there is no limitation, no qualification, no condition whatever attached to the classification made by Section 16, except that a case shall come within its definition. Sections 30 & 39 and Section 36, each have limitations and qualifications, but in Section 16 there are none in regard to the total disabilities that it names, because it was intended there should be none. But Section 16 has relation to those, and only those, cases which it definitively mentions. As to them it lays down a prevailing definition. Besides, as has been seen, it sends the question of any partial disability, thereafter remaining, in the instances of its mention, to the Commission for attention; though it does not mark a way to procedure.

A case not within the prescription of Section 16 is governed by Sections 30 & 39, or by Section 36, whichever may fit the exigency. The case in hand is outside the schedule of Section 16. Mr. Graney's injury was not of the kinds that that section names. The section governing a further procedure in his case is numbered 36. Under that section proceedings are barred, for, while the petition was filed before the expiration of two years from the entry of the decree, still it was not filed before the expiration of the designated compensable period. There is neither legal nor logical avenue around the barrier. The bar is a part of the statute, and it is the duty of the commission as an administrative tribunal and of this court to enforce the provision.

In *Lemelin's Case*, 121 Maine, 72, as here, the petition, belatedly filed, while original in form and so inadvertently styled, yet in purpose was one seeking an increase, by way of a review of proceedings, and so was regarded in the arrived-at result. And an "increase," let it be noticed, may include an extending of the time of the award quite as well as the augmenting of the installments of stipend.

It may not be unworthy of remark, touching the subject of procedure under the act, that, seemingly, when a case falls within Section 16, a convenient and consistent method would be to reserve it, on the close of the first proceedings, for further hearing at the ending of the statute period of disability. This thought likely was in the mind of the writing Justice in *Maxwell's Case*, 119 Maine, 504, as he there indicated the consistent simplicity, directness, and expedition which ought to attend the administration of the remedial legislation.

More need not be said.

Appeal sustained.
Petition dismissed.

JOHN NEWELL'S CASE.

Kennebec. Opinion October 2, 1922.

An agreement for compensation made by employee and employer and approved by the Commission, under the Workmen's Compensation Act, is binding and final except that a review may be had if the petition therefor is filed within two years from the date of such approval, and within the time for which compensation was fixed under such agreement.

Under the Workmen's Compensation Act, an agreement between employer and employee concerning compensation, when approved by the Labor Commissioner, has the binding force of a judgment. If, subsequently, by reason of changed conditions or otherwise, a remedy be essential, it must be had by an application for a review, seasonably entered.

On appeal by respondents. The only question involved in this case is the effect of an agreement between the employer and employee as to compensation which agreement was approved by the Commission. Under such circumstances the agreement is binding and the only remedy provided for relief in case of changed conditions is by a petition for a review seasonably filed. Under such circumstances the method of procedure in the instant case was not appro-

priate, being by an original petition, but should have been by a petition for a review. Appeal sustained. Award set aside. Petition dismissed.

The case is sufficiently stated in the opinion.

Petitioner not represented by counsel.

Thomas N. Weeks, Perkins & Weeks and Robert Payson, for respondents.

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

DUNN, J. This record contains a single query, and it a simple one of pleading. An injured person and his quondam employer came to an agreement concerning the right of the one and the liability of the other under the Workmen's Compensation Act, the agreement being approved by the Labor Commissioner. That agreement was carried out, by payments in weekly installments at first, and eventually by a so-called final settlement; the latter evidenced by an acquittance containing the recital that it was subject to review and approval by the Industrial Accident Commission. In point of time, less than two months had gone, when he of the disability filed an original petition to the Commission, for compensation; using, in so doing, a blank form prepared by that tribunal. The petitioner,—not unlikely in sinister purpose,—failed to answer those plain and pertinent questions on the blank, truthful replies to which would have told of what had been done already in a compensatory way, by revealing the existence and whereabouts of the officially-approved agreement. However, the employer's insurance carrier set up the agreement, in bar, by way of answer. Nevertheless, the Chairman of the Commission heard the petition on its merits. Finding the petitioner to be partially incapacitated for work, the Chairman ordered the payment of compensation, erroneously supposing section fifteen of the act as governing the situation.

Once it has the approval of the Labor Commissioner, a workmen's act agreement has the binding force of a judgment. *Maxwell's Case,* 119 Maine, 504. If, subsequently, by reason of changed conditions or otherwise, a remedy be essential, it must be had by an application for a review, entered, within the statute's limita-

tion as to time, by any party in interest. Section 36 of the Act; *Gauthier's Case*, 120 Maine, 73; *Graney's Case*, 121 Maine, 500.

The original petition being inappropriate, the entry will be,

Appeal sustained.
Award set aside.
Petition dismissed.

JOSEPH LACHANCE'S CASE.

Franklin. Opinion October 4, 1922.

In industrial accident cases, as a usual rule, knowledge of a foreman is knowledge of the principal. An oral notice may be equivalent to a written notice regularly given. Where death ensues from a disorder or disease, after an injury, which would not have occurred at the time it did, and in the way it did, had it not been for the injury, it must be held to have resulted from the injury.

As a usual rule, in industrial accident cases, foremen are included in the category of those whose knowledge is regarded as that of the principal.

In and of itself, an oral notice may not take the place of a written one under the Workmen's Compensation Act. Nevertheless, an oral notice may attain to the office of suggesting a way, which the employer or his agent may follow or not, to the acquirement of such intellectual acquaintance with fact as would be the equivalent of a notice regularly given.

If, but for an injury arising out of and in the course of his employment, an employee would not have died at the time at which, and in the way in which, he did die, then, within the meaning of the act, the unfortunate occurrence, though it merely hastened a deep-seated disorder to destiny, must be held to have resulted in an injury causing death.

The foreman of a camp in the lumber woods was the employer's agent. As such agent he had, seasonably, a knowledge of the employee's injury.

On appeal by defendants. This is an appeal from the decision of the Chairman of the Industrial Accident Commission, granting compensation to claimant as dependent widow of Joseph Lachance, in the sum of $15.00 per week, from October 22, 1920,

for a period of 233 1-3 weeks. Joseph Lachance, husband of dependent claimant, while in the employ of the Skinner Lumber Company, at Skinner, Maine, an assenting employer, as a blacksmith, while riding on a saddle horse, furnished by the employer, in going to the Pine Tree Mill Camp of employer for the purpose of performing his regular work as blacksmith at said camp, was thrown from the saddle by the horse, landing heavily on the ground receiving an injury to his leg below the knee. He reported the accident to his foreman, Frank McIver, who was in charge of the camp. After the accident he complained of his leg and heart and general lameness. He had been subject to heart trouble for some time prior to the accident, which occurred October 22, 1920, and he died April 3, 1921. The award of compensation was made upon the ground that the fall from the horse was the cause of his death by accelerating a pre-existing disease resulting in the earlier death by reason of the injury. Appeal dismissed. Decree affirmed.

The case is fully stated in the opinion.

E. J. Hudon and H. M. Cook, for applicant.

Arthur L. Robinson, for defendants.

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

DUNN, J. Joseph Lachance was a blacksmith in the employment of the Skinner Lumber Company. He was wont to come, from the main shop at the company's mill, to do horseshoeing and other work at its different camps in the woods, whenever his services were needful.

In the forenoon of October 22, 1920, he set out from his home, in the Franklin County settlement known as Skinner, where both the head shop and the principal local office of the concern were, to go to Pine Tree Camp, eight miles away. He was mounted on a horse which the employer had furnished; his kit was in a knapsack on his back; and before him, on the saddle, rested a rifle. While yet within the sight of a person on the piazza of the Lachance house, the horse, as suddenly as unexpectedly, became unruly. The beast reared, and zigzagged, and bucked. He threw his rider, and, one foot remaining in a stirrup, he dragged him until, after a distance of a few feet, the man's foot became free. Witnesses said that the horse, in turning to make for a stable, stepped upon the prostrate man's back.

With patent difficulty, in stooping posture, and displaying evidence of the presence of that uncertain thing called shock, Lachance walked home; but only to rest and to refit himself to start out once again, this time on another horse. Arriving at the camp, he told Frank McIver, the foreman in charge, of what had occurred. That day he worked, but on the next he did not. On this next day he complained of pain in his leg and of heart trouble. The foreman, realizing in some degree the seriousness of the injured man's plight, summoned the company's doctor to treat him. The doctor found Lachance in a bunk. He was generally lame, bruised in the left leg, and "with a special pain in his side," but he soon began working again. The length of time that he remained at the camp is stated from two to three weeks. Little visits to his home, where he had the doctor's aid, intersticed his stay. His ability to work was affected, concededly, by the accident, but the defense insists the record to show that lameness solely contributed to lessened capacity for labor; and that, with regard to this, there was a full recovery. From the Pine Tree Camp Mr. Lachance went to one styled No. 6. Here he continued to work, intermittently, until one day in the month of February. He was not now that he had been. He was, in despite of medical care, in the phrase of that camp's foreman, "all gone." This foreman dismissed him from service. The man went home. There he still had the same physician's care. Ultimately he was taken to a hospital, where he died on April 3, 1921, the cause of his death being given as asystole.

The presenting questions are:

(1) Whether the employer or his agent had knowledge of the injury within the provisions of section twenty of the Workmen's Compensation Act, no formal written notice having been given; and

(2) Whether the finding and decree of the Chairman of the Industrial Accident Commission, based on the theory that the decedent died from a personal injury which arose out of and in the course of his employment, had the support of evidence; not necessarily of evidence in preponderating weight, but rather of evidence as a mere support. *Ballou's Case*, 121 Maine, 282.

Mr. McIver, as we have seen, was the foreman or boss in charge of affairs at the Pine Tree Camp. As a usual rule, in industrial accident cases, foremen are included in the category of those whose

knowledge is regarded as that of the principal. *Simmons's Case,* 117 Maine, 175; *Bloom's Case,* 222 Mass., 434; *State ex rel.* v. *District Court,* 132 Minn., 251, 156 N. W., 278. It is common knowledge, to go one step farther in a right direction, that a boss in charge of a lumber woods camp, is invested with an authority approaching unto that of the master of a ship at sea.

Oral notice of the injury, on the very day, was given to the foreman. Of course oral notice is never the written notice that the statute extorts as essential to the workman's rights. Laws of 1919, Chap. 238, Sec. 17. In no case may an injured workman recover compensation, unless his proof shall show that he gave a written notice within the requisite time, except where the employer or his agent had knowledge of the injury. Section 20. *James Graney's Case,* 121 Maine, 500. An oral notice in and of itself may not take the place of a written one. Nevertheless, an oral notice may attain to the office of suggesting a way, which the employer or his agent may follow or not, to the acquirement of such intellectual acquaintance with fact as would be the equivalent of a notice regularly given.

Properly may it be said, in recurring to the subject of agency in the case in hand, that the foreman or boss called the doctor to Lachance—a doctor under retainer by this defendant to attend its injured employees. Another boss, later on, perceived the man's physical unfitness to do work. And, so perceiving, discharged him from his job. The purpose of a written notice to, or of knowledge of the injury by, the employer is that he may have opportunity for the protection of his rights. What was done throughout this case goes to show that the employer's rights were not left unprotected. The acts themselves tend to show that McIver, the boss, was the employer's agent. And that, as such agent, he had, seasonably, a knowledge binding upon his principal.

The real rub of the case is in another respect. Heart disease caused Lachance's death. The malady was chronic before the mishap with the horse. Plaintiff's attitude is that the injury accelerated the disease to a mortal end sooner than it otherwise would have come; that the death was due, not to the character of the disease acting alone and progressing in its usual course, but to that disease hastened to culmination by an industrial injury.

If Lachance, but for the hurt, would not have died at the time at which, and in the way in which, he did die, then, within the meaning of the Workmen's Act, the unfortunate occurrence, though it merely hastened a deep-seated disorder to destiny, must be held to have resulted in an injury causing death. *Patrick* v. *Ham*, 119 Maine, 510; *Brightman's Case*, 220 Mass., 17; *Madden's Case*, 222 Mass., 487; Honnold on Workmen's Compensation, Vol. 1, Page 509. In an analogous situation, this principle underlies the decision in *Orlow Webber's Case*, 121 Maine, 410.

Though apparently a robust and vigorous man, Lachance, for two years before the accident, had had what physicians recognized, by its signs and symptoms, as a cardiac limitation. But this had been compensated, or recovered from temporarily, in nature's way. The heart was carrying its added load efficiently. A dropsy of the subcutaneous cellular tissue of the feet and legs had disappeared. The man was working, each following day, and bearing the heavy burden of a blacksmith's toil, uncomplainingly and uninterruptedly, to and inclusive of that day just before the injury. Witnesses spoke of his great capacity, till then, for unremitting industry. Idleness on his part seems to have been unknown. Then came an unusual strain, with an accompanying traumatic condition, as the immediate result of what happened while Lachance was doing that which he had been employed to do. Soon afterward the man was observed, by those persons whom he met in his daily walk, to be suffering from breathlessness. Also, the circulation of blood was impaired, due to failure of the aortic valve to function regularly; an impairment increased by the effusion, in considerable quantity, to the embarrassment of the lungs, of serum or fluid into the chest. Seemingly this empyema, which was relieved by tappings, was not at first discernible, likely because the accident did not manifest itself at once in full degree. Oedema of the feet, the ankles, and lower legs reappeared. The man got over the effect of lameness. Not so as to his other ailments. His physical failure was rapid. At the end of scarcely more than five months, he died, aged 56 years. But for the injury, there is nothing to indicate that the man would not have had an expectancy of life embracing a period of years. True it is, that medical men, in keen perception, in examining Lachance both before and after the fall from the horse, had observed the same symptoms. Equally

true is it, in prominence and with emphasis, that neither Lachance's wife, nor daughter, nor niece, nor a fellow-workman knew him, before the accident, to be a sufferer from disease. Yet they, and each of them, noticed and remarked his rapidly progressive decline, dating from the fall. So did the bosses at the camps. Upon the authority of the foreman at the mill, "he was a rugged man to that time."

The record carries an admission that hospital doctors attending Lachance could not relate his death to the accident. Why expect otherwise? Two other physicians were called, but as experts only. No novel virtue should be ascribed to the testimony of either. Each had his hypothesis. They,—like the counsel on the one side and the other,—directed attention to opposite conclusions. Within restrictions studiously respected they shed light and revealed wisdom upon what already had been imprinted, and only this.

Sufficient has been said to show, that it is rational to say, of the case as a whole, that Joseph Lachance began to die when he was thrown from the horse, and that thereafter he died, as the result of an injury that arose out of and in the course of his employment.

Appeal dismissed.
Decree affirmed.

REUBEN MITCHELL *vs.* CANADIAN REALTY COMPANY.

Washington. Opinion October 4, 1922.

Limitations upon the general and apparent scope of the authority of an agent who has been accredited to third persons, do not affect such third persons, unless they have knowledge thereof, as they have a right to presume that his agency is general and not limited. The findings of the presiding Justice on questions of fact are final.

Third persons dealing bona fide with one who has been accredited to them as an agent are not affected by any limitations upon the general and apparent scope of his authority unless they have knowledge thereof.

Persons dealing with an agent have a right to presume that his agency is general and not limited and notice of the limited authority must be brought home to their knowledge before they are to regard it.

The defendant under these principles was bound by the acts of its agent in making the contract in this case.

The price was specified in the contract as follows: "$17.50, if price goes up, you to have it." The ruling that the defendant thereby undertook to pay the highest market price which pulp wood of quality described in the contract reached in the vicinity of Harrington prior to the delivery on board cars was correct.

The decision of the presiding Justice as to the quantity and quality of the pulp wood delivered related purely to questions of fact and his findings thereon are final.

On exceptions by defendant. This is an action of assumpsit to recover the purchase price of pulp wood sold and delivered to the defendant under a written contract, heard by the presiding Justice without a jury who gave judgment in favor of plaintiff for $310.14. Exceptions were taken by defendant to a ruling by the presiding Justice admitting in evidence the contract, on the ground that the authority of the agent of the defendant who executed the contract was limited and that he exceeded his authority. Exceptions were taken by defendant also to certain rulings by the presiding Justice upon questions of construction of the contract. Exceptions overruled.

The case is fully stated in the opinion.
Gray & Sawyer, for plaintiff.
Reed V. *Jewett*, for defendant.

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

CORNISH, C. J. This is an action of assumpsit brought to recover the purchase price of pulp wood sold and delivered to the defendant under the terms and provisions of a written contract dated June 22, 1920.

The case was heard by the court at nisi prius, without the intervention of a jury and with right of exceptions in matters of law. Decision was rendered in vacation pursuant to R. S., Chap. 87, Sec. 37, and judgment was awarded for the plaintiff in the sum of $310.14. The case is before the Law Court on defendant's exceptions.

As stated by the Justice in his findings, the controversy between the parties as presented to him involved two main points:

"(1) The price which defendant is bound to pay for the pulp wood which conforms to the contract of June 22, 1920.

"(2) The amount of pulpwood delivered under the contract, and its quality."

1. AGENCY.

The first exception relates to the admission of the written contract which was objected to by the defendant on the ground that the defendant's agent, Ramsdell, who made the contract had no authority to insert therein this written clause, "if price goes up, you to have it" after the figures "$17.50."

The contract in printed form had been prepared by the defendant, leaving necessary blanks as to name and residence of seller, quantity of pulp wood, place of delivery, price, etc., to be filled in by the agent when the various trades might be made, to correspond with the terms of such trades. In this particular case the agent filled in both the figures $17.50 and the words above quoted and the contract in that form was signed in duplicate by the agent in behalf of the company, and by the seller, the plaintiff. One copy was then kept by the plaintiff and the other was sent to the home office

of the defendant and filed without objection. It was accepted and such acceptance without protest or notice to plaintiff might well be deemed strong evidence of a ratification of the agent's authority even if he had transcended his original powers.

But the Justice rested his decision on another and impregnable ground, viz.: "The defendant contends that Ramsdell was limited by instructions to paying not exceeding $17.50 per cord, but I am of the opinion and rule that plaintiff's rights under the contract are unaffected by any such limitation upon the authority of the agent, he having no knowledge of such limitations." This ruling is in strict accord with settled law. Third persons dealing bona fide with one who has been accredited to them as an agent are not affected by any limitations upon the general and apparent scope of his authority unless they have knowledge thereof. Private instructions between principal and agent are ineffective under such circumstances. The defendant in the case at bar sent forth this agent, armed with these blank contracts to deal with farmers and pulp wood owners. His chief duty was to agree upon price. It was a part of and the main part of his general authority. This agent agreed upon the price with this plaintiff, "17.50, if price goes up you to have it, dollars per cord," and inserted those figures and words in the proper blank. To permit the principal to avoid liability on the ground that the agent's authority was limited to $17.50 would nullify the well-settled principle of law as well as the principles of fair dealing and common justice. *Stickney* v. *Munroe*, 44 Maine, 195, 203; *Greene* v. *Nash*, 85 Maine, 148; *Maxcy Mfg. Co.* v. *Burnham*, 89 Maine, 541. "Persons dealing with an agent have a right to presume that his agency is general and not limited, and notice of the limited authority must be brought to their knowledge before they are to regard it." *Trainer* v. *Morrison*, 78 Maine, 163; *Wood* v. *Finson*, 89 Maine, 459. There was no error in the ruling concerning agency.

2. CONSTRUCTION OF CONTRACT.

The second exception relates to the legal construction of the clause "$17.50, if price goes up, you to have it."

The ruling of the court was as follows: "Upon consideration of the entire contract, I am of the opinion and rule that the defend-

ant undertook to pay not less than $17.50 per cord and if the market advanced, the defendant undertook to pay the highest market price to which pulpwood of quality described in the contract reached in the vicinity of Harrington prior to the delivery on board cars. Such a contract seems improvident, but the justification may be found in sharp competition for pulpwood at the time the contract was made."

This construction is obviously correct. The plain words of the contract mean that and nothing else. Anxiety to obtain the wood and willingness to pay the highest market price which it might touch before delivery prompted the agreement on the part of the agent. The plaintiff accepted the terms, performed his part of the contract and now should receive the compensation agreed upon. The defendant takes nothing by this exception.

3. QUANTITY AND QUALITY.

The third exception relates to the decision of the Justice determining the amounts of pulp wood delivered under the contract and its quality.

This is purely a question of fact and under the well-settled rule of law and of practice in this State the finding of the court below on this point was final. It cannot be reviewed here. This exception must also be overruled.

The mandate will therefore be,

Exceptions overruled.

FRED M. WASS *vs.* CANADIAN REALTY COMPANY.

Washington. Opinion October 4, 1922.

The same legal rule as to agency given in the preceding case, Mitchell v. *Canadian Realty Company, applies in this case. The findings of the presiding Justice on questions of fact are final, and the finding of the presiding Justice as to accord and satisfaction involved a question of fact, and is therefore conclusive.*

This case, like the preceding case of *Mitchell* v. *Canadian Realty Company*, concerns a written contract with much the same questions involved as in that case.

Held:

1. That the same legal rule as to agency applies as in the Mitchell Case.
2. That the price specified in the written contract as "$17.50 and rise which others pay" was correctly construed as meaning that the defendant was to pay $17.50 per cord, and if the market advanced it was to pay the highest market price which pulp wood of quality described in the contract reached in the vicinity of Columbia Falls prior to the delivery on board cars.
3. The findings as to quantity and quality involved purely questions of fact and are final.
4. The finding as to accord and satisfaction also involved a question of fact as the testimony on this point was not such that only one inference or finding could be made therefrom, and is therefore conclusive.

On exceptions by defendant. This is an action of assumpsit to recover the purchase price of pulp wood sold and delivered to defendant under a written contract, heard by the presiding Justice without the intervention of a jury, who gave judgment for plaintiff for $234.44. Exceptions were taken by defendant to rulings of the presiding Justice upon questions of construction of certain parts of the contract, and to a ruling upon an alleged claim of accord and satisfaction. Exceptions overruled.

The case is sufficiently stated in the opinion.

Gray & Sawyer, for plaintiff.

Reed V. Jewett, for defendant.

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

CORNISH, C. J. This case, like the preceding case of *Mitchell* v. *Canadian Realty Company*, arises out of the sale and delivery of pulp wood made under a written contract with the defendant, through its agent Ramsdell, dated June 26, 1920, four days after the Mitchell contract was made. It has taken the same course, having been heard by the court at nisi prius without the intervention of a jury and upon the rendering of his decision for the plaintiff in the sum of $234.44 for the balance due it has been brought to the Law Court on defendant's exceptions.

1. AGENCY.

Exception one relates to the admission in evidence of the written contract containing the words "and rise which others pay," the defendant's objection being lack of authority in the agent to make that addition. The facts connected with this are the same as in the Mitchell case and for the same reasons as are given in the opinion in that case this exception must be overruled.

2. CONSTRUCTION OF CONTRACT.

The specification as to price in this contract differs somewhat from that in the Mitchell case. The words are "$17.50 and rise which others pay," instead of "$17.50, if price goes up you to have it." The court held that while the language differed the meaning was the same in both contracts and that under it the defendant was to pay not less than $17.50 per cord, and if the market advanced it was to pay the highest market price which pulp wood of quality described in the contract reached in the vicinity of Columbia Falls prior to the delivery on board cars.

We think this interpretation is correct. Each case really aids the other in this interpretation. The rivalry between pulp wood buyers was evidently keen and this defendant was anxious to secure contracts at the then market price and at any advanced market price before delivery. It made these two contracts four days apart and inserted substantially the same clause in both. Its meaning is clear and is well stated by the court. There was no error in the ruling.

3. QUANTITY AND QUALITY.

The finding on these points by the court involved purely questions of fact and was final, the same as in the Mitchell case.

4. ACCORD AND SATISFACTION.

The finding of the court on this point is as follows: "The defendant claims that the receipt, retention and use by the plaintiff of the check of May 3, 1921, for $605.60 constituted an accord and satisfaction of plaintiff's claim under the original contract. In the first place I do not think that the words printed and written on the back of the check before delivery to plaintiff necessarily import that the check was tendered upon condition that if the plaintiff accepted it, such acceptance must be in full settlement of all claims of plaintiff under the pulpwood contract, especially so after the erasure of the word 'settlement' by defendant's manager before final acceptance of the check by the plaintiff. Accord and satisfaction is a question of fact to be submitted to the jury, unless the testimony is such that only one inference or finding can be made. *Bell* v. *Doyle*, 119 Maine, 383. The burden is upon the defendants, and the proof must be clear and convincing that the debtor offered the check upon condition that, if accepted, it shall be in full settlement of the demand, and that the creditor understood the condition on which the tender was made or the circumstances under which it was made were such that he was bound to understand it. To my mind the evidence does not establish these facts." He then goes on to discuss and carefully analyze the evidence on this point and concludes: "There was no accord and satisfaction."

This needs no further consideration. The rule of law is correctly stated by the court below and it being a question of fact under the cited case of *Bell* v. *Doyle*, the finding of the court is not subject to exception.

Exceptions overruled.

STATE *vs.* M. B. STRIAR.

Sagadahoc. Opinion October 5, 1922.

Misnomer should be raised by a plea in abatement. A respondent having appeared in his own proper person and described himself in his demurrer, and signed it by the same name inserted in the complaint, must be held to have admitted that he was correctly described in the complaint, and inasmuch as judgment must be rendered upon the whole record and not upon the complaint alone, the complaint must be adjudged good upon demurrer.

The respondent was described in the complaint as "M. B. Striar whose full and correct name is to the complainant unknown, of Bangor." To this complaint the respondent, appearing in his own proper person, and not by attorney, demurred, describing himself in his demurrer, and subscribing it as M. B. Striar.

Held:

That having appeared in his own proper person and described himself in his demurrer, and signed it by the name of M. B. Striar, he must be held to have admitted thereby that either M. B. Striar is his full and correct name, or as to his surname and initials, he was correctly described in the complaint.

That upon such an admission, inasmuch as judgment must be rendered upon the whole record and not upon the complaint alone, the complaint must be adjudged good upon demurrer.

That if the respondent wished to raise the issue by pleading to the complaint that the name by which he is described is not his full and correct name, it should have been done by plea in abatement.

On exceptions. The respondent was arrested on a complaint and warrant alleging illegal possession of intoxicating liquor. In the complaint the name of the respondent appeared as follows:—"That M. B. Striar whose full and correct name is to your complainant unknown of Bangor in the County of Penobscot and State of Maine." The respondent appeared in person, not by attorney, and filed a demurrer to the complaint, and subscribed it as M. B. Striar. The demurrer was overruled by the presiding Justice and respondent excepted. Exceptions overruled. Judgment for the State.

The case is stated in the opinion.

Arthur J. Dunton, County Attorney, for the State.

Edward P. Murray, for respondent.

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

WILSON, J. A complaint against the respondent for having in possession intoxicating liquors in which he was described as "M. B. Striar whose full and correct name is to your complainant unknown, of Bangor," etc. The respondent, when arrested and brought into court, demurred to the complaint. The demurrer was overruled and the case comes to this court on the respondent's exceptions. There is no merit in his contention and the exceptions must be overruled.

A respondent, it is true, is entitled to have a complaint or indictment describe him by his full and correct name, or if unknown, to so describe him by physical characteristics, sex, residence or otherwise as to identify him. This is essential to enable the officer to apprehend the proper person, and also to enable the accused to maintain in case of conviction, a plea of former jeopardy in case of a second charge for the same offense, as well as to comply with the provisions of the constitution. Article I, Section 5.

The respondent in this case, however, instead of taking the usual course in cases of misnomer, and pleading in abatement, seeks by a demurrer to take advantage of what is no doubt a loose way of describing a respondent when his full christian name is unknown. His contention is that by the addition of the general clause, "whose full and correct name is to your complainant unknown" is in effect an admission by the State that M. B. Striar is in no part his true name, but on the contrary must be regarded as though a fictitious name, and, therefore, upon the authority of *Com.* v. *Crotty.* 10 Allen, 403, the complaint is bad.

Whether a warrant issued in this form would have been a protection for the officer arresting the respondent is not in issue here, as it was in *Com.* v. *Crotty*, supra, *Harwood* v. *Siphers*, 70 Maine, 464, and in other of the cases cited in the respondent's brief. Upon plea in abatement setting forth his full and correct name, unless he failed to show, if the issue was joined by the State, that he was not also known by the name of M. B. Striar, the complaint would have been abated.

Respondent, however, comes into court "in his own proper person," and in his pleadings describes himself as M. B. Striar and signs his pleadings by the same name. In case of a demurrer, judgment is not given on the complaint or indictment alone, but upon the whole record. Chitty on Pleadings, Volume 1, Page 701. *State* v. *Wasilenskis,* 114 Maine, 91. Any admissions, therefore, made in respondent's own pleadings must be taken against him. His appearance in his own proper person, and describing himself in his demurrer as M. B. Striar, and signing it in the same form, must be held to be an admission that either it is his full and correct name or that as to his surname and initials he was correctly described in the complaint.

Upon such an admission the complaint must be held to be good on demurrer. As this court said in *State* v. *Cameron,* 86 Maine, 196; "Letters of the alphabet, consonants as well as vowels, may be sufficient to distinguish different persons of the same surname." Also see *State* v. *Wasilenskis,* supra. It is also a familiar rule of criminal pleading that a complaint or indictment describing the respondent by his surname and initials may be good upon two grounds, first, it may be his true and full name, second, if not, he may be known by the abbreviated name as well as by his full name. *State* v. *Libby,* 103 Maine, 147. In either event the issue can only be raised by a plea in abatement; and the complaint or indictment is good on demurrer, as was held in *State* v. *Cameron,* supra, and *State* v. *Wasilenskis,* supra.

Exceptions overruled.
Judgment for the State.

STATE *vs.* ARTHUR GAUTHIER.

York. Opinion October 6, 1922.

There is no valid Maine Statute defining the term "intoxicating liquor." Chapter 235 of the Laws of 1919, has been held unconstitutional. The statute of this State has not been abrogated in whole or in part by the Eighteenth Amendment to the U. S. Constitution, or federal legislation. Under the Maine Statute in prosecutions of this nature the intoxicating quality of liquor must be proved as a fact, and it must be proved also that the liquor is "capable of being used for tippling purposes or as a beverage."

The Eighteenth Amendment to the Federal Constitution prohibiting traffic in intoxicating liquor provides that "the Congress and the several states shall have concurrent power to enforce this Article by appropriate legislation."

To be appropriate within the meaning of the amendment legislation must be consistent with prohibition not hostile to it, must help not hinder, support not defeat, promote prohibition and not thwart it. License and local option laws, or at all events the license feature of such laws, are inappropriate. They are inconsistent with prohibition. They tend to defeat or thwart it. Prohibitory laws while differing one from another in definitions, procedure and in penalties are appropriate. The prohibitory law of Maine is appropriate legislation and is not abrogated by the Eighteenth Amendment or by any Federal legislation.

The definition of intoxicating liquor contained in the Volstead Act was not intended to and does not control, enter into, modify or in any way affect our state legislation.

In case of irreconcilable conflict between State and Federal Statutes, even those which under the Eighteenth Amendment are concurrent, pending final decision by the Supreme Court of the United States, State Courts must treat the Federal Statutes as supreme. But there is no irreconcilable conflict between the Maine statute and the Volstead Act in respect to definition of intoxicating liquor contained in the latter.

The Volstead Act defines intoxicating liquor as "any spirituous, vinous, malt or fermented liquor, liquids and compounds containing one-half of one per cent. or more of alcohol by volume which are fit for use for beverage purposes." This definition applies to prosecutions in the United States Courts under the Federal Statutes. It is not and does not purport to be controlling in prosecutions in the State courts under State statutes. In prosecutions in the State courts, therefore, it is not sufficient to show that the liquor which is the subject of the prosecution contains one half of one per cent. or more of alcohol and is fit for use for beverage purposes. It must appear that it is in fact intoxicating and also capable of use as a beverage.

The respondent offered four letters written by Federal officials. The most that these letters, if admissible, prove is that Bosak's Horke Vino contains an undisclosed percentage of various ingredients in some unspecified degree laxative, and that the compound is classed as a medicine. This is not decisive. A liquid may be in some small degree laxative and be classed as a medicine and still be intoxicating in fact and capable of use as a beverage.

The court is satisfied that the liquor found in respondent's possession and seized was an intoxicating beverage masquerading as a medicine.

On report. The respondent was adjudged guilty of the illegal possession of intoxicating liquor in the Sanford Municipal Court and on appeal the case went to the Supreme Judicial Court, thence to the Law Court on report. That the respondent had in his possession, intended for sale in this State, a quantity of Bosak's Horke Vino, a so-called medicinal preparation containing more than eighteen per cent. of alcohol, was not disputed. The question at issue was as to whether such preparation was an intoxicating liquor within the purview of the law of this State. Respondent adjudged guilty. Liquor forfeited.

The case is very fully stated in the opinion.

Edward S. Titcomb, County Attorney, for the State.

Francis J. Carney and Lucius B. Sweet, for respondent.

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

HANSON, J., concurring in the result.

DEASY, J. The respondent was arraigned in the Sanford Municipal Court and adjudged guilty of the illegal possession of intoxicating liquor. The case was brought to the Supreme Judicial Court by appeal and to the Law Court on report.

THE ISSUE.

It is undisputed that the respondent had in his possession, intended for sale in Maine, a quantity of Bosak's Horke Vino, a so-called medicinal preparation containing more than eighteen per cent. of alcohol. Whether Bosak's Horke Vino is an intoxicating liquor within the purview of the Maine law is the point in controversy.

There is no valid Maine Statute defining the term "intoxicating liquor." Chapter 235 of the Laws of 1919 which if fully effectual would adopt as a part of the State Law, the definition contained in the subsequently enacted Volstead Act, is in its attempt to accomplish this result, unconstitutional in that it undertakes to delegate general legislative power. *State* v. *Int. Liquor, Vino Company Claimant,* 121 Maine, 438, 117 Atl., 588.

The problem before us involves consideration of the Eighteenth Amendment, the so-called Volstead Act and the prohibitory statutes of Maine excluding Chapter 235 of Laws of 1919 which has been held unconstitutional.

THE EIGHTEENTH AMENDMENT.

The Amendment omitting formal parts is as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The controversy in this case relates to the construction of the second section of the Amendment, especially the words "concurrent power" and "appropriate legislation."

THE VOLSTEAD ACT.

This Law (41 Stat. L. 305 Fed. Stat. Ann., 1919, Page 202) was enacted by Congress under the authority of the Eighteenth Amendment. It was intended to be concurrent with legislation by the states. The Act comprises three titles. We are concerned only with the second. This title has thirty-nine sections.

Section 3 prohibits traffic in intoxication liquors. Section 29 provides penalties. Section 1 defines the phrase intoxicating liquor, "when used in Title II and Title III of this Act." It does not undertake to define the term when used in concurrent legislation by states. By this definition intoxicating liquor includes certain specified liquors "and in addition thereto any spirituous, vinous, malt or

fermented liquor, liquids and compounds . . . . containing one half of one per cent or more of alcohol by volume which are fit for use for beverage purposes." The other sections prescribe procedure and various details including the granting of permits for keeping and selling liquor for non-beverage purposes.

UNITED STATES SUPREME COURT CASES.

The Supreme Court of the United States has final jurisdiction in all matters involved in this case. In the case of *Rhode Island* v. *Palmer*, 253 U. S., 350, 64 L. Ed. 946 important principles are established. The Volstead Law is held not to transcend the powers granted to Congress by the Eighteenth Amendment. It finally disposes of the theory that concurrent means joint and the further theory that the word concurrent implies a division of powers along lines separating interstate from intra-state fields. It decides that an act to be appropriate must be consistent with prohibition and must not tend to defeat or thwart it. But neither the case of *Rhode Island* v. *Palmer* nor the later case of *Vigliotti* v. *Pennsylvania*, 66 L. Ed., 389 passes upon the questions involved in this opinion.

It is contended that the state prohibitory law has been invalidated by the Amendment and the federal law or if not invalidated, then in part superseded or modified by having read into it the definition of intoxicating liquor contained in the Volstead Law to wit, liquor "containing one half of one per cent or more of alcohol by volume."

STATE STATUTE NOT AFFECTED BY VOLSTEAD ACT.

It is too plain to require extended discussion that the Maine statute has not been abrogated in whole or in part by the Amendment or the Federal Act. Our statute is consistent with prohibition. It does not tend to defeat or thwart it. It is appropriate legislation. The authorities hereinafter cited under another branch of the case support this view.

More plausible is the contention that the definition of intoxicating liquor contained in the Volstead Act reads itself into the Maine statute and, without valid state legislation, becomes in effect a part of the statute. The other and better supported theory is that Congress having in this field not supreme but concurrent power has

no authority to control the concurrent legislation of the state and further that the definition contained in the Volstead Act purports to apply only to prosecutions under that Act, and not to prosecutions in the State courts under State statutes. In the leading and frequently cited case of *Commonwealth* v. *Nickerson*, 236 Mass., 295, 128 N. E., 284 Chief Justice Rugg says: "We assume that the definition of intoxicating liquors contained in the Volstead Act cannot be imported into our statute without legislative action."

We believe that this assumption is well grounded. Congress having merely concurrent power to legislate on this subject cannot control the legislation of states having like concurrrent power. Moreover, the definition contained in the Volstead Act purports to relate only to that act and not to state legislation.

However, the theory that a state court in construing a state statute is bound by the Volstead definition has the support of respectable authority and we have given it careful consideration.

ARTICLE VI OF CONSTITUTION. SUPREME LAW.

It is urged that Congress has the exclusive power of defining the term intoxicating liquor as employed in the Eighteenth Amendment by reason of Article VI of the Constitution which reads as follows:—

"This Constitution and the laws of the United States which shall be passed in pursuance thereof . . . . shall be the Supreme law of the land."

But the Eighteenth Amendment is as much a part of the Constitution as Article VI. The Amendment is also the supreme law of the land. It enacts what in effect is a modification of that part of Article VI which makes Congressional legislation supreme. It grants to Congress power to enact appropriate intra-state legislation, but makes that power, not paramount, supreme or exclusive, but concurrent with the power of the states. Against this it is contended that the concurrent power granted by the Amendment relates to enforcement, as distinguished from the power to define.

THEORY THAT CONGRESS HAS EXCLUSIVE POWER OF DEFINING.

It is urged that the Eighteenth Amendment gives to or leaves with the states concurrent power to enforce prohibition by providing for

the purpose courts, officers and penalties, but that the power of defining the subject of it, as distinguished from the power of enforcing it, remains exclusively in Congress, not under the Amendment, but under Article VI making constitutional Acts of Congress supreme. *Johnson* v. *State*, (Fla.), 89 So., 117. *Wood* v. *Whitaker*, (Fla.), 89 So., 119.

We think that this theory is unsound—

(1) If the state may penalize and prosecute the manufacture and sale of only such liquor as Congress may declare to be intoxicating the power of the state is in no true sense concurrent, but is rather ancillary and subordinate, indeed is hardly more than an "insubstantial shadow." *Commonwealth* v. *Nickerson*, 236 Mass., 295.

(2) The term "intoxicating liquor" does not need statutory definition. In the absence of such definition it is for courts and juries to determine as a fact whether liquor is intoxicating. The Legislature of Maine has never found it necessary to define the term, whether as liquor having a specified alcoholic content, or otherwise. Further specific definition is for the purpose of aiding enforcement. In our opinion Congress adopted the definition for no purpose except to facilitate enforcement.

(3) The Eighteenth Amendment prohibits the sale &c. of intoxicating liquor. Congress has no power to prohibit traffic in non-intoxicating liquor within states. Had it undertaken to forbid traffic in intoxicating liquor and also in non-intoxicating liquor containing one half of one per centum or more of alcohol, such act would undoubtedly be held unconstitutional so far as it relates to non-intoxicating liquor. What the Volstead Act does, we think is to create a conclusive presumption that liquor containing alcohol in the proportion specified is intoxicating. Such a presumption applies to prosecutions in the federal courts for violation of the Volstead Act. It is a corollary of the power of enforcing.

(4) Congress derives its power to enact intra-state prohibitory legislation exclusively from the Eighteenth Amendment. The almost unlimited police power of the States ante-dates the Constitution. The states' police power is not taken away expressly. The grant of concurrent power to Congress does not take it away by necessary implication.

"The police power reserved by the states is neither abrogated nor abridged by Amendment 18." *Hess* v. *State*, (Ind.), 135 N. E., 145;

See also *Allen* v. *Commonwealth,* (Va.), 105 S. E., 589. *People* v. *Wicka,* 192 N. Y. S., 636. Ex parte Volpi (Cal.), 199 Pac., 1090.

(5) It is said that the Eighteenth Amendment contemplates that in its enforcement there shall be uniformity throughout the nation, and that for this reason Congress should be held to have the exclusive power of defining the subject of constitutional prohibition.

But uniformity throughout the nation is not contemplated except in prosecutions under the federal law. All authorities hold that the state may establish its own procedure and prescribe its own penalties. Moreover, it is clear that no state is required to have a prohibitory law, or any law on the subject of intoxicating liquor. If it enacts an inappropriate law the amendment instantly invalidates it unless it contain a separable appropriate provision which may survive. But the state may leave the liquor problem to the care of federal courts and officers. There is no requirement of uniformity in state and national enforcement.

THEORY SUPPORTED BY REASON AND AUTHORITY.

We believe this to be the true theory:—The powers of Congress and of the State Legislatures are under the Eighteenth Amendment independent and while both are subject to the organic law, and while acts of Congress have nation-wide territorial application, neither is within a state paramount. If the state law is not "appropriate legislation" it is for that reason void. If it is appropriate legislation it is valid. This presents a constitutional question ultimately determinable by the Supreme Court of the United States, but in the first instance to be determined ordinarily by the state court. As to law relating to irreconcilable conflict between federal and state legislation, see infra.

To be appropriate, legislation must be consistent with prohibition, not hostile to it, must help, not hinder, support, not defeat, promote prohibition and not thwart it. *Rhode Island* v. *Palmer,* supra. License and local option laws or at all events the license feature of such laws are inappropriate. They are inconsistent with prohibition. They tend to defeat or thwart it. Prohibitory laws while differing from one another in definitions, procedure and in penalties are appropriate.

The Amendment in providing for concurrent power to legislate is based upon the principle that the same conduct may be an offense against the state and also against the nation. The same act may offend against the sovereignty of the State and that of the United States. Prior to the adoption of the Eighteenth Amendment the sale or keeping for sale of intoxicating liquor within a state could only be an offense against the state sovereignty. Under the police power the state could forbid such acts but Congress had no power whatever in the premises. Since the passage of the Eighteenth Amendment the sale and keeping for sale of intoxicating liquor for beverage purposes in a state offends against the sovereignty of the nation as well as that of the state. The new power vested in Congress applies to the whole nation and all places subject to its dominion, but is otherwise parallel with and not superior to the state police power.

The phrase "concurrent power" is new in the constitution, but has been frequently used in reference to relations somewhat analagous to that now newly created. Take the case of a robbery of the mails on a state highway. Here one act violates both the state and the national sovereignty. Here while the constitution has not specifically and in terms so provided, Congress and the State Legislature have concurrent power. Congress has power to define the crime against the nation and to impose penalties to be enforced by the federal courts. The State Legislature has power to define the crime (the same act) against the state and to impose penalties to be enforced by the state courts. The definitions contained in the Act of Congress do not enter into the State statutes.

See the following cases in which the concurrent power of the nation and state to punish the same act have been recognized. *U. S.* v. *Amey*, 24 Fed. Cas., 792 (Stealing a letter from a post office). *Fox* v. *Ohio*, 5 How., 410. 12 L. Ed., 213 (Cheating by means of counterfeit U. S. Coin). Ex parte Siebold, 100 U. S., 371, 25 L. Ed. 717 (Violation of state law in election of member of Congress). *Cross* v. *North Carolina*, 132 U. S. 132, 33 L. Ed. 287 (Forgery in making false entries on books of a national bank).

The authorities generally support the view herein expressed. "It (the 18th Amendment) impairs no right theretofore existing in the state except that of acting in repugnance to the Amendment." *State* v. *Ceriani*, (Conn.), 113 Atl., 316.

State "did not surrender any of its control under the (18th) Amendment except the power to pass legislation hostile to it." *People* v. *Wicka*, 192 N. Y. S., 638.

"State statute which adopts" means different from those adopted by Congress if such means do not conflict with the efficacious enforcement of federal legislation is within the purview and meaning of the amendment. *Youman* v. *Commonwealth*, (Ky.) 237 S. W., 6.

"We reject the view that the legislation of Congress will supersede and abrogate the laws of the state which are appropriate for the enforcement of the Amendment." *Jones* v. *Hicks* (Ga.), 104 S. E., 771.

"The same conduct may constitute an offense against the United States and also a distinct offense against the state and the accused may be punished for both crimes each sovereignty punishing for the crime committed against it."

Allen v. *Commonwealth*, (Va.), 105 S. E., 589.

"Though an exception may be in violation of the federal law on the subject a defendant may not be indicted and convicted in the state court for violation of a state statute which contains an exception exculpating him until our Legislature has acted in the matter and passed a statute that condemns him." *State* v. *Barksdale*, (N. C.), 107 S. E., 508.

It was not "intended that the right of the states to pass appropriate legislation to enforce the prohibition would be more restrictive than the power conferred upon Congress to effect the same result save that the laws of Congress would affect all the people in the United States, while the laws of the state would only affect those within its boundaries." Ex parte Gilmore, (Texas), 228 S. W., 203.

"But so long as the legislation of a state actually seeks to enforce by appropriate legislation under the second section of the amendment what is prohibited by the first no valid objection can be made even though the state law may differ from that of Congress." *State* v. *District Court*, 58 Mont., 684-194 Pac., 308.

"The 18th Amendment permits the passage and enforcement of laws which tend to the enforcement of the amendment that power being specifically reserved as concurrent with the power of the Federal government." *State* v. *Turner*, (Wash.), 196 Pac., 638. *State* v. *Woods*, (Wash.), 198 Pac., 737.

"Should the federal government and a state differently define the term intoxicating liquors it appears that both enactments would be equally binding upon the people of the state, the one enforcible exclusively through the federal courts and the other through the courts of the state." Ex parte Volpi (Cal.), 199 Pac., 1093.

"The Volstead Act manifests no intent on the part of Congress to supersede or suspend state statutes not directly repugnant thereto on the same subject. Even if under the Eighteenth Amendment Congress has the clear power to do so, its enactment would not be given that effect except in instances where its design to accomplish that result is plain and the repugnance between the federal and state statute is absolute, positive and irreconcilable so that both cannot stand together." *Commonwealth* v. *Nickerson*, 236 Mass., 295.

If space permitted, an analysis of the above-cited cases would strengthen the support that this opinion receives from the above excerpts. For example take *Commonwealth* v. *Nickerson*, supra, pronounced by a competent commentator to be "easily the leading case among state decisions." Prof. Dowling in Minnesota Law Review, Volume 6, No. 6. The license feature of the Massachusetts statute was held invalid. The state law minus the license feature was sustained and enforced notwithstanding that its definition was different and by reason of its greater permitted alcoholic content less drastic than that of the federal law.

PRIMA FACIE SUPREMACY OF CONGRESSIONAL ACTS.

The Federal Supreme Court determines finally whether in any case Congress has supreme power under Article VI or the states and the people have such supreme power guaranteed to them by the Tenth Amendment. Pending determination by the courts, to avoid the calamity of "forcible collision between the two governments" the United States Supreme Court has held that in case of conflict, Acts of Congress shall have "temporary supremacy until judicial decision." *Tarbles Case*, 13 Wall., 407.

Long after Tarbles Case was decided the Eighteenth Amendment was adopted. This gives to the federal and state legislative bodies concurrent power over certain subjects and controversies, to wit, those connected with prohibition.

But here again notwithstanding the federal and state legislative power is concurrent the authorities hold that in case of "actual repugnancy" (*Powell* v. *State*, Ala., 90 S. 138) "repugnancy or conflict that cannot be reconciled." (Ex parte Crookshank, 269 Fed., 980) or legislation by Congress and states "irreconcilable so that both cannot stand together," (*Commonwealth* v. *Nickerson*, supra.) Constitutional Acts of Congress are to be held supreme.

If the state statute is not "appropriate legislation," it is void for that reason and not because of repugnancy to an Act of Congress. It is not necessary to decide whether there can be an irreconcilable conflict between two acts both of which are appropriate within the meaning of the amendment for it is clear that there is no such repugnancy between the Maine and Federal Statutes in respect to the definition of intoxicating liquor. The concurrent statutes have the same dominant purpose. They forbid the same thing, to wit, traffic in intoxicating liquor. Under the state statute enforced in state courts, the intoxicating quality of liquor must be shown. Under the federal statute enforced in the United States courts it is presumed from proof of alcoholic content. It would be a perversion of language to say that this difference in practice creates an irreconcilable conflict. Applying the above quoted test prescribed by the Massachusetts Courts. "The intent on the part of Congress (assuming that it has power) to supersede or suspend the state statute" is not plain. The *contrary intent* is plain. The repugnance between the statutes is not "absolute, positive and irreconcilable so that both cannot stand together." There is *no repugnance* in the sense in which the word is used.

RECAPITULATION.

We hold that the Maine prohibitory statute is "appropriate legislation" and is not abrogated by the Eighteenth Amendment or federal legislation.

The definition of intoxicating liquor contained in the Volstead Act was not intended to and does not control, enter into, modify or in any way affect our state legislation.

In case of irreconcilable conflict between state and federal statutes even those which under the Eighteenth Amendment are concurrent, pending final decision by the Supreme Court of the United States, state courts must treat the federal statutes as supreme.

There is no irreconcilable conflict between the Maine Statute and the Volstead Act in respect to the definition of intoxicating liquor contained in the latter.

The present case is therefore governed by the Maine Statute under which in prosecutions of this nature the intoxicating quality of liquor must be proved as a fact.

It remains to be determined whether the liquor found in the respondent's possession is in fact intoxicating. *State* v. *Piche*, 98 Maine, 348.

Of this we have no doubt. A witness testified that it had the same effect upon him as did the drinking of "checkberry or alcohol or anything of that kind." Moreover, its undisputed alcoholic content exceeding eighteen per cent. justifies, if not requires a finding of intoxicating quality.

The state has the further burden of proving that the liquor is "capable of being used for tippling purposes or as a beverage." *State* v. *Intoxicating Liquor*, 118 Maine, 198. This burden is sustained. Witnesses testified that it tasted like port wine. It was sold as a beverage. This is not the test, but is some evidence as against the respondent that it is capable of such use. *State* v. *Sayers*, 121 Maine, 339, 117 Atl., 235. When the witness Berube said to the respondent "That's pretty good port wine" he replied "You bet it is good stuff."

The fact that the respondent said that he would sell only one bottle at a time shows that the liquid was sold as a beverage. He substituted for the law of the state a rule of his own and then proceeded to violate both.

The respondent offered four letters written by federal officials. These letters were excluded. Exceptions were reserved. The case was then by consent reported. The exceptions were thus waived. The case was reported for the court to determine the rights of the parties upon the "evidence introduced." When the letters were offered to be introduced they were excluded. However, the letters are set forth in the printed case and are probably intended by both parties to be considered.

Assuming that they are not mere hearsay and that the liquor referred to in them is the same as that found in the respondents possession, they do not overcome the state's evidence. The most that they prove is that Bosak's Horke Vino contains an undisclosed percentage of various ingredients in some unspecified degree laxative,

and that the compound is classed as a medicine. This is not decisive. A liquid may be in some small degree laxative, and be classed as a medicine, and still be intoxicating in fact and capable of use as a beverage.

We think that the liquor found in the respondent's possession and seized was an intoxicating beverage masquerading as a medicine.

Respondent adjudged guilty.
Liquor forfeited.

ISAAC STACHOWITZ *vs.* BARRON ANDERSON COMPANY.

Androscoggin. Opinion October 6, 1922.

Whether given conduct can be legally held a breach of a certain contract i. e. whether capable of being so held is a question of law. If at the time action is brought, the plaintiff has no grievance, in that the contract has not been renounced, or all future liability under it repudiated, it is exceptionable error to hold that there was a breach, unless it appears that such error is harmless and that the excepting party must ultimately fail upon the facts admitted to be true.

In the instant case the exceptions are to a ruling that the facts show a breach of contract by the defendant. This court is of the opinion that the evidence is not legally capable of such construction.

On defendant's exceptions. This is an action in covenant for breach of a contract under seal. The contract was dated June 13, 1921, for one year, for employment of plaintiff as pressman in defendant's clothing factory at Lewiston, at seventy-five dollars per week. On September 5, 1921, defendant removed his factory to Boston, and on the same day, through its agent, Mr. Barron, made three propositions to the plaintiff with a view of adjusting his rights under the contract. The first two propositions were rejected by plaintiff, but after some consideration, the plaintiff on the same day wrote a letter to Mr. Barron, accepting the third proposition. On September 10, the action was brought. The defendant pleaded *non est factum* with a brief statement alleging that it had been ready to make its payments

then or thereafter to become due during the entire period of the contract, and further alleged that it was ready to perform all the conditions of the modified contract resulting from the third proposition made by defendant to plaintiff and by him accepted, and that at the time the action was brought there had been no breach of any covenant by it to be performed. The case was heard by the presiding Justice of the Superior Court without the intervention of a jury, right of exceptions in matters of law being reserved by both parties. The Justice ruled that there had been a breach of the contract by defendant by removal of its factory to Boston, unless plaintiff assented to the changed condition embraced in the third proposition, and further ruled that there had been a breach by defendant, and that the plaintiff had a right of action, and rendered judgment for the plaintiff in the sum of $2,128.00. To which rulings defendant excepted. Exceptions sustained.

The case is fully stated in the opinion.

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

William H. Newell, for defendant.

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

DEASY, J. The sealed contract, between the parties, dated June 13, 1921, whereby the defendant agreed to employ the plaintiff as pressman in its Lewiston factory for one year from that date was about September 5th, 1921 as hereinafter appears modified by mutual agreement. The defendant moved its factory to Boston. It paid the plaintiff his wages in full to September 10th and offered to either (1) employ him in Boston for the remainder of the contract term or (2) pay him $600 to cancel the contract or (3) provide work for him in Lewiston in connection with its Boston factory. The plaintiff accepted the third alternative as appears by the following letter.

"Auburn Me. Sept. 5 1921.

DEAR MR. BARRON.

I have decided to stay in Lewiston and do your work that you will send me over. For it is towards winter and I don't see what I can do otherwise. Respectfully yours

ISAAC STACHOWITZ."

On September 10th the day to which he had been paid his wages, the plaintiff brought this suit. It was heard by the Justice of the Superior Court without a jury and judgment ordered for the plaintiff for $2,128.

Conceding that the findings of particular facts are conclusive, the defendant reserves exceptions to two rulings. As the second exception must be sustained it is unnecessary to prolong this opinion by further reference to the first. The second exception is to the following ruling:

"That on the 10th day of September, at the time this action was commenced, there had been a breach of the covenant on the part of the defendant by closing its factory and removing the business to Boston, terminating the plaintiff's employment, for which the plaintiff had a right of action."

This is in part a conclusion of law. Whether given conduct can be legally held a breach of a certain contract, i. e., whether capable of being so held is a question of law. *Connor* v. *Giles*, 76 Maine, 134.

The contract which alone was in force on September 10th was made after and in view of the defendants closing its factory and removal to Boston. It is obviously impossible that there could have been any breach caused by such closing and removing.

The exception must be sustained unless it appears that the error is harmless and that the excepting party must ultimately fail upon the facts admitted to be true. *Orr* v. *Old Town*, 99 Maine, 194. *Hathaway* v. *Crosby*, 17 Maine, 448. This the plaintiff claims.

He urges that the defendant though it had paid the plaintiff his wages to the date of suit, had renounced the contract, repudiated all future liability under it and had thus given the plaintiff a right of action for anticipatory breach as held in *Sutherland* v. *Wyer*, 67 Maine, 64.

But the letter from the defendant's attorney relied upon for the purpose fails to show a repudiation of future liability on the contract. The letter dated September 9 reads—"I find that your client has no grievance at this time since he has been paid for all services rendered and there is nothing due him at this time."

This letter states the situation with precision. The plaintiff had no grievance "at this time," (September 9). There was nothing due the plaintiff "at this time." There was no suggestion of repudia-

tion of the only contract then in existence between the parties, to wit, the contract made by the defendant's offer and the plaintiff's written acceptance of September 5th. The plaintiff had not "been discharged and prevented from the further execution of" the contract as was true in *Sutherland* v. *Wyer*.

At the date of the beginning of the action there was nothing due the plaintiff for services rendered; nothing on the contract of June 13th for that had been superseded by a modified contract, and the modified contract had not been violated or renounced by either party.

Exception sustained.

SIMON MICHAUD'S CASE.

Aroostook. Opinion October 16, 1922.

Claimant under the Workmen's Compensation Act not within the terms of the assent nor of the policy issued by the insurance carrier, when performing labor at a different place, and of a different kind, than that mentioned in the assent or policy, but does come within the exception specified in Sec. 4, Chap. 238, of Public Laws of 1919, hence not entitled to compensation.

The only issue raised in this case was as to whether claimant was engaged in employment embraced within the provisions of the Workmen's Compensation Act. He was within the terms neither of the assent nor of the policy, but was within the exception of "Employees engaged in the work of cutting, hauling rafting or driving logs" specified in Public Laws, 1919, Chap. 238, Sec. 4.

On appeal by defendants. This case was taken to the Law Court on an appeal from the finding of the Chairman of the Industrial Accident Commission under the Workmen's Compensation Act, granting to claimant compensation for an injury sustained by him while in the employ of the Ashland Company on November 4, 1920, as a swamper engaged in preparing a road for a log hauler in the logging operation in the woods by said company on the Machias river. The only question involved was as to whether claimant was

engaged in employment which brought him within the provisions of the Act. The claimant was engaged in such employment in a different place, and such employment was of a different kind, than that embraced in the assent, or in the policy issued by the insurance carrier, but was within the exception specified in Public Laws 1919, Chap. 238, Sec. 4. Appeal sustained. Decree of sitting Justice reversed. Petition dismissed.

The case is sufficiently stated in the opinion.

A. J. Fortier and A. S. Crawford, Jr., for plaintiff.

George E. Thompson and Granville C. Gray, for defendants.

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

CORNISH, C. J. Appeal under the Workmen's Compensation Act. The single question presented is whether the claimant was engaged in employment which brought him within the provisions of that Act.

The Ashland Company on June 20, 1920, filed with the Industrial Accident Commission an employers' written assent together with a copy of an industrial insurance policy issued to the Ashland Company by the Travelers Insurance Company. These two documents specified the extent of the assent and insurance. In the assent the location of the business was given as "Sheridan, Aroostook County, Maine," and "the kind of business included in assent, Lumber yard at Stockton Springs, Maine, hotel and market men." The policy was limited in its application to "all factories, shops, yards, buildings, premises or other work places of this employer . . . . at Sheridan, Maine, Aroostook County, and Stockton Springs, Maine," and the nature of the business was given as the "manufacturing and shipping of lumber, manufacturing of laths, shingles, clapboards, planing mill, saw mill, box shop and lumber yard (logging in woods excluded). Rated as saw mill, stationary; lumber yard; commercial yard only at Stockton Springs, Maine, Hotel including laundry, store risk."

Michaud, the claimant, was what is known as a swamper, engaged in cutting a log hauler road in the logging operation in the woods carried on by the Ashland Company on the Machias river, many miles from either Sheridan or Stockton Springs. He was within the terms neither of the assent nor of the policy, but was within the

exception of "Employees engaged in the work of cutting, hauling, rafting or driving logs" specified in Public Laws, 1919, Chap. 238, Sec. 4.

A similar question arose in *Fournier's Case*, 120 Maine, 191, and that case is decisive of this. Further discussion is unnecessary.

The entry will be:

Appeal sustained.
Decree of sitting Justice reversed.
Petition dismissed.

GEORGE L. BESSEY *vs.* JOHN E. HERRING.

Piscataquis. Opinion October 16, 1922.

While it is true that on cross examination matters of a collateral nature thus testified to cannot be contradicted by the cross examiner, who thus makes such inquiries at his peril, by introducing other testimony, and the introduction of such other testimony in contradiction should be excluded; yet, if admitted and exceptions taken, the excepting party must go further and show that the admission of the evidence was prejudicial to his interest. Prejudicial errors only are reversible. Although admitted evidence is technically inadmissible, if it is harmless the exception must be overruled.

In the instant case plaintiff's counsel was bound by the answers made by the witness to his inquiries on cross examination concerning matters of a collateral nature, and could not contradict the answers by introducing other testimony. The evidence of Greeley could therefore properly have been excluded.

The excepting party must go further than to show that the admission of such evidence was error, and show that its admission was prejudicial to his cause. If harmless only, exception must be overruled.

On exceptions by defendant. This is an action on the case alleging deceit in the sale of land. The deceit complained of by the plaintiff consisted in the alleged representations made by defendant to plaintiff that in the land sold was included a ten-acre wood lot owned at the time of the representations by the wife of defendant. Counsel for

plaintiff called Howard Greeley as a witness to contradict some matters of a collateral nature brought out by him on cross examination of the wife of defendant, and also as tending to show a fraudulent design or intent on the part of defendant in making to plaintiff the alleged fraudulent representations, and defendant's counsel objected. The presiding Justice excluded the evidence on the ground of tending to show fraudulent design or intent, but admitted it for the purpose of contradicting the testimony of the wife of defendant brought out on cross examination by plaintiff's counsel and counsel for defendant excepted. Exception overruled.

The case is fully stated in the opinion.

Hudson & Hudson, for plaintiff.

C. W. & H. M. Hayes, for defendant.

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

CORNISH, C. J. This is an action on the case for alleged deceit in the sale of land. The verdict was in favor of the plaintiff, but the record does not disclose for what amount. No motion was filed by the defendant asking to have the verdict set aside on the ground that it was manifestly wrong on the facts, but he asks that a new trial be granted because of a single alleged error in the admission of testimony.

From the defendant's bill of exceptions it appears that the defendant's wife was the owner of a ten-acre lot adjoining the land of the defendant which was sold to the plaintiff. The plaintiff claimed that the defendant in showing him the land prior to the making of the deed included the wife's lot as a part of his own real estate to be sold, and that he, the plaintiff, made the purchase relying upon this false representation, and was deceived thereby because as he afterwards discovered the wife was the owner of this ten-acre lot. The defendant denied this and claimed that he had made full explanation of the extent of his own and of Mrs. Herring's land. This was the sharp issue of fact.

During the course of the trial Mrs. Herring was called as a witness by the defendant and on cross examination by plaintiff's counsel she was interrogated as to a certain conversation which took place in her presence the year before when her husband was trying to sell the same property to one Greeley. The counsel evidently was desirous

of proving that in that attempted trade with another party the defendant included his wife's lot in his description of the premises. In this he was not successful, as she testified that before her husband had completed his description, she interrupted him and told him not to put her ten acres in.

In rebuttal the plaintiff introduced Greeley as a witness to this conversation for two purposes, first as tending to show a fraudulent design or intent on the part of Herring in the Bessey transaction, and second for the purpose of contradicting Mrs. Herring. The presiding Justice excluded it on the first ground, but admitted it on the second, and in his charge to the jury was careful to instruct them that they must not consider the evidence of Greeley as tending to prove deceit in the present case, but could only consider it as tending to contradict either the defendant or his wife.

Even as thus limited the defendant excepts to its admission and invokes the familiar rule that as the inquiries put to the witness on cross examination concerned matters of a collateral nature, the plaintiff's counsel was bound thereby and he could not contradict the answers by introducing other testimony. We think the technical point is well taken. The matter was of a collateral nature, res inter alios acta, and under such circumstances the rule is well settled that the cross examiner inquires at his peril. The evidence of Greeley could therefore properly have been excluded, *State* v. *Benner*, 64 Maine, 287; *Davis* v. *Roby*, 64 Maine, 427; but that is not decisive of the case. The excepting party must go further and show that the admission of the evidence was prejudicial to his cause. It is only prejudicial errors that are reversible. Although admitted evidence is technically inadmissible, if it is harmless the exception must be overruled. *Pierce* v. *Cole*, 110 Maine, 134-8.

What was then the nature and effect of Greeley's evidence as tending to contradict either the defendant or his wife as to the conversation the year before? It could have no tendency whatever to contradict the defendant because it does not appear that he gave any testimony on that point. It likewise failed to contradict Mrs. Herring and must have been a disappointment to plaintiff's attorney. Her testimony was as follows:

"Q Now were you present the year before when your husband was trying to sell this land to Howard Greeley?

"A. Yes, I was.

"Q. Did you hear your husband describe the boundaries of the farm?

"A. Yes, sir.

"Q. As he described the boundaries of the farm, did his description include your ten acre lot?

"A. I interrupted him.

"Q. Answer my question please?

"A. I interrupted him before he had finished and says 'Now you be sure and put my ten acres in.'

"Q. Put it in or not put it in, which?

"A. Why, to reserve it I mean.

"Q. You mean not to put it in?

"A. Yes, sir.

"Q. Now then he didn't make any mention of your ten acre lot at all, did he, until you interrupted him?

"A. No, sir, because he hadn't got through describing it.

"Q. Didn't you interrupt him because the lands as he was describing them there to Greeley included your ten-acre lot?

"A. No, sir, I didn't.

"Q. You were afraid he was going to include your ten acres so you interrupted him, so he wouldn't?

"A. No, sir; I wasn't.

"Q. But you did interrupt him?

"A. Yes, sir.

"Q. And told him not to put them in?

"A. I says, 'If my ten acre lot . . . you remember my ten acre lot,' in a joking way."

The point which the plaintiff's counsel desired and attempted to prove by this cross examination was that Mr. Herring included the ten-acre lot in his oral description to Greeley and that after he had finished Mrs. Herring spoke of her ten-acre lot. This she denied.

Greeley's testimony, introduced by the plaintiff to contradict this, was as follows:

"Q. Now if you will state what was said.

"A. Well after I looked over this farm I went to see Mr. Herring in regard to buying it, and we were in the kitchen, and of course I went there, ... I had looked the land over and went there with the intention of buying it. And Mr. Herring asked me if I didn't want to explore the land, and I told him that I didn't. I says

'I have been over it'. And then he asked me if I had been up in the northeast corner to a stake and stones, as I remember it in the northeast corner of this lot and described it out, and at that time I knew by his description how it looked, and I told him I had.

"Q. Well, did his description include that ten acre lot?

"A. Well there hadn't been anything said about the ten acre lot then.

* * * * * * * * * *

"Q. Well had Mrs. Herring said anything up to then?

"A. Yes. Mrs. Herring says: 'you ain't described my piece of land I have got up there, have you?'

"Q. Who did she say that to?

"A. She said it to Mr. Herring I suppose, and I sat there.

"Q. What did he say?

"A. Well she says, 'I have got a warranty deed of ten acres of land,' and I remember what I said to her. I says, 'Of course if you have got a warranty deed of ten acres of land it is yours.'

"Q. What did Mr. Herring say when she interrupted him and spoke about the ten acre piece?

"A. Well he says 'I intended to tell him about that piece of land when we looked it over,—if we looked it over'."

On the whole this testimony of Greeley was at most a feeble contradiction of Mrs. Herring. It shows that she did interrupt as and when she says she did, and Greeley gives her interruption substantially as she gave it. It was so insignificant in weight and effect that it could have played no appreciable part in the verdict which was rendered. In fact its general effect was probative of Mr. Herring's good faith rather than bad faith, as he said he intended to tell Greeley about the ten-acre lot when they looked it over.

The single issue in the case on trial was what representations were made by defendant when on the premises he pointed out the land to the plaintiff. The defendant's exceptions state it succinctly in these words: "The important fact to be determined was what was said and done by Mr. Herring, the defendant, at the time he pointed out the land." On that occasion only the plaintiff and defendant were

present. Mrs. Herring was not there and therefore could give no testimony on that crucial point, and it was a question of the credibility of the plaintiff or defendant.

The defendant relies with confidence on *Provencher* v. *Moore*, 105 Maine, 87, where the court said: "The testimony of Buker was a direct contradiction of the plaintiff tending to discredit him as a witness and must be regarded as prejudicial." The present case is to be distinguished from that in two important particulars as affecting the question of prejudice; there the person to be contradicted was the party plaintiff himself, here it is merely a witness and not a witness testifying to the crux of the case. There the contradiction was squarely and directly proven while here it is more nearly corrobarative than contradictory, more helpful to the defendant than prejudicial.

Our conclusion is that while the testimony of Greeley was technically inadmissible and could properly have been excluded, it was practically harmless, and to quote the language of our court in an earlier and somewhat similar case in principle: "To sustain exceptions for such a cause would be more nice than wise." *Hovey* v. *Hobson*, 55 Maine, 256, 273.

Exception overruled.

AMERICAN REALTY COMPANY, In Equity

vs.

EVERETT E. AMEY et als.

Cumberland. Opinion October 20, 1922.

Knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, makes such person chargeable, as a matter of law, with notice of ascertainable facts by ordinary diligence, if he fails to make such inquiry. In absence of agreement, power of an agent is restricted to acts beneficial to the principal, and parties dealing with an agent, having knowledge that such agent's interests in the matter are adverse to those of the principal are charged with the duty to ascertain agent's authority, and they will not be permitted to plead ignorance of agent's want of authority, as a matter of law. Declarations of an agent are no evidence as to the extent of his authority.

If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained.

An agent has no power to use his office otherwise than for the benefit of his principal, in the absence of an agreement that it may be so used.

When parties deal with an agent in a matter affecting his principal, and know that the interests of the agent in the matter are adverse to those of his principal, they are charged with the duty of ascertaining that the acts of the agent are authorized by the principal, and they will not be heard to say that they were ignorant of the agent's want of authority.

Under such circumstances the duty is imposed upon them to make inquiry as a matter of law, and as a matter of law they are chargeable with knowledge which could have been obtained by inquiry.

Inquiry of the agent alone is not sufficient to justify failure to make further inquiry. The declarations of an agent, although accompanying his acts, constitute no evidence of the extent of his authority.

On appeal by plaintiff. This is a bill in equity seeking to charge defendants as trustees of certain property for the benefit of plaintiff and to hold them accountable to the plaintiff for the profits derived by

them from the purchase and sale of certain personal property, water rights and timberland properties comprising approximately 20,000 acres of woodland. The defendant Amey was an agent of plaintiff company at its offices in Portland, Maine, for several years prior to the summer of 1917. He never knew anything about the properties in controversy until they were called to his attention in August, 1916, by another agent of plaintiff by the name of Danforth. Amey instructed Danforth to obtain an option for the plaintiff which he did do in the name of the plaintiff for the sum of $200,000 and delivered the option to Amey. Afterwards, Amey fraudulently misrepresented, it is alleged, to the officers of the plaintiff company the true value of the property covered by the option. While the option was in full force and effect, plaintiff alleged, that Amey entered into negotiations with defendant Barnjum and through Barnjum with defendant Hunt for the purpose of making an agreement with them that the three should purchase said properties for their joint benefit each to contribute a stated portion of the purchase price and the profits to be divided pro rata, according to the percentages of the purchase price agreed to be contributed by the respective parties to the agreement. Afterwards, while the option was in full force and effect, defendant Amey, while still agent for plaintiff and acting in its name entered into negotiations with the parties who gave the option to obtain a more favorable purchase price, and succeeded in reducing it to $170,000. Pursuant to the agreement between defendants Amey consummated the transfer of the properties to defendant Hunt upon representations to owners of said properties that they should be conveyed to Hunt under the option for the benefit of plaintiff. Before the conveyances were made of the properties to Hunt, Amey had advised plaintiff against the purchase of the properties. After the conveyances were made to Hunt, defendants sold a part of the real estate, and thereafter, Amey, while still the agent of plaintiff, but acting for the interests of the defendants, sold portions of the balance of the properties to plaintiff company for $238,000, and during the period of the negotiations for the sale, and at the time of the sale, to plaintiff, Amey was agent for plaintiff and as such agent notified the plaintiff of the opportunity to make the purchase and advised plaintiff to make the purchase. The case was heard on bill, answer, replication and proof and the sitting Justice sustained the bill against all the defendants, and made numerous findings of fact

and rulings of law, and plaintiff appealed. Appeal sustained with additional costs. Decree in accordance with opinion.

The case is fully stated in the opinion.

Weeks & Weeks and Woodman, Whitehouse & Littlefield and Raymond S. Oakes, for complainant.

William R. Pattangall and Carroll N. Perkins, for respondents.

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

MORRILL, J. The American Realty Company is a subsidiary of the International Paper Company, maintained by the latter company as a part of its organization for securing and maintaining an adequate and constant supply of wood for its mills. On September 25, 1916, the defendant, Amey, was, and for a long time prior thereto had been, employed by American Realty Company with title of "Assistant to the President"; he was attached to the company's office in Portland, Maine; his immediate superior was the president of the company, Mr. George M. Stearns; his duties, as stated by Mr. Stearns, were "to prepare business that the president should do and didn't have time to do perhaps. We would have a conference today and discuss various things, and I might ask him to prepare the business the next time I came around. I very seldom was here in Portland at our office more than two or three days at a time, three or four times a month, and we would discuss these various things today and he was to bring me an answer the next visit I came here."

"Q. Was he instructed by you in relation to being on the lookout for any good propositions?

"A. Always. We were always looking for timberlands; we never had enough. You see, the International Paper Company uses sixty or seventy thousand cords a year, and it is a large amount of wood and we had . . . . we were always looking for timberlands.

"Q. Whether or not he was instructed or permitted by you to conduct preliminary negotiations and even secure options to bring in to submit for your approval at times?

"A. That was what I used to ask him to do, to look over these things and bring them in in concrete form, if he could, for the action of the executive committee, not to purchase anything without asking the executive committee.

"Q. You say that he was not authorized to complete any purchase? A. Oh, no.

"Q. Without the action and approval of the executive committee?

"A. No."

As stated by himself, Amey's duties were, "principally to provide wood for the mills in Maine and New Hampshire" . . . . "by buying and operating on their lands, cutting wood on their lands and buying from . . . . buying wood."

We shall have occasion later to inquire as to Barnjum's and Hunt's knowledge of Amey's authority and duty.

In August, 1916 Amey learned from one Danforth, who was then superintendent of the Bangor Division of the American Realty Company's operations, that certain property in Aroostook County owned or controlled by the Stockholm Lumber Company, known as the Milliken lands, might be purchased. We here quote from the very comprehensive findings of the sitting Justice as to the successive steps by which the transactions which are the subject of this suit were completed.

"In 1916 a part of these lands was owned by the Stockholm Lumber Company and a part by the Northern Realty Company. Certain water rights connected with them were owned by the Little Madawaska Improvement Company. All of the stock of the Stockholm Lumber Company was owned by Charles A., Carl E., and M. P. Milliken; all of the stock of the other two said corporations was owned by the Stockholm Lumber Company, except the director's qualifying shares which were held by the Millikens.

"On September 25th 1916 William B. Danforth, the plaintiff's agent, acting under the direction of the defendant E. E. Amey, who occupied the position of assistant to the president of the American Realty Company, negotiated for and received a written option running to the American Realty Company for the purchase of all the said Milliken lands, except 500 acres in the east half of 15 range 4 (Westmanland) for $200,000. The option also included water rights, a stock of goods owned by the Stockholm Lumber Company and certain mill machinery and other personal property. The option was executed by the three corporations. By its terms it expired on October 25th 1916, except that a further time expiring November 10th 1916 was provided in order to close deal when option accepted.

"On October 14th 1916 Danforth still acting under the direction of Amey met the Millikens at Bangor and secured an oral modification of the option, reducing the purchase price to $170,000, and providing that all the lands should be conveyed including the 500 acres excepted in the written option. At this conference Danforth orally accepted the option and in behalf of the American Realty Company agreed to take the property.

"On October 30-31 the transaction was closed at the plaintiff's office in Portland. At the time and place of closing there were present C. A. and C. E. Milliken, Danforth, Amey, R. W. Shaw and C. L. Andrews. Before closing a further modification was agreed to. The store, stock and tenement houses of the Stockholm Lumber Company were agreed to be taken out of the option and retained by that corporation and $18,000 deducted, reducing the purchase price to $152,000. This sum was paid in three checks signed by the defendant Barnjum.

"By direction of Amey the transfer was made not to the American Realty Company but to the defendant, W. D. Hunt. The vote of the corporation authorizing the sale contains this clause "said William D. Hunt being the person indicated by the said American Realty Company as the person to whom said real estate is to be conveyed as provided in said option."

* * * * * * * * *

"It also appears that while the payment was made directly by Barnjum's checks, the money was furnished, $137,000 by Hunt for Barnjum and himself jointly and $15,000 by Hunt for Amey, Hunt being afterwards reimbursed for the $15,000 by Barnjum's check. To state this more explicitly Hunt sent Barnjum a check for $155,000. This with the $15,000 to be supplied by Amey making up the $170,000 which was the consideration contemplated by the option as amended in Bangor, and before the $18,000 deduction was made which was only agreed upon at the Portland meeting on October 30-31.

"Of this $155,000, $152,000 was used to pay for the deed and assignments. The case shows that $3,000 was returned by Barnjum to Hunt and that subsequently a $15,000 check for Amey's part was sent by Barnjum to Hunt.

"The case also shows that a deed was given by Hunt to Amey covering 15-152 of the property received. It does not appear whether this deed was recorded or not. Certain letters passed between Barnjum and Hunt showing an agreement that after Hunt had

received out of the property $137,000 being balance of investment with interest the 137-152 held by Hunt was to be divided equally between Hunt and Barnjum.

"No express arrangement was made to cover the contingency of possible loss."

In the Spring of 1917 a part of the property conveyed to Hunt in the preceding October for $152,000 had been sold, and Amey then called the property to the attention of Mr. Stearns, President of the American Realty Company, and recommended its purchase for $238,000. The recommendation described the property as "the town of Westmanland and a small interest in Cyr Plantation consisting of 20,000 acres." The recommendation was approved by Mr. Stearns, and by Mr. Russell, Vice President of the American Realty Company, and $238,000 was sent to make the purchase, which the parties ineffectively attempted to complete by deeds dated March 14, 1917.

The plaintiff claims the right to void these acts of Amey on the ground of fraud, known to, and participated in by Barnjum and Hunt, and that the defendants should be compelled to give the plaintiff the full advantage of the purchase by defendants under the option above referred to, as subsequently modified; that the defendants should be compelled to render a full and complete account of sales by them to parties, other than the plaintiff, of any part of the so-called Stockholm property acquired by Hunt under the transaction of October 30-31, 1916, and the monies derived therefrom; and that the defendants should be compelled to pay to the plaintiff the difference between $170,000 and $238,000.

The record before us comprises seven hundred and seventeen printed pages; the sitting Justice made very comprehensive findings of fact and rulings of law occupying eighteen pages of the record, and covering every phase of the case as presented to him.

As to Amey's fraud he held:

"Amey acted for the plaintiff company in purchasing from Hunt (March 14, 1917) property in which he had a personal interest. Amey was the only person connected with the plaintiff company who had any knowledge of such interest, and he failed to disclose the fact. It is clear and is conceded that this conduct was constructively fraudulent.

"However innocently his title was derived Amey cannot be permitted to retain any part of the profit thus acquired.

"But Amey's conduct was not merely constructively fraudulent. As agent for the plaintiff he had an option by virtue of which the plaintiff company was given the right to purchase the Milliken Lands. In turning over to Hunt the privilege of purchasing this land, for the benefit of Barnjum, Hunt and himself, Amey was guilty of actual and intentional fraud. He perhaps did not conceal the existence of the option. From some source Russell knew about it early in October. But he (Amey) took pains to conceal his own favorable opinion and the grounds of it. Planning to acquire the property for himself and his associates he with fraudulent intent disparaged it to the plaintiff's officers. He falsely stated to the Millikens in substance that the conveyance to Hunt was with the assent and for the benefit of the plaintiff Company. He said that Hunt "is one of our men." The letter of November 7, 1916 is full of intentionally misleading statements.

"The evidence of Amey's intentional and deliberate fraud is so plain that it is unnecessary to quote from the testimony or make further reference to it."

As to the participation of Barnjum and Hunt in Amey's fraud the sitting Justice said:

"Hunt and Barnjum received and now hold nine tenths of the profits derived from Amey's fraud, Amey himself having been content with one tenth. But I find no evidence that Hunt and Barnjum or either of them participated in Amey's fraudulent purposes, or had actual guilty knowledge of his fraudulent misrepresentations. If they are liable in this action they have become so through

1. Failure to convey to the plaintiff the property which it paid for.
2. Failure to make inquiry when fairly put upon their inquiry.
3. Frauds committed by Amey as partner or agent.

"The defendants did not convey to the plaintiff all the property which it paid for and is entitled to. It is however perfectly clear that this was not due to any fraudulent design, but to carelessness on the part of both seller and buyer.

"The plaintiff may have a decree that the defendants be required to complete the conveyance of the property for which it paid."

The careful and learned Justice then considered the other grounds of liability suggested, and decided them adversely to the plaintiff.

He then entered a decree providing for confirming the title of the plaintiff to all the property purchased and paid for by it in March 1917, and giving judgment against Amey for "the amount of profit which accrued to him from the transaction with interest," fixed at $11,151.37 with interest from March 14, 1917. From this decree plaintiff has appealed.

In an elaborate brief counsel for plaintiff contend, that the sitting Justice erred in matters of law in six rulings upon which the decree appealed from was based. In the view which we take of the case, it will be necessary to consider only one of those rulings:

"That Hunt and Barnjum were not put upon their notice to make inquiry whether the plaintiff proposed to take up the option before they entered into an agreement with Amey to purchase the property for themselves."

In our judgment the right of the plaintiff to maintain this action against Barnjum and Hunt must depend upon the correctness of the ruling on this point.

Upon this point the sitting Justice held:

"The plaintiff urges that Hunt and Barnjum 'were put upon their notice to make inquiry whether the company proposed to take up the option before entering into a partnership with Amey to purchase it for themselves and should be charged with the knowledge which they would have obtained if they had faithfully made the inquiry.'

"I have found and now repeat that there is no evidence showing Hunt and Barnjum to have had actual guilty knowledge of Amey's frauds. Failure to convey all the property was plainly an inadvertence.

"Was it their duty to make further inquiry before joining with Amey in the purchase?

"The transaction was an unusual one. They were buying property upon which to their knowledge the plaintiff had an option. They were paying nothing to the plaintiff for its option, although Amey expressed confidence that the stumpage was worth about three times the option price, and he a subordinate officer of the company was joining with them in the purchase. They made no examination or exploration of the property. For the desirability of the purchase they relied upon Amey and the plaintiff's explorer. They made no examination of title. For the validity of the title they relied upon an examination made by the plaintiff.

"But it should be borne in mind that—Amey in 1916 enjoyed in a remarkable degree the confidence of the plaintiff's officers, and of the public, that the defendants paid for the property a price which certainly was not manifestly inadequate, and that while the plaintiff had been a large buyer of wood and stumpage, it had not for some years bought woodland in the State of Maine.

"In view of these facts I find that the peculiar circumstances of the purchase as above outlined are not in and of themselves sufficient to put the defendants upon their further inquiry."

In *Knapp* v. *Bailey*, 79 Maine, 195, at Page 204, this court has said: "As to what would be a sufficiency of facts to excite inquiry, no rule can very well establish; each case depends upon its own facts. There is a great inconsistency in the cases upon this point."

Certain facts disclosed by the testimony of Barnjum and Hunt, in addition to those so concisely stated by the learned Justice, throw much light upon the situation and enable us better to visualize the transaction. It clearly appears that Barnjum had known Amey since 1912 or 1913; that on their first meeting Barnjum was favorably impressed with him; that they became on intimate terms personally; that Barnjum addressed him by his first name, and signed letters to him by his own first name; that extending over the period from 1913 to 1916 Barnjum had dealings with American Realty Company, in which Amey acted for the company; during that period Barnjum and Amey had various transactions between them with reference to purchases of lands by Barnjum as sources of wood supply for American Realty Company, and during that period Barnjum knew that Amey's duties were "principally providing the wood supply for the mills, either by buying stumpage or wood;" that he "sometimes handled the negotiations, preliminary negotiations for procuring stumpage or wood or permits, and bringing them up for final approval by the executive committee."

Barnjum was also on friendly and intimate business relations with Mr. Stearns, Amey's immediate superior, President of American Realty Company; he testifies:

"Q. In transacting your business with the American Realty Company were you at their office in Portland more or less? A. Yes, quite often.

"Q. How often should you think . . . . or rather, how many times a year, perhaps?

"A. Oh, perhaps I went . . . . very often, when I was in Portland I would go in and shake hands with Mr. Stearns or Mr. Amey, whether I had any business with them or not. It would be very hard for me to say how many times, but I should say six or eight or ten times a year perhaps."

It further appears that Barnjum furnished no money for the original transaction, and "no express arrangement was made to cover the contingency of possible loss," as found by the sitting Justice. He testifies:

"He (Amey) called me up on the phone one day and said that they had been offered the Stockholm Lumber Company property, and he had put it up to Mr. Stearns and Mr. Stearns had turned it down and said they were not buying any lands, and he said that it was too good a proposition to lose, and he wanted to know if I wouldn't like to take it up. I told him that I would talk it over with Mr. Hunt, and at that time I was so well invested up that I didn't have the funds, and if Mr. Hunt would furnish the money I would be very glad to look into it."

He did look into it and on October 21, 1916, addressed a letter to Hunt in which the following occurs: "This land that I have just bought through Amey is particularly attractive for two reasons," which he states; then he proceeds, "If you think you would like to join me in this deal, you shall certainly have the first refusal, as it would be an added pleasure to have you in it with us.

"The total price we are to pay for the entire property is $170,000, of which Amey puts in $15,000, reducing our investment to $155,000 . . He is coming to Boston Tuesday, therefore I should be glad to hear from you Monday, so that we may decide just whom to take into the proposition." Hunt thought that he would like to join Barnjum in the deal, and Barnjum decided to take him into the proposition to the extent of the entire purchase price less Amey's $15,000, making with Hunt the agreement referred to in the findings for an equal division of profits. This position of Barnjum in the matter is very illuminating upon the question whether he and Hunt were put upon their inquiry to ascertain the attitude of the plaintiff toward the valuable option of which they were having the benefit.

Hunt, also, knew of Amey; knew that he was an agent of the plaintiff, that he had to do with timberlands; he had participated with Amey and Barnjum in at least one previous deal; Barnjum

discussed the proposition with him and "repeated just the story that Mr. Amey put up to me," as Barnjum testifies. Hunt therefore knew that Amey was participating in a deal in which his interest was adverse to the interest of his principal.

On October 31, Barnjum arrived in Portland with Hunt's money and paid the entire purchase price, later receiving $15,000 from Amey. So far as the record shows he did not ask for a copy of the vote of the stockholders of the Stockholm Lumber Company, authorizing the sale, which would have disclosed to any prudent business man the signs of Amey's fraud. The explanation given by Barnjum and Hunt in the record may well impress the reader as unsatisfactory when offered to support their position of innocent participators in a transaction saturated with Amey's fraud.

We are not, however, considering whether the findings of fact are so clearly wrong as to require reversal, but whether there is error in the rulings of law.

In *Knapp* v. *Bailey*, supra, it is said: "The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser before buying should clear up the doubts which apparently hang upon the title, by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does wrong not to heed the 'signs and signals' seen by him. It may well be concluded that he is avoiding notice of that which he in reality believes or knows." Barnjum and Hunt had knowledge of an "unusual transaction" as described in the findings; they knew that Amey was an agent of American Realty Company acting for the company in a transaction in which he had a personal interest adverse to the interest of his principal; having opportunity at hand through Barnjum's intimate personal relations with Mr. Stearns, to make inquiries, they failed to do so.

Amey's statement that he had put the offer up to Mr. Stearns and that the latter had turned it down is not sufficient to justify failure to make further inquiry. *Cordova* v. *Hood*, 17 Wall. 1, 21 L. Ed., 587. *Moores* v. *Citizens Nat. Bank*, 111 U. S., 156, 28 L. Ed., 385, 389. *Salene* v. *Queen City Fire Ins. Co.*, 59 Ore., 297, 116 Pac. 1114.

M. & M. Nat. Bank v. *Ohio Valley Furniture Co.*, 57 W. Va., 625, 50 S. E., 880. *Wilson* v. *LeMoyne*, 204 Fed., 726. *Beach* v. *Osborne*, 74 Conn., 415.

In *Farrington* v. *South Boston Railroad Co.*, 150 Mass., 406, at Page 409, it is said: "An agent cannot properly act for his principal and himself when their interests are adverse, and any person dealing with an agent in a matter affecting his principal, and knowing that the interests of the agent are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by the principal." To the same effect; *Moores* v. *Citizens Nat. Bank*, 111 U. S., 156, 28 L. Ed., 385. Mechem on Agency, Sec. 754.

In 21 R. C. L. at Page 910, Section 87, it is said: "Whenever it appears that the interests of an agent and those of his principal are necessarily in opposition in a particular transaction, strangers dealing with the agent are charged with notice of his want of authority to bind the principal by his acts." In support of this statement, *Langlois* v. *Gragnon et al*, 123 La., 453, 49 So. 18, 22 L. R. A. (N. S.), 414, is cited, in which it is said: "The principle of law which comes into play in such a case is the following: 'In matters touching the agency, an agent cannot act so as to bind his principal, where he has an adverse interest in himself.' Story on Agency, Sec. 210. As a corollary to that principle, where from the circumstances of the particular business, the agent's interest and that of his principal are necessarily in opposition, third persons are charged with notice of such want of authority."

Again, in the following section (88) of the same work it is said: "Every agency is subject to the legal limitation that it cannot be used for the benefit of the agent himself, or of any person other than the principal, in the absence of an agreement that it may be so used; and, as this is a matter of law, and not of fact, all persons must take notice of it." In support of this statement, *Salene* v. *Queen City Fire Ins. Co.*, 59 Ore., 297, 116 Pac., 1114, Anno. Cas. 1916 D, 1296, 35 L. R. A. (N. S.), 438, is cited, in which it is said: "The plaintiff (a mortgagee and holder of a policy in defendant corporation, issued to her by one Rowland) knew that Rowland (the agent) was the owner of the property to be insured, and also knew that he was undertaking to act as the agent of the company in his own interest as against that of the company in the transaction. She knew that

Rowland was providing a security for the possible payment of his debt out of the funds of the company. Aware of all these things, she dealt with him at her peril; and, if she would recover from the company, she must bring home to the latter knowledge of the whole transaction before any liability arose upon the policy, and further show that it approved or ratified the same, having such knowledge. The law imputes to her knowledge of the legal effect of the agent's operating in his own interest and adversely to the principal whom he claimed to represent."

In *M. & M. Nat. Bank* v. *Ohio Valley Furniture Co.*, 57 W. Va., 625, 50 S. E., 880, 70 L. R. A. 312, where an agent admitting the agency, represented that he had secured authority to use the proceeds of a note which he offered for discount, the court said: "The declaration on the part of the holder, after having admitted the agency, that he had secured the right to use the note for his own benefit, calls for the application of another principle of the law of agency, which is a limitation imposed by law upon the power of every agent, general or special, of which all persons must take notice, namely that an agent has no power to use his office otherwise than for the benefit of his principal. When he undertakes to exercise it for a purpose which can in no way benefit his principal but will benefit himself or some third person, he places himself in a position in which the law determines that he is outside the scope of his agency, and the person who deals with him in such a position will not be heard to say that he was in ignorance of the want of authority, for ignorance of law excuses no man. . . . . The declarations of an agent, although accompanying his acts, constitute no evidence of the extent of his authority."

In *Dowden* v. *Cryder*, 55 N. J. L., 329, it is said: "It is a universal principle in the law of agency that the powers of the agent are to be exercised for the benefit of the principal and not of the agent or third parties. 1 Amer. Lead. Cases (5th Ed.), 687. Persons dealing with one whom they know to be an agent and to be exercising his authority for his own benefit, acquire no rights against the principal by the transaction."

In *Cordova* v. *Hood*, 17 Wall., 1, 21 L. Ed., 587, Mr. Justice Strong uses this language: "Wherever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge with

the duty of using them are, in equity, equivalent to knowledge itself. Had inquiry been made of the vendor, it would easily have been ascertained that a portion of the purchase money remained unpaid. Inquiry of Hood, the debtor, if any such inquiry was made, was an idle ceremony "

In *Vredenburg* v. *Burnett*, 31 N. J. Eq., 229, the Vice Chancellor thus states the principle: "Whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry became a duty and would lead to a discovery of the requisite fact by the exercise of ordinary diligence and understanding," adopting the language used in *Lodge* v. *Simonton*, 2 Penrose & Watts, 439, 445, quoted with approval in *Hopkins* v. *McCarthy*, 121 Maine, 27, 30.

The facts of the instant case bring the position of Barnjum and Hunt directly within the application of the doctrine of the foregoing cases. They knew of Amey's agency and that they were buying property on which the plaintiff had an option, and that the option was a valuable one . . . . "too good a proposition to lose;" Amey was to have an interest in the property when bought, and to contribute $15,000, on which his share of the profit would be "quite considerable for him." Clearly Amey's interests were adverse to the interests of his principal. By these facts Barnjum and Hunt were put upon inquiry, not of Amey of whom inquiry was an "idle ceremony," but of the officers of the plaintiff corporation. This they did not do, but hurried the transaction through upon the statement of Amey that he had put the proposition up to Mr. Stearns and that it had been turned down. They made no inquiry as to the vote whereby the stockholders of Stockholm Lumber Company directed its Treasurer to convey the property to Hunt instead of the plaintiff. We think that, knowing that Amey was acting in a matter in which he was personally interested adversely to his principal, the duty was imposed upon them to make inquiry, as a matter of law, and that as a matter of law they are chargeable with knowledge which could have been obtained by inquiry. Upon due inquiry they would have learned that Amey had not informed the President of the Company fully and in detail of all that he knew concerning the property (a fact which Amey in his testimony admits), that he had deliberately deceived the Vice President of the Company in regard to the cruise and the value of the property, that the officers of the company were not informed as to the result of the cruise and the terms of the modi-

fied option; and that while Amey had been directing a cruise of the property and an examination of title ostensibly for the benefit of the company, he had been planning by deliberate misrepresentation to secure the benefit of this valuable option for himself and his associates.

In *Hudson Structural Steel Co.* v. *Smith & Rumery Co.*, 110 Maine, 123, this court said: "Notice sufficient to put one upon inquiry imposes upon him such a degree of diligence as will enable him to ascertain the truth, and in failing to do so he will be charged with the knowledge he ought to have obtained by reasonable investigation."

In *Wood* v. *Carpenter*, 11 Otto., 135, 25 L. Ed., 807, it is said: "There must be reasonable diligence and the means of knowledge are the same thing in effect as knowledge itself."

The bill must be sustained against Barnjum and Hunt, as well as Amey, for an accounting. They acquired no rights against the principal by the transaction. *Dowden* v. *Cryder*, supra. Having discovered the fraud practiced upon it the plaintiff is entitled to follow the property and its proceeds into the hands of those chargeable with knowledge of the fraud.

The only remaining ground of defense which requires mention is the alleged settlement of Amey's liabilitites to the plaintiff. This contention was not mentioned in the answers.

The sitting Justice ruled that it was incumbent on the defendants to prove that the payment of $169,500 by Amey (in property of that agreed value) and of $10,000 by his father, John T. Amey, was in full discharge of all Everett E. Amey's civil liability in the Dunn-Lumbert, Van Dyke, and Milliken-Dole matters, and also in the Milliken-Westmanland transaction, which is the subject of this suit. "This," he says, "has not been satisfactorily proved," and after a full discussion of the evidence he concludes, "I feel entirely clear that the defendants have not sustained the burden of proving that the transaction involved in this case was settled at the New York conference."

Counsel have not challenged the ruling as to the burden of proof; it was manifestly right. To the finding of fact the usual rule must be applied (*Gilman* v. *Haviland*, 114 Maine, 303), and upon a careful review of the record we cannot say that the conclusion of the sitting Justice is clearly erroneous. The testimony, coming from men of the highest integrity, was squarely conflicting. The only memorandum

of the conference was made and produced by Mr. Russell who testified against the contention of defendants. We think that the decision must rest where it has fallen.

The plaintiff is entitled to a modification of the decree below, with additional costs. The modified decree will provide that the defendants, and each of them, make and execute deeds and other instruments necessary to convey and transfer to the plaintiff all property acquired by the defendants, or either of them, by the transaction of October 30-31, 1916, now in their hands or under their control jointly or severally. The decree will specify the deeds and instruments necessary.

The defendants as joint purchasers are ordered to account for and pay to the plaintiff the amount of profit which has accrued to them from said transaction, with interest. The exact amount will be specified in the decree, and if counsel cannot agree upon the amount, the cause will be committed to a master to determine the same, and execution against them jointly will issue therefor.

Appeal sustained with additional costs. Decree in accordance with this opinion.

ELIZABETH M. GILPATRICK *vs.* BELA L. CHAMBERLAIN & Tr.

Penobscot. Opinion October 24, 1922.

The right of immediate possession at time of conversion is absolutely essential, though plaintiff may be owner, to sustain trover. Mortgagee entitled to possession of chattel at time of execution of mortgage and thereafter unless otherwise provided by agreement. Newly-discovered evidence not a ground for new trial, if moving party had knowledge, or by due diligence, might have obtain knowledge of such new evidence nor unless a different result seems probable.

In order to maintain an action of trover the plaintiff must prove title to the property or right of immediate possession thereof; and even though the plaintiff is the general owner yet he must prove his right to possession at the time of conversion.

The right of possession of a mortgaged chattel is in the mortgagee, before as well as after breach of condition, unless otherwise provided by agreement between the parties to the mortgage.

A new trial should not be granted on the ground of newly-discovered evidence when the moving party knew before the original trial what his new witnesses would testify to or, by the exercise of due diligence, might have known, nor unless it seems probable that the testimony of the new witnesses would change the result.

On exceptions and motion by plaintiff. An action of trover alleging conversion of an automobile. Defendant pleaded the general issue, and under a brief statement set up Res Judicata.

Defendant presented in evidence an unredeemed chattel mortgage of the automobile, given by plaintiff to Arthur W. Gilpatrick, and by him assigned to defendant. At conclusion of the evidence the presiding Justice upon motion by defendant directed a verdict for defendant, and plaintiff excepted, and also file a motion for a new trial on newly-discovered evidence. Motion and exceptions overruled.

The case is sufficiently stated in the opinion.

Clinton C. Stevens, for plaintiff.

T. S. Bridges and Fellows & Fellows, for defendant.

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

PHILBROOK, J. This is an action of trover brought to recover damages for the alleged conversion of an automobile. At the close of the evidence the presiding Justice directed a verdict for the defendant, to which ruling the plaintiff seasonably filed exceptions, and herewith presents the same for our consideration. She also moves for a new trial on the ground of newly-discovered evidence.

EXCEPTIONS.

In order to maintain her action it was incumbent on the plaintiff to prove that she had title to the property, or was entitled to the immediate possession thereof. *Landry* v. *Mandelstam*, 109 Maine, 376. The action was begun November 17, 1920. She alleges in her declaration that the conversion complained of occurred on November 3, 1920.

But the defendant presented in evidence an unredeemed chattel mortgage of the same automobile, dated June 29th, 1918, given by the plaintiff to Arthur W. Gilpatrick, and by him assigned to the defendant, the assignment bearing date of February 3, 1920. This mortgage contained no provision for possession of the property by the mortgagor, and it is well-settled law that the right of possession of the chattel mortgaged is in the mortgagee, before as well as after breach of condition, unless controlled by an agreement between the parties. *Libby* v. *Cushman*, 29 Maine, 429. "It is elementary that to maintain trover the plaintiff, though the general owner, must have the right of possession at the time of conversion." *Jones* v. *Cobb*, 84 Maine, 153. As this plaintiff did not show her right of possession on November 3, 1920, the verdict for the defendant was properly ordered and the exception must be overruled.

MOTION.

The plaintiff asks a new trial on the ground of newly-discovered evidence. A new trial should not be granted when the moving party knew before the original trial what his new witnesses would testify to, or by the exercise of due diligence might have known; nor unless

it seems probable that the testimony of the new witnesses would change the result. *Fitch* v. *Sidelinger*, 96 Maine, 70. Litigation over the title of the automobile has been in progress, with more or less delays, since June 26, 1918, when it was attached as the property of the plaintiff's husband. Defeat has been the plaintiff's lot at each stage of the litigation although more than one attorney has championed her cause. We have carefully examined the motion for new trial, the list of witnesses whom she now wishes to call to her assistance, and what those witnesses would testify to, in the light of all the evidence given in the record before us. It would be of little interest, except to the parties, to enter into an extended discussion of the testimony, or the lack of diligence on the part of the plaintiff in procuring the witnesses whom she now desires to call, but we are firmly persuaded that she has not brought herself within the salutary rule by which she would be entitled to have her motion granted, that the result would not be changed, and that justice does not weigh in her favor to the extent that further litigation should be conducted.

Motion and exceptions overruled.

STATE *vs.* DANIEL MESERVIE.

Waldo. Opinion Ocotber 24, 1922.

Ordinarily questions of law are not raised upon a motion for a new trial, unless an injustice would otherwise inevitably result. The definition of "dwelling-house" as given by R. S., Chap. 121, governs in an indictment for arson, and under such definition, a building which is connected with or occupied as a part of a dwelling-house is a part of the dwelling-house, though such connection may be by an intervening structure.

The practice of raising questions of law upon a motion for new trial is not to be encouraged, although in cases where manifest error in law has occurred, and injustice would otherwise inevitably result, the law of the case may be examined upon a motion and, if required, the verdict may be set aside as against law.

The word "dwelling-house" does not always have the same sense in all cases. It may mean one thing under an indictment for burglary or arson, another under a homestead law, another under pauper law and another under a contract or devise. In this State the Legislature, by R. S., Chap. 121, has defined arson and also defined the word "dwelling-house," as used in that chapter, so that in this case, an indictment for arson, we must be governed by that definition. By that definition also a building which is connected with or occupied as part of a dwelling-house is part of the dwelling-house. The connection of such building with the main part of the dwelling-house may be by an intervening structure.

On appeal. Respondent was indicted for arson under the provisions of Chap. 121 of the R. S., and tried and found guilty, and presented a motion for a new trial to the presiding Justice, which was denied, and respondent appealed. The buildings destroyed by the fire consisted of the main dwelling-house, ell, woodshed, carriage-house and barn connected in the order named, forming one continuous set of buildings, with means of access without going out of doors. The fire, it was alleged, was set to the barn and communicated through the intervening structures to the main dwelling-house. The only real question raised under the motion was that the barn did not adjoin the dwelling-house and as a consequence the act did not come within the meaning of the statute.

Appeal dismissed. Verdict affirmed. Judgment for the State.

Case is fully stated in the opinion.

Ralph I. Morse, County Attorney, for the State.

Arthur Ritchie, for respondent.

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

PHILBROOK, J. The respondent was indicted under the provisions of R. S., Chap. 121, Sec. 1, which provides for punishment of any one who "wilfully and maliciously sets fire to, or causes fire to be set to the dwelling house of another . . . . or to any building adjoining thereto . . . . with intent to burn such dwelling house." The indictment charges that the respondent "a certain barn of the property of one Frank C. Meservie, there situate, and adjoining to the dwelling house of him, the said Frank C. Meservie also there situate, feloniously, wilfully and maliciously did set fire to, with intent then and there to burn said dwelling house; and by the kindling of said fire, and the burning of said barn, the said dwelling house was then and there feloniously, wilfully and maliciously burned and consumed."

Upon his arraignment the respondent pleaded that he was not guilty and upon trial the jury returned a verdict of guilty. He then presented a motion for a new trial to the presiding Justice, which motion was denied, and an appeal was taken to this court. His motion is formally based upon the three customary grounds, viz.: (a) that the verdict is against law, (b) against evidence, (c) against the weight of evidence. His actual ground of motion is that the barn did not adjoin the dwelling-house. His claim is that originally the house and ell stood alone; that the barn, which was originally northeast of the house, was moved forward in line with the house, though some distance away; that sometime afterward a wagon-house and woodshed was built into the space between the ell and the barn; that no part of the woodshed or carriage-house was occupied as a dwelling.

No exception appears to have been taken to any ruling upon the admission or exclusion of evidence, nor to the instructions contained in the charge of the presiding Justice. The charge forms no part of the record and we must assume that it contained correct statements of law, including a correct definition of what buildings constitute a dwelling-house, as well as a correct explanation of what is

comprised in the words "adjoining thereto." If any error appeared in any ruling or instruction, or any proper requests for additional or corrective instructions were denied, an avenue would be opened to this court by means of a bill of exceptions.

The practice of raising questions of law upon a motion for new trial is not to be encouraged, although in cases where manifest error in law has occurred, and injustice would otherwise inevitably result, the law of the case may be examined upon a motion and, if required, the verdict may be set aside as against law. *Pierce* v. *Rodliff*, 95 Maine, 346.

An examination of the testimony satisfies us that when the fire was kindled the dwelling-house, ell, woodshed, carriage-house and barn were connected in the order named, forming one continuous set of buildings with passageway from house to barn without going out of doors. The word "dwelling-house" does not always have the same sense in all cases. It may mean one thing under an indictment for burglary or arson, another under a homestead law, another under pauper law, and another under a contract or devise. *Robbins* v. *Railway Co.*, 100 Maine, 496. R. S., Chap. 122, Sec. 8, the chapter under which this indictment is drawn, defines the term in the following words: "Any permanent building or edifice, usually occupied by any person by lodging therein at night, is a dwelling-house, although such occupant is absent for a time, leaving furniture or goods therein, with an intention to return; but no building shall be deemed a dwelling-house, or part of it, unless connected with or occupied as part of the dwelling-house." The words of exclusion necessarily limit the legislative intention by those words but, on the other hand, they may throw much light on that intention as to inclusion. Hence it naturally follows that a building which is connected with or occupied as part of the dwelling-house comes within the definition of a dwelling-house. The disjunctive "or" should be noted, in the phrase "connected with or occupied as part of the dwelling-house." The woodshed and carriage-house being "occupied as part of the dwelling-house" as shown by a fair interpretation of the record, it follows that the barn, which was connected with the carriage-house, was adjoining the dwelling-house. It is true that in answer to a leading question propounded by his counsel the respondent testified that no part of the woodshed and wagon-house was occupied as a

dwelling-house, yet the question involves a legal deduction and his self-serving answer cannot be binding upon the court when passing upon questions of law.

Moreover, the connection of the barn with the ell, or with the main part of the dwelling-house, may be by an intervening structure. That a storehouse connected with a dwelling-house by a covered but uninclosed gallery is part of the dwelling-house, so as to render one setting fire to it guilty of arson of a dwelling-house, has been held in *Spears* v. *State*, 46 So., 166; 16 L. R. A., (N. S.), 285.

It is the opinion of the court that the respondent takes nothing by his motion and the mandate must be,

Appeal dismissed.
Verdict affirmed.
Judgment for the State.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

WILLIE GUILBAULT *vs.* JOSEPH MARCOUX.

York County. Decided December 17, 1921. Action for criminal conversation and alienation of wife's affections, before the Law Court upon general motion, and motion for new trial on ground of newly-discovered evidence, filed by the plaintiff.

The general motion must be overruled. The only evidence tending to show criminal relations was the testimony of one Arthur Newn, a hotel keeper in Sherbrooke, Province of Quebec, who identified the defendant and Mrs. Guilbault as persons who registered at his hotel as "Robert Blouin and wife, Laconia, New Hampshire," and occupied a room there together on the night of July 26, 1920. The probative force of this testimony depends entirely upon the certainty of the identification. It is apparent that the jury discredited the testimony of Newn and refused to accept his identification of the parties. The court will not reverse this finding, based on the weight to be given to Newn's testimony, in the light of the testimony of both alleged participants. It cannot be said to be unmistakably wrong. Upon the entire record the plaintiff fails to sustain the burden of proof of showing that the verdict is wrong. *Harvey* v. *Donnell*, 107 Maine, 541.

To the evidence claimed to be newly discovered, taken in support of the motion for a new trial, we must apply the rule stated in *Parsons*

v. *L. B. & B. St. Ry.*, 96 Maine, 503, 507, and since consistently followed. *Mitchell* v. *Emmons*, 104 Maine, 76. *Drew* v. *Shannon*, 105 Maine, 562. *Higgins* v. *Portland R. R. Co.*, 106 Maine, 39. Having in mind that the evidence of criminal relations depends entirely upon identification made by Newn, the hotel keeper at Sherbrooke, it does not seem to the court probable that on a new trial, with the additional evidence, the result would be changed. The testimony of Belanger as to the time table of trains between St. Henry, Sherbrooke and Boston, if material, was available at the trial; he was present and had the knowledge at that time, to which he later testified. This evidence could have been easily procured at the time. The remainder of his testimony, and the testimony of Fortier and of Lageux, tends to discredit the testimony of the witness, Laliberte. So the testimony of Anna Wax tends to contradict the testimony of the defendant and his daughter, as to the day when he arrived in Boston on his return to Biddeford. The testimony of these witnesses may be true (although we are not impressed with the correctness of the date given by Mrs. Wax), yet it fails to place the defendant and Mrs. Guilbault together in Sherbrooke at Newn's hotel on the night of July 26, 1920, or to corroborate or render more probable Newn's identification. It simply adds conjecture to conjecture based upon the arrival of Marcoux and Mrs. Guilbault in Biddeford on the same day upon their return from Canada, the one coming by the way of Boston, the other coming to Portland over the Grand Trunk Railway.

In our opinion the fact that in his writ dated August 5, 1920, the plaintiff charged criminal relations between his wife and Marcoux, without any evidence, known to him at that time, so far as this record shows, to support such a charge, and the admitted fact shown in the record that he continued to cohabit with her, occupying the same bed, until the day of trial, outweighs even the possibility of a different result, if a new trial is granted. Such condonation and continued cohabitation is not a bar to the action. *Sanborn* v. *Neilson*, 4 N. H., 501. *Shannon* v. *Swanson*, 208 Ill., 52. But it confirms us in the belief, upon reading the whole record, that no injustice has been done, *Woodis* v. *Jordan*, 62 Maine, 490, or is likely to be done if a new trial is refused. Motions overruled. *Louis B. Lausier and Willard & Ford*, for plaintiff. *Emery, Waterhouse & Paquin*, for defendant.

FRED E. MCKENNEY *vs.* A. FALKNER MCKENNEY.

Cumberland County. Decided December 17, 1921. This is an action of deceit, which is before us on general motion for a new trial. In 1915 or 1916 the plaintiff employed the defendant as his agent to sell for him certain real estate upon an agreed commission of two hundred and fifty dollars; the price at first fixed was $8,000; there is evidence, however, tending to show that in March, 1919, the plaintiff told the defendant that the property had advanced in value and that he ought to get more for it, to which the defendant replied, that he was going to . . . . was asking more for it.

The plaintiff alleges that in August, 1919 the defendant represented to him that he had secured a customer in the person of one Mathis who would pay $8,000 for the property and that he, the defendant, could not get any more; that relying upon said statement, the plaintiff sold and conveyed said property for said sum of $8,000; that the statement was false, and known to the defendant to be false, and that in fact the defendant did procure a purchaser in the person of Mathis, who was willing to pay $8,500. It is undisputed that the plaintiff conveyed the property to the defendant for $8,000, and on the same day the defendant conveyed to Mathis for $8,500, the deed to Mathis being delivered before the defendant had received a deed from the plaintiff.

The defendant contends that he made no false statement to the plaintiff; that he told him that he had found a purchaser in the person of one Ward, who would give $8,000 and no more; that this was the truth; that Ward a few days later sold the property to Mathis for $8,500.

This brief statement states concisely the issue between the parties. In a very clear charge, in which the elements of an action of deceit, and the legal relation and duties of an agent towards his principal were fully explained, the presiding Justice directed the attention of the jury to the issue in the following language: "What was the statement which Falkner McKenney brought back to Fred McKenney about a customer? What did he tell him? Did he tell him falsely that he had got a customer who would only pay eight thousand when he had a customer who would pay eighty five hundred? Or did he

tell him truly that he had a customer, Ward, who would pay eight thousand, and that was the fact?" He directed their attention to this issue more than once. No exceptions are taken to the charge.

The issue so presented the jury found in favor of the plaintiff.

A careful examination of the record does not disclose any grounds for setting aside the verdict on account of bias, prejudice, passion or sympathy. The result rested solely on the credibility of the witnesses; the plaintiff was the only witness in his behalf; the defendant also testified, and was given wide latitude in introducing evidence of attendant facts, which he claims support his defense. Yet the jury found for the plaintiff.

To state the case most favorably for the defendant, it is a case where intelligent, fair-minded and conscientious men may reasonably differ. *Munroe* v. *Hampden*, 95 Maine, 111. We cannot say that there is a moral certainty of error. *Smith* v. *Brunswick*, 80 Maine, 192; or that the verdict is clearly and unmistakably wrong. *McNerney* v. *East Livermore*, 83 Maine, 449. The defendant does not press his motion upon the ground that the damages are excessive. Motion overruled. *Samuel L. Bates*, for plaintiff. *E. P. Spinney, Elias Smith and William A. Connellan*, for defendant.

L. L. ROGERS *vs.* HARRY BROWN et al.

Waldo County. Decided December 17, 1921. This case comes up on motion by defendant to set aside the verdict. No exceptions were taken and the presumption is that every issue raised in the course of the trial was properly submitted to the jury. The case, accordingly, presents a pure question of fact upon which the jury have passed. The only question therefore is whether there was any adequate evidence upon which they were authorized to base their verdict. A careful consideration of the evidence discloses ample evidence for the verdict, if they believed it, and credibility is always a question for the jury. We are unable to discover any legal ground upon which the verdict can be disturbed. Motion overruled. *Dunton & Morse*, for plaintiff. *Arthur Ritchie*, for defendants.

NAZAIRE J. GENDRON *vs.* AMEDIE LEGERE, Applt.

York County. Decided December 17, 1921. This is an action of assumpsit for installing a furnace in the house of the defendant.

The jury found for the defendant. A careful reading of the testimony shows that the jury was well warranted in finding the conclusion at which they arrived.

As the case presents a pure question of fact, an analysis or discussion of the testimony would be without profit to the parties or as a precedent. Motion overruled. *Willard & Ford*, for plaintiff. *E. P. Spinney and Lucius B. Sweet*, for defendant.

E. L. EDGERLEY *vs.* MARY THOMPSON.

Somerset County. Decided February 2, 1922. This is an action brought by the plaintiff against the defendant for the recovery of damages upon the allegation that the plaintiff's horse was kicked by the defendant's horse and so injured that it had to be killed. The plaintiff and the defendant were neighbors. The defendant after one of the heavy storms of 1919 being short of hay and the roads being so blocked with snow that it was difficult to procure any, requested the plaintiff to take her horse into his stable, take care of it and feed it for a short time until it was practicable to bring hay to her own barn. It was understood that a fair compensation should be paid for keeping the horse. It is evident, however, that the plaintiff did not consent to taking the horse for gain, but for the accommodation of his neighbor under the exigency brought about by the big storm. The horse remained in the plaintiff's stable about eight days and on the very day that the defendant had made plans to take the horse to her own barn she kicked one of the plaintiff's horses and so injured him as to render him worthless.

The plaintiff's horse was hitched in a stall which was partitioned to the ceiling about half way back and then about four feet high to the back end of the stall. A rope was stretched across the rear of the plaintiff's horse to prevent him from backing out beyond the stall.

The adjoining stall in which the defendant's horse was placed was a double one, and no rope was stretched across her stall. There is no question but that the defendant's mare kicked the plaintiff's horse and spoiled him. The plaintiff alleges that the defendant's mare was vicious to other horses and particularly in the tendency to kicking especially with one foot and that this vicious habit was known to the defendant and not communicated to him by her and that he had no knowledge that the mare was vicious in the respect named.

The record shows that the defendant when sending the mare to the plaintiff's farm, and her son-in-law when taking the mare there, both studiously refrained from any caution as to her previous habits. The defendant, to charge the plaintiff with knowledge of that vicious habit of the mare, now relies on two casual remarks made to the defendant during the preceding year, one by her stepson, the other by her son-in-law; both remarks were so casual in their character as probably to be forgotten by the hearer as soon as uttered; or if recalled, are too indefinite to charge the plaintiff with knowledge that the mare "might sometimes under certain circumstances kick other horses," to quote the brief statement of special matters in defense.

There is no question of law involved in the case and the issue of fact raised is whether the plaintiff had such knowledge of the vicious kicking habit of the defendant's mare, as should charge him with the duty of so disposing of her, in his stable as to prevent opportunity of contact with his own horse and to be regarded as guilty of such contributory negligence, in failing so to do, as to make the injury by kicking attributable to his own fault.

That the kicking habit of this mare was known to the defendant, was amply proven and not denied. Assuming for the purpose of briefly discussing the effect of the evidence that the defendant's witnesses did communicate to the plaintiff the information which they claim to have given him; it was then not sufficiently definite and explicit to warn him of the particular habit to which this horse was addicted. One witness said when they were working on the roads that he told the plaintiff he better put his horse on the pole. As near as he could recollect the conversation, when asked the reason by the plaintiff he said:

"Because sometimes she kicks as I have heard. I have never seen her kick."

And the reply of the plaintiff was:

"I guess she will be all right. We will take the chances."

Now there are various kinds of kicking horses. Some will kick in a wagon and no where else; some will kick in a stable and no where else; some will kick at another horse and on no other occasion; so that the mere statement that a horse may kick under one set of circumstances may convey little or no information that he will kick under other circumstances. Consequently, the evidence of the witness that he better put his horse on the pole gave no particular evidence of information that that mare was accustomed to kick with one foot at another horse while in the stable. The defendant testified that this mare was kind in all respects except her disposition to kick, and that she herself had never seen her kick. On cross-examination she was asked these questions:

"Q. You heard Mr. Jeffer's testimony this morning?"

"A. Yes."

"Q. Why did you tell Jeffer to look out for the horse and not send any word to Edgerley to look out for the horse?"

"A. Because I thought everybody knew,—that is, that knew the horse; knew he kicked, I thought everybody knew that."

She further says that she did not tell Mr. Thompson with regard to the vicious habit of the horse.

She was finally asked:

"Q. You didn't feel the necessity of acquainting Mr. Edgerley yourself with the habit of this horse, even after he had befriended you by taking this horse to keep?"

"A. I didn't think it was necessary."

Upon this testimony of the defendant and her witnesses, we are of the opinion that the plaintiff did not receive such definite information with respect to the particular kicking habit of this horse as to reasonably charge him with knowledge that she would be dangerous to his horse, in view of the way they were placed together in the stalls. His horse could back but a very short distance beyond the end of the stall. If this horse had been an ordinary kicker she would probably have done no harm. The particular habit of kicking with one foot was what caused the mischief. It was the bounden duty of the defendant to explicitly inform the plaintiff of the particular habit of the horse; her excuse for not doing so is trivial.

When however, we go further and consider the plaintiff's evidence and the circumstances and probabilities in corroboration of it, we are of the opinion that, while there is apparent conflict of the testimony, there is but little doubt, if any, as to the real weight and truth of the evidence. It is easy for any person to assert or to deny but when such assertion or denial is contradicted by admitted facts that show them to be inherently incredible, the assertion or denial is mostly if not quite stripped of its value as evidence. The plaintiff absolutely denied that he had any information whatever, with respect to the vicious kicking habit of this mare. His statement is corroborated by the fact that he had in a stall a horse of the value of three hundred dollars and by the improbability that, without any precaution of safety whatever, he placed beside that horse a mare which he knew to be a kicker and liable at any moment to do injury to his own horse. Such conduct would be contrary to the self-interests of the plaintiff and inherently improbable. It cannot be assumed for a moment that he would have taken this mare for the accommodation of the defendant and placed her in such dangerous proximity to his own horse had he known or even suspected that she was a kicker. There is no reason why he should do it. It was not a business transaction. He was under no obligation to take the horse. He would have been fully justified in saying had he known that this horse was a kicker that he must decline to take her on that account; that he could not for the accommodation of a neighbor jeopardize his own interests. That is what any reasonable man of ordinary prudence would have said.

The evidence, probabilities and circumstances of the case, when viewed as a whole, are so overwhelmingly in support of the plaintiff's contention that we think a new trial should be granted. Motion sustained. New trial granted. *James H. Thorne,* for plaintiff. *L. L. Walton,* for defendant.

HARRY N. SMITH *vs.* DAVID B. JONES.

Penobscot County. Decided February 6, 1922. An action by the husband for alienation of his wife's affections. The declaration contains two counts, one alleging criminal conversation and the con-

sequent alienation of affections, the second alleging alienation by persuasion and craft and the separation of husband and wife. The jury in answer to specific questions found for the plaintiff under the first count and assessed damages in the sum of $1,416.66. It comes before this court on a motion for a new trial on the usual grounds. An examination of the evidence does not disclose that the verdict of the jury was manifestly wrong, nor can the damages awarded be said to be excessive in amount. Entry will be. Motion overruled. *Merrill & Merrill,* for plaintiff. *B. W. Blanchard,* for defendant.

CHARLES E. HADLEY *vs.* ELDEN T. GAREY.

Oxford County. Decided February 6, 1922. An action for damages caused by defendant's automobile colliding with a heifer belonging to the plaintiff. It is alleged that the defendant was negligent in the operation of his automobile. The jury heard the evidence and found for the defendant. The case is before this court on a motion for a new trial on the usual grounds. The issue was solely one of fact. An examination of the evidence does not satisfy us that the verdict of the jury is so manifestly wrong as to warrant interference by this court. Entry will be. Motion overruled. *Frederick R. Dyer,* for plaintiff. *Alton C. Wheeler,* for defendant.

HARMON, Executrix *vs.* MATHIS et als.

Cumberland County. Decided February 14, 1922. This is an action upon a promissory note for four thousand, one hundred and thirty dollars ($4,130) with interest at eight per cent. per annum, said principal sum and interest payable in amount and upon the dates therein mentioned, in other words upon a promissory note payable

in installments. The cause is reported to the Law Court upon the writ, pleadings, plaintiff's exhibit, which is the note in suit, and the auditor's report, the Law Court to render such judgment as is warranted by the pleadings and so much of the evidence as is legally admissible. It is well established that cases submitted on report are shorn of all technicalities and are to be determined upon their merits regardless of the pleadings. In other words a reported case is to be decided upon the evidence. The decision of the present case therefore, depends upon the consideration of the auditor's report. When such a report is offered in evidence it is regarded as prima facie evidence of the facts and conclusions therein contained.

It is then open to attack only to the extent of the correction of errors, if any, which it may contain, either of law or of fact. The evidence seems to have been fully considered by the auditor as shown by his report which is carefully and comprehensively drawn.

We are of the opinion that the prima facie effect of the report has not been overcome, and that judgment should be rendered for the plaintiff, in accordance with his report. Judgment for the plaintiff for four thousand, two hundred and fifty-five dollars and ninety-six cents, ($4,255.96) and interest from August 15th, 1918. *Sherman I. Gould,* for plaintiff. *Fred V. Matthews,* for defendant.

EDWARD BUCKLEY *vs.* WILLIAM L. MORSE.

GRACE ELIZA BUCKLEY, Pro Ami *vs.* WILLIAM L. MORSE.

Androscoggin County. Decided February 14, 1922. "These are two action tried together and involving the same facts. One by a father for loss of service of his daughter and for expense incurred as a result of her injury by the defendant. The other by a daughter pro ami for damages as a result of injury caused by the defendant. The claim of the plaintiffs was that the defendant's agent and servant so negligently operated the defendant's

motor truck that it struck the sled on which the plaintiff's daughter was sitting or by which she was standing and thus caused the injury. The occurrence took place January 8, 1920."

The verdict was rendered for the plaintiff in each case, and both cases are brought to the Law Court upon the usual motion. The controversy as the case comes to the Law Court is confined to a single issue. The defense is an alibi. The issue as stated by the defendant in his brief is as follows:

"The fixing of this time is important, because it will be brought to mind that the defendant denies that his truck was there at that locality at that time and was not the truck, if any, injured the girl, and we do not believe that she received her injury in any such way as is alleged in the writ."

The question is not whether the truck was, as a matter of absolute fact, at the locality, but does the evidence preponderate in favor of the plaintiff's contention in proof of that fact. That was a question of fact not for the court but for the jury.

We are of the opinion from an examination of the evidence that the jury did have substantial evidence upon which to found their verdict if they believed it; and the question of credibility was also one addressed to them and not to this court. Whatever we might have found, were we sitting as triers of fact, we have no legal right under the law and constitution of this State to substitute our judgment for that of the jury when they have acted within the scope and meaning of the law. Nor do we feel authorized to disturb either verdict on account of the amount. Motion overruled in each case. *George C. Wing and George C. Wing, Jr.*, for plaintiffs. *Frank A. Morey*, for defendant.

CHARLOTTE C. DRUMMOND et als. *vs.* CARRIE A. WITHEE.

Penobscot County. Decided March 1, 1922. This is a real action to recover possession of a lot of land on the southeasterly side of Holland Street in Bangor, measuring 200 feet on the street,

and 115.5 feet deep; the lot is unfenced except on its southeasterly side adjoining land of one Davis; it lies along said street southwesterly of the homestead of defendant's father and mother, and is not separated therefrom by any fence or other monument. The record title is conceded to be in the plaintiffs. The defendant holds a warrantee deed of the premises from her father and mother dated June 16, 1904, duly recorded on July 19, 1904, and claims title thereto under open, peaceable, notorious, adverse and exclusive possession thereof by her father for many years prior to June 16, 1904 and by herself since that date, originating in a contract of some kind for the purchase of the land from one Edward P. Baldwin, who died May 7, 1885.

The defendant has a verdict, which the plaintiffs ask us to set aside upon general motion. The charge of the presiding Justice is not printed, and no exceptions thereto are presented. We must therefore assume that adequate instructions as to the character and duration of the possession necessary to ripen into title were given to the jury.

We have carefully examined the record and are of the opinion that the testimony, if believed, clearly discloses acts of possession of the requisite character, continued for the requisite time, to support the verdict. The learned counsel for plaintiffs contends, (1) that the evidence is consistent with permissive use; but the testimony does not disclose that the possession was permissive, but rather tends to show that possession began under some contract of purchase made by Simeon W. Withee, father of defendant, with Edward P. Baldwin, the details of which the witnesses do not know; (2) that the possession was interrupted, and ownership was disclaimed by Simeon W. Withee at the time of his insolvency in March, 1882; but the jury would have been justified in finding that the possession was thereafter resumed during Mr. Baldwin's lifetime and that the disseizin continued uninterruptedly thereafter for the requisite period.

These were questions of fact for the jury and presumably were included with all other questions of fact in arriving at their verdict. Upon a careful examination of the record we cannot say that the verdict is clearly wrong. Motion overruled. *Howard M. Cook*, for plaintiffs. *Clinton C. Stevens*, for defendant.

JOSEPH MERCIER *vs.* CHARLES SMITH et al.

Oxford County. Decided March 6, 1922. The plaintiff recovered a verdict of $3,000 for alleged assault by the defendants, husband and wife, by shooting him with a rifle, the bullet penetrating his side. The evidence was contradictory, much of the defendants' self contradictory, and upon a careful examination the court is not of opinion that the jury manifestly erred in accepting the plaintiff's version.

The damages are large but not so extravagant as to require reduction by the court, when the serious nature of the assault and the proper awarding of punitive damages are considered. Motion overruled. *Albert Beliveau and Frederick R. Dyer,* for plaintiff. *George A. Hutchins, Matthew McCarthy, Benjamin L. Berman and Jacob H. Berman,* for defendants.

JARVIS L. PARKS *vs.* GEORGE W. PARKS.

Aroostook County. Decided March 16, 1922. This is an appeal from a decree in equity. The plaintiff, Jarvis L. Parks, is the owner of a lot of land in Fort Fairfield Village, bounded on the southerly side by a double track of the Canadian Pacific Railway Company, on the northerly side by the Aroostook River, on the westerly side by land of the defendant, George W. Parks.

The defendant is the owner of a lot extending from Main Street in Fort Fairfield Village northerly to the Aroostook River. The plaintiff's lot forms the easterly boundary of that portion of defendant's lot which lies north of the Canadian Pacific Railway track. Plaintiff's lot originally formed part of a larger lot extending, like defendant's lot, from Main Street to the Aroostook River.

In 1883, the predecessors in title of both plaintiff and defendant entered into an agreement whereby each granted a strip of land

from their adjoining lots, plaintiff's predecessor granting six feet, and defendant's predecessor eight feet, extending from the Main Street to the Canadian Pacific Railroad right of way. The agreement provided, that "said space to be by both and their heirs and assigns, forever kept free for mutual use and convenience as a passage way."

The plaintiff claims a legal right to use the passageway, and to have the same unobstructed, by virtue of a deed from Jewell B. Williams, dated April 3, 1912, in which said Williams conveyed his interest "in a right of way from Main Street to the Aroostook River," &c. The defendant denies that the plaintiff has a legal right of way over the above-described passageway from the Main Street to the railroad, because, as he alleges, the deed to Mr. Williams, plaintiff's grantor, "did not convey in express terms any interest in the right of way to Williams." The defendant denied as well all the allegations of the bill as to obstructing the way, and consequent damage.

The sitting Justice, after hearing the evidence, filed the following decree, viz.: "This cause was heard upon bill, answer and replication and proof. A question is raised as to the rights of the plaintiff in the passage way which have never been established. The interferences with such rights complained of are not continuous, nor the injuries resulting therefrom irreparable in their nature. We think the plaintiff should first establish his rights in an action at law which may remove all further complaints; if not this court sitting in equity will then protect him in the enjoyment of them. Bill dismissed with costs."

Upon a careful reading of the case, we are of opinion that the decree of the sitting Justice is fully supported by the evidence. The decree points out the proper course if the plaintiff desires to insist on his claim. *Boynton* v. *Hall*, 100 Maine, 131; *Sterling* v. *Littlefield*, 97 Maine, 479; *Varney* v. *Pope*, 60 Maine, 192; Bispham's Principles of Equity, 8th Ed., Par. 440. Appeal dismissed with costs. Decree affirmed. *O. L. Keyes*, for plaintiff. *Powers & Guild*, for defendant.

GRANVILLE F. FISH, alias GRANVILLE FISH, Pro Ami,

vs.

WALTER E. FRYE.

Androscoggin County. Decided March 16, 1922. This is an action for malicious prosecution, tried in the Superior Court for the County of Androscoggin. The jury returned a verdict for the plaintiff in the sum of eighty-seven dollars and fifty cents. The case is before the court on the defendant's general motion.

After a very careful examination of the evidence, we are unable to conclude that the verdict is manifestly wrong. The entry will be. Motion overruled. *Tascus Atwood,* for plaintiff. *Pulsifer & Ludden,* for defendant.

BERTHA G. KIMBALL

vs.

JAMES C. DAVIS, Director General of Railroads.

Cumberland County. Decided March 20, 1922. While approaching the Union Station in the city of Portland for the purpose of purchasing railway tickets to be used by another person on a later train, the plaintiff slipped on an icy walk which was the regular approach to the station. This walk was on land of the railway company and was constructed and maintained by the company. There had been a heavy fall of snow and the ice was partially concealed thereby. The charge of negligence against the company on which the plaintiff relied was failure to keep the walk in a reasonably-safe condition for those who were impliedly invited to use the same when approaching the station on business legitimately connected with that of railroad transportation. The defendant offered no testimony but contends that the plaintiff did not main-

tain the burden of proof necessary to show defendant's negligence, and further contends that the testimony offered by the plaintiff proved her guilty of contributory negligence.

Upon both questions of fact, namely the negligence of the defendant and the lack of contributory negligence on the part of the plaintiff, the jury found for the plaintiff. After a careful examination of the record, we do not find justification in setting aside the jury verdict. Neither do we feel that the damages were excessive. The injury was severe and the probability of permanence considerable. Motion overruled. *John T. Fagan, Benjamin L. Berman and Jacob H. Berman,* for plaintiff. *Charles B. Carter, of White, Carter & Skelton,* for defendant.

ALBERT M. WENTWORTH *vs.* WILLIAM L. GERRISH.

York County. Decided March 22, 1922. The declaration in this cause contains two counts alleging criminal conversation with plaintiff's wife and a third count charging defendant with alienation of the affections of plaintiff's wife. The jury found a verdict for the plaintiff and assessed damages in the sum of $7,888.33.

The case is before us on general motion for new trial, with especial attack upon the amount of the verdict.

We have examined the record carefully. That a verdict for the plaintiff is the only verdict which could be found under all the testimony is our firm conviction. But the question of damages is as much within the realm of the jury's deciding right as the question of liability. The entire charge of the presiding Justice is made part of the report, and examination of that charge shows the law relating to both compensatory and exemplary damages to have been given with unusual clarity and completeness. No exceptions thereto were taken.

As bearing upon the question of wealth of the respondent and its effect upon the amount of exemplary damages, there is no satisfactory evidence. The defendant testified as to his business and that he had, roughly speaking, an equity in perhaps a dozen houses.

How great that equity might be does not appear. In *Audibert* v. *Michaud*, 119 Maine, 295, a case of criminal conversation and alienation of affections, where a verdict for $7,000.00 was rendered, this court sustained the verdict, saying: "It was for them (the jury) to say how much the plaintiff should recover for a stolen wife and a broken home." It is urged by the defendant that the plaintiff's own conduct was largely if not wholly the cause of the loss of his wife's affections, but all these questions of fact were passed upon and decided by the jury who saw the witnesses and heard them testify. We do not feel that we should disturb their finding either upon the question of liability or amount of damages. Motion overruled. *Franklin R. Chesley and Emery, Waterhouse & Paquin,* for plaintiff. *John P. Deering and Willard & Ford,* for defendant.

CARRIE A. BLACK *vs.* ERNEST E. BLACK.

Knox County. Decided March 29, 1922. An action to recover for money had and received. The parties were formerly man and wife. Differences arose and the plaintiff contends that terms of separation were agreed upon; and that in consideration of her signing a deed and releasing her interest in the real estate, it was agreed that she should receive two thirds of the net proceeds of the sale of all their property including the real estate and their household goods, and in case she applied for a divorce she would not seek alimony or ask for counsel fees.

The defendant contended that no agreement was ever reached as to a division of the proceeds of the sale of the property; that she signed the deed of the real estate for another consideration entirely, and whatever talk was made relative to division of the property was upon the condition that she should apply for a divorce, and if any agreement was arrived at it was without consideration and not binding. The divorce was obtained on libel of the defendant, though it appears one was also filed by the plaintiff.

The evidence was somewhat conflicting as to the amount of the net proceeds of the sale of the property,—the defendant claiming

it did not exceed twenty-five hundred dollars, and the plaintiff contended it was in excess of three thousand dollars.

The questions in dispute were solely of fact and for the jury. The issues were clearly presented by the presiding Justice. The jury evidently found that the preponderance of the evidence supported the plaintiff's contention as to an agreement being arrived at, but found the amount received was as contended by the defendant. While the evidence was conflicting and discloses a regrettable lack of appreciation on both sides of their marital responsibilities, and the jury's verdict was arrived at only after additional instructions by the court upon the importance of their agreeing, we cannot say upon the record before us that it is manifestly wrong. Motion overruled. *R. I. Thompson and O. H. Emery,* for plaintiff. *E. K Gould,* for defendant.

CATHERINE F. CONNORS

vs.

ANDROSCOGGIN AND KENNEBEC RAILROAD COMPANY.

Androscoggin County. Decided June 8, 1922. Action to recover damages for injuries sustained by the plaintiff on November 8, 1920, while walking southerly on the easterly sidewalk of Lisbon Street in Lewiston on her way to work at the Lewiston Bleachery. At this point the defendant was constructing three spur tracks leading from a yard or field across this easterly sidewalk to connect with the main line. The excavation on the sidewalk for these spur tracks was about twenty-five feet long, eight feet wide and twelve to eighteen inches deep. The work had been going on for several days. The removed earth was piled along the easterly line of the walk. At night during the progress of the work the entire excavation was covered by a plank or board platform which was placed there by the laborers at the end of the day's work and was removed in the morning before the next day's work began. At noon, while the force were at dinner, the excavation was left unguarded and unprotected.

The accident happened at 12:50 P. M. on the last day of the construction work. The ties and rails had been put in place and some tamping beneath the ties had been done at the northerly and southerly sides. The plaintiff claims that a plank about ten feet long had been laid across the rails in the central portion; that when she came to the excavation she crossed on this plank as she had seen others ahead of her do, but that it was warped at the southerly end and as she came to that end the plank wobbled and threw her off, causing the injuries.

The defendant claims that there was no plank across the spur tracks, and that the plaintiff was injured in crossing by stubbing her toe causing her to fall and strike her knee against one of the rails.

The sharp issue around which the testimony crystallized was the existence or nonexistence of the plank which, if there, constituted as it was claimed an invitation to pedestrians to use it in crossing, rather than to take the street around the excavation, a situation clearly distinguishable from that in *McLane* v. *Caribou National Bank*, 100 Maine, 437. The evidence was irreconcilable. The plaintiff and two apparently disinterested witnesses all testified positively that they crossed on it that noon. Three of the defendant's employes out of twelve who were engaged in this construction, and a young man who crossed just ahead of the plaintiff, testified as positively that no plank was there, and in addition the assistant general manager stated that soon after the accident the plaintiff claimed to him that she fell between the rails and made no mention of a plank.

It was, therefore, a controverted question of fact for the jury to settle, and the question of credibility played an important part. While the correctness of the verdict seems to the court to be by no means free from doubt, we do not think it is so manifestly and palpably wrong as to require reversal. No questions of law are raised and on the single issue of fact found by the jury in the plaintiff's favor we do not feel bound to interfere. The verdict of $1,007.75 was not excessive. Motion overruled. *McGillicuddy & Morey*, for plaintiff. *William H. Newell*, for defendant.

CHARLES KITCHEN *vs.* HAINSWORTH BALDWIN.

York County. Decided July 3, 1922. This is a suit to recover damages for a collision on the public highway between a bicycle upon which the plaintiff was riding and an automobile driven by the defendant. The plaintiff obtained a verdict of $492.00. Defendant seeks to have that verdict set aside by a motion for a new trial on the customary grounds. No exceptions are present upon questions of law. The case was tried before a jury. In addition to the spoken word of witnesses, the jury was assisted further by the presence of a chart upon which was delineated the locus of the accident. The principal street and the intersecting streets were there delineated. That chart was not before this court. As usual in such cases each side claimed negligence upon the part of the other and due care upon the part of themselves. The jury saw the witnesses, noted their appearance, heard their verbal testimony, and were fully competent to pass upon issues of fact. We have examined the record carefully and fail to see any evidence of bias, prejudice, misunderstanding, or lack of judgment on the part of the jury. Plainly the questions involved were for the determination of a jury and the losing party has failed to satisfy us that his motion should prevail. Motion overruled. *John V. Tucker*, for plaintiff. *George A. Goodwin*, for defendant.

WALTER R. DYER *vs.* HERMENEGILDE TARDIF.

Penobscot County. Decided July 6, 1922. Action to recover damages for personal injuries received in a collision between the plaintiff's motorcycle and defendant's automobile. The plaintiff claims that as he was ascending, and near the summit of, a hill on the road from Augusta to Waterville, the defendant in his car came over the summit of the hill so close to the right hand side of the road where plaintiff was riding, that the automobile struck

the motorcycle on the left side, breaking the engine, and crushing the plaintiff's left leg so that amputation above the knee was necessary. The case is before us upon defendant's motion to set aside a verdict for plaintiff.

The plaintiff was the only witness called in his behalf as to the circumstances of the collision. If his version is substantially correct, the verdict was unquestionably justified.

The defendant's witnesses to the accident are himself, his son, and his son's wife who were occupants of his car. A car followed the defendant's car up the hill, but its occupants did not see the collision. The driver testifies that when he first saw Dyer, the latter was on his right hand side of the road "coming up right over the brow of the hill," and that the Tardif car had gone out of his sight down over the hill; that Dyer fell from his motorcycle when they were "opposite practically."

The defendant who was seated on the left hand side driving his car, testifies that he was driving on his right hand side of the road, that Dyer was about one hundred and fifty feet away when the witness came to the top of the hill, and was coming on Tardif's side of the road.

"Q. What did he do if anything about turning out before he got to you, what did Mr. Dyer do, if anything, about turning out before he got to you?

"A. I thought from what I saw that he was trying to go to his right side of the road, but he seems to have struck the edge of the road and that bounced him back in front of me, on me, on me.

"Q. Yes. What part of your machine did his motorcycle hit? A. The rear mud guard."

He points out a dent on the *rear left* mud guard as the place where Dyer struck his car.

Albert Tardif, the defendant's son, who was sitting immediately behind his father, testifies that when their machine was on the top of the hill, he first saw Dyer one hundred or one hundred twenty-five feet away coming on his father's right hand.

"Q. How did Mr. Dyer strike your father's car?

"A. Well, what I can see, when I see him he was coming on my father's right side and when he saw . . . . had his head about this way, a little low, when I see him, and when he lift up his head

he try to take his own side, and then he start to go in the ditch there and he bring his wheel back, not take the ditch, and he hit the mud guard on the back side."

He says that Dyer ran seventy-five feet before he fell and his father ran another seventy-five feet. On cross examination he testified:

"Q. So you didn't see the motorcycle strike the car?

"A. I saw him going, see when he came around the machine there, I saw him going, coming pretty close to the car, but I didn't see him hitting the car.

"Q. You heard some noise?

"A. I heard some noise, I thought it was a rock first, and then after I had seen he was coming so close to my father's machine, I looked behind, that is why I told my father to stop, see.

"Q. Now, Mr. Tardif, after you looked behind, just what did you see as you looked behind after you saw he apparently struck the car?

"A. I saw Mr. Dyer going on his motorcycle and his wheel turning around.

"Q. Which way, Mr. Tardif? A. On Mr. Dyer's right, and he fell down with his motorcycle.

"Q. Fell down where? A. Well, it seems to me to be a little beside of the road.

"Q. On his right? A. On his right."

Mrs. Albert Tardif was sitting on the front seat at the right of her father-in-law, with a ten-months old baby in her arms. She testifies that Dyer hit her father-in-law's automobile "in back," and that she did not see him after he struck it.

The issue was to be decided by the weight which the jury should give to the testimony of the witnesses, which was flatly contradictory. It was a question of credibility, and the jury might well regard the version of the collision given by the defendant and his witnesses as entirely inadequate to account for the condition of the motorcycle after the collision, and the very serious injuries which plaintiff received.

We perceive no reason for interfering with their conclusion. Motion overruled. *G. R. Grau and D. F. Snow,* for plaintiff. *F. A. Morey,* for defendant.

FRED T. PARKER *vs.* CHARLES F. DRAKE.

Waldo County. Decided July 6, 1922. This is an action to recover the price of certain pulp wood which the plaintiff alleges that he sold and delivered to defendant. The defendant denies that he made any contract to purchase the wood, and claims that at plaintiff's request he shipped the wood, with his own wood, to Oxford Paper Company subject to inspection and scale by that company; that the entire carload was rejected as not conforming to specifications, and that he received nothing for the same.

The issue was solely between the parties; no other witness testified as to the contract between them. The decision involves only a question of fact, determined largely by the weight which the jury gave to the testimony of the plaintiff and defendant. The evidence was squarely conflicting, and we perceive no reason which would justify us in interfering with the conclusion of the jury. Motion overruled. *Arthur Ritchie*, for plaintiff. *Buzzell & Thornton*, for defendant.

VERNA HUSTON *vs.* LELAND LIBBY.

Androscoggin County. Decided July 18, 1922. This is a complaint under the so-called bastardy act. That the complaint, accusation at time of travail, constancy of accusation, declaration before trial, and all other statutory requirements had been complied with are not questioned. Upon the issue of fact as to whether the respondent is the father of complainant's illegitimate child the jury found him guilty. That verdict he asks this court to set aside on account of manifest error in the finding.

He admits frequent acts of sexual intercourse with the complainant but denies paternity of the child. He relies largely upon medical testimony as to time of conception and length of the period of pregnancy, as understood by the medical profession, also as to the power of the respondent to indulge in sexual intercourse while suffering from venereal disease. He also relies upon letters written by the complainant to another man, which, he says, tends to

show that such other man was the father of the child. Other testimony was produced in defense to all which the jury listened with the witnesses in view.

On the other hand the complainant says that she first went alone to the respondent and informed him of her condition, that he was in bed on account of sickness, and that he said "he wanted to wait until he got up out of bed;" that later she went to him with her father and mother. At this interview there were present the father and mother of the complainant, the father and mother of the respondent, as well as the complainant and the respondent. From the testimony of complainant's mother at this latter interview he was asked if he was willing to marry Verna or make things right with her so there would not be any disgrace hereafter and that he did not then deny responsibility for Verna's condition but cried and said he "didn't want to get married now; the boys would all make fun of him." Mrs. Huston also testified that, in the presence of his son, Mr. Libby, father of the respondent, said "Now keep still and don't say nothing to nobody about this and just as soon as Leland gets able so he can get around we will go and get his papers made out and you can get Verna's papers made out. Just as soon as we can do it. Wait until he gets well and then we will go and get his papers made out and you can get Verna's papers made out so that they can get married." The complainant's father corroborated his wife and says that the respondent, after convalescence, went away or, to use his own language "First thing I knew he had skipped."

Other evidence appeared in the record which, with that already referred to and believed by the jury, would serve as a proper foundation for the verdict. We are not convinced that there was manifest error in the finding. Motion overruled. *Frank A. Morey,* for plaintiff. *George C. Webber,* for defendant.

CLARIDA CHABOT *vs.* HORACE A. PIERCE.

York County. Decided July 20, 1922. The plaintiff, a passenger in her husband's automobile, was injured when the defendant's automobile ran into the car in which the plaintiff was riding. The

jury rendered a verdict in favor of the plaintiff. The only point raised by the defendant before the Law Court is contributory negligence. The negligence of the defendant and the amount of damages are not contested. The evidence fails to disclose any conduct on the part of the plaintiff inconsistent with that of a reasonably-prudent woman under like circumstances. The jury so found and their verdict instead of being manifestly wrong was manifestly right. Motion overruled. *Lucius B. Sweet,* for plaintiff. *Henry Cleaves Sullivan,* for defendant.

FLORA V. M. BERRY, Complainant, *vs.* JOHN WALSH.

Cumberland County. Decided July 20, 1922. This is a complaint in bastardy. When all the proper preliminary steps were complied with, necessary to the presentation of the case to the jury, the only defense was the admitted fact that within a few days after the alleged and admitted intercourse with the respondent the complainant had intercourse with another party.

The statute requires as a condition precedent to the maintenance of the complaint that the complainant, in travail, shall accuse the defendant of being the father of her child, and that she has been constant in such accusation.

These things the complainant did, and upon this evidence and the admitted action on the part of the respondent the jury found a verdict in her favor, and the court cannot say that it is clearly wrong. Motion overruled. *Raymond S. Oakes,* for complainant. *Sullivan & Sullivan,* for respondent.

EUGENE A. MERRILL *vs.* DELBERT M. BENNER.

Kennebec County. Decided September 26, 1922. This is an action of deceit to recover damages for alleged misrepresentations in the sale of farm property. The jury found a verdict for the

plaintiff for the sum of $4,450; the case is before us upon a general motion. The defendant strenuously insists that the verdict is manifestly wrong on the issue of liability, and that, even if the court is not convinced that a new trial should be granted for that reason, the damages awarded are clearly excessive.

We have given the record our careful consideration. The declaration contains allegations charging actionable misrepresentations as to the farm, which we have classified under five heads; (1) as to the orchard on the "Sand Knoll place" and the production of apples thereon; (2) as to the shingling of the buildings; (3) as to the location of a spring claimed by defendant to be on the "Sand Knoll place;" (4) as to the amount of wood on the Blaisdell lot and the quality of the orchard thereon; (5) representations as to the timber lot of 32 acres excepting those excluded as not actionable; the declaration contains two other charges of misrepresentations as to the farm, one of which was abandoned by plaintiff's counsel as inserted by error, the other relating to value of standing timber on the 32-acre lot, excluded by the presiding Justice from consideration by the jury as not actionable. Another charge of actionable misrepresentation relates to certain sawed and unsawed lumber, sold by defendant to plaintiff in a transaction independent of the sale of the farm; the latter charge appears to have been lost to sight in the trial, and we have been unable to discover any evidence affording basis for an award of damages, even if the charge is sustained. Our consideration of the case is therefore confined to the first five classes of representations relating to the farm.

That the representations alleged related to material facts directly affecting the value of the property, is not questioned. Whether such representations were in fact made by the defendant, were false, and were relied upon by the plaintiff as material influences inducing him to purchase the property are questions of fact for the jury. The weight to be given to the testimony was an important, practically controlling, element in the decision of the case. Without extending here an analysis of the evidence, it is sufficient to say that the record contains ample evidence, if believed by the jury, to sustain their verdict on the question of liability for all five classes of representations. We perceive no ground upon which we are justified in reversing their conclusion.

As to the damages. A majority of the court deem the award of damages excessive and are of the opinion that a verdict of three thousand dollars is ample. Motion overruled if plaintiff within twenty days after mandate is filed remits all of the verdict in excess of $3,000; otherwise motion sustained. *Pattangall & Locke*, for plaintiff. *McGillicuddy & Morey*, for defendant.

ARSENE LEBLANC *vs.* LOUIS G. LEVASSEUR.

Androscoggin County. Decided October 4, 1922. An allegation in a declaration in a writ, in effect that the defendant agreed with the plaintiff, at the time of the making of a sale of an automobile, that if it did not measure up to the terms of an accompanying warranty against defects in construction, the vendor "would take the machine back and pay him back his money," sufficiently lays a promise of a repayment by the defendant, the count in all other respects being good. A demurrer to the declaration was adjudged bad, and rightly. Being devoid of merit, an exception to the overruling of the demurrer is itself overruled.

This action was begun "to recover the money back," the contract of sale having been rescinded for a breach of the warranty mentioned. Defendant's liability, as found by the jury, is abundantly supported by proof. Damages were awarded in the sum of $1,740.00. The award is excessive in amount. The price of the automobile apparently was $3,270.00, though the declaration fixes it at $3,240.00. Adopting the latter figure, that price was made up by the plaintiff thusly:

By exchanging with the vendor a truck, at the agreed value of	$1,940.00	
an allowance for tires, stated by plaintiff to have amounted to $75.00 but consistently	60.00	
plaintiff's promissory note to defendant	1,000.00	
Cash	240.00	
		$3,240.00

Plaintiff, before this action was commenced, had paid $500.00 on the note. The immediate question is, not whether the plaintiff will pay the rest of the note which, presumably, the original payee still holds, nor yet in whom the title to the truck, and as well that of the tires, may be, but as to how much money the plaintiff is to be regarded as having paid toward the purchase price of the automobile, and, therefore, to be entitled to recover. He has so paid $740.00. That is the measure of the proper amount of a verdict in this case, save that the plaintiff is entitled to interest on the amount, calculated from February 14, 1921, the day of the rescission, to May 2, 1922, the day of the date of the verdict.

If, within thirty days after the filing of this rescript, the plaintiff will file a remittitur of so much of the verdict as is herein indicated to be excessive, the motion for a new trial will be overruled; otherwise it must be sustained. Exceptions overruled. Motion overruled, if remittitur filed; otherwise, motion granted. *Frank A. Morey,* for plaintiff. *Benjamin L. Berman and Jacob H. Berman,* for defendant.

LOREN N. LIBBY et al. *vs.* FRED S. SHERBURNE.

York County. Decided October 6, 1922. Bill in equity to redeem a mortgage given to the defendant by the plaintiff's decedent, Adah A. Harmon. There is no dispute as to the right of the plaintiff to redeem, but only as to the amount due. The conditions are unusual in that the defendant refused to accept the plaintiff's tender because, as the defendant contends, the amount of it was greater than the sum due on the mortgage.

The real controversy relates only incidentally to the mortgage. Before the mortgage was given the defendant had received from Mrs. Harmon a conveyance of the standing timber on the land suitable for sawing, together with the right to cut and remove it within eight years. After the period had expired to wit, Aug. 30, 1915, the mortgage having in the meantime been given, the defend-

ant's right to cut and remove timber was in writing extended "from year to year for the sum of $25 per year so long as said Sherburne may want it to remain on said land."

The defendant made no yearly payments as provided by the extension agreement unless he made such payments, Mrs. Harmon consenting, by crediting twenty-five dollars per year upon her mortgage. Mr. Sherburne says that he gave Mrs. Harmon such credit and that this was done by her agreement.

It seems to be assumed by both parties that if payment was not made as above the defendant's right to cut the timber has lapsed. This was the issue of fact. Upon this issue the Justice who heard the parties and their witnesses found in favor of the plaintiff. He found "that there was no agreement between the said Adah A. Harmon and the defendant to apply yearly payments mentioned in said agreement, upon the mortgage declared upon in the plaintiff's bill; that no such application was ever made of any yearly payments by the defendant upon said mortgage." The findings of a single justice on issues of fact in an equity case have the force of a jury's verdict. The appellant "must show the decree appealed from to be clearly wrong Otherwise it will be affirmed." *Hahnel* v. *Gardiner*, 119 Maine, 308 and cases cited. A careful reading of the evidence fails to show that the decree in this case is clearly wrong. Appeal dismissed. Decree below affirmed. *Willard & Ford,* for plaintiffs. *Mathews & Stevens and Lucius B. Sweet,* for defendant.

STATE OF MAINE *vs.* JACK ENNIS.

York County. Decided October 9, 1922. The respondent was tried upon the charge of selling intoxicating liquor and a jury verdict of guilty was returned against him. At the conclusion of the charge to the jury the respondent presented three requested instructions as follows:

First: That the respondent was acting as the agent of the officer in procuring the liquor in question and is not guilty as charged as a matter of law.

Second: That if the jury find as a matter of fact that the officer gave the respondent the money to purchase the liquor, and that the respondent afterwards purchased the same with that money, as a matter of law the respondent was acting as the agent of the officer or detective and is not guilty as charged.

Third: The proving that the respondent was using this agency as a "cover" is on the State.

The transcript of the testimony was made a part of the bill of exceptions. The charge of the presiding Justice is not brought before us and, as no exceptions thereto are noted, we must assume that it contained a full and correct statement of the principles of law governing the case, including full and correct instructions regarding the law of agency in matters like the case at bar.

With reference to the first requested instruction the presiding Justice said, "I cannot give you that instruction as a matter of law. It is a question of fact, as I have already stated to you, whether he was acting as the agent of the officer, in good faith, or whether the supposed agency is a mere cover." The refusal to give the requested instruction, and the reason for the refusal, are correct and in complete harmony with the legal principles governing the trial of criminal causes, whereby the determination of issues of fact is left to a jury.

With reference to the second requested instruction the presiding Justice said, "I cannot give you that as a matter of law. It is a question of fact. The mere giving of the money, and mere payment for the liquor in advance is not decisive of the question of agency."

Here also the refusal to give the requested instruction, and the reason for the refusal, are correct, especially so when issues of fact are to be decided by consideration of all the evidence in the case and not alone by a single piece of evidence which may or may not be supported by other evidence.

With reference to the third requested instruction the presiding Justice said, "I give you that. I have given you that as a part of the general instruction that the burden is upon the State to satisfy you of its contention that there was a sale of liquor."

No error appearing in the rulings, and refusals to rule, the mandate must be exceptions overruled. Judgment for the State. *Edward S. Titcomb, County Attorney,* for State. *Stewart & Putnam,* for respondent.

CHARLES W. HANSON

vs.

WATERVILLE, OAKLAND AND FAIRFIELD STREET RAILWAY.

Kennebec County. Decided October 10, 1922. The only issues involved at the trial of this case were of facts and were submitted to the jury, we must assume, under proper instructions.

The jury heard all the witnesses and found a verdict for the defendant company. It must have rejected the plaintiff's testimony, and that of his last attending physician, as to the cause of his present condition and of the trouble from which he suffered in the fall following his injury in March, 1920; and must further have found that the injuries he suffered by reason of the alleged negligence of the defendant were superficial and left no permanent effect, and also that such damages as he suffered thereby were either fully compensated for by the full time pay he received while incapacitated and the payment of his medical expenses, and that if there were any additional and measurable damages they were waived by him, since no claim against the company or complaint was made by him during his later employment or when he left the defendant's employ four months after the injury.

After a careful examination of the evidence we cannot say the verdict of the jury was so manifestly wrong as to require interference by this court. Motion overruled. *Percy A. Smith,* for plaintiff. *Perkins & Weeks,* for defendant.

MORRIS SHERIFF *vs.* GEORGE D. MURRAY.

Cumberland County. Decided October 10, 1922. An action to recover one half of the amount of the commissions received or due the defendant by reason of the sale of a certain parcel of real estate. Both parties are real estate brokers. The plaintiff claimed that the defendant promised to pay him one half the commission resulting from the sale of the property if he would assist in interesting his brother in the pruchase of it. The brother of the plaintiff purchased or traded for the property, but the defendant denied there was any agreement to pay the plaintiff one half the commission or that the plaintiff materially aided in the consummation of the negotiations.

The issue was solely one of fact, and depended upon the veracity of the witnesses. The jury heard and saw them and found for the defendant. It would clearly be usurping the province of the jury for this court to set aside their verdict in this case, arrived at without bias or prejudice so far as the evidence shows. Motion overruled. *Harry S. Judelshon and Edward J. Harrigan,* for plaintiff. *Frederic J. Laughlin and Albert E. Anderson,* for defendant.

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ACTIONS AGAINST ADMINISTRATOR.

A plaintiff in an action brought against an administrator of an estate on a claim not preferred, having filed the claim supported by affidavit in the Probate Court prior to bringing action, and the estate is subsequently decreed insolvent, and the claim is not presented to the commissioners, can either discontinue without costs, or continue, try, and have judgment rendered with the effect, and satisfied in the same manner provided in the case of an appeal.
Kennison v. *Dresser, Adm'r.*, 77.

ADVERSE POSSESSION.

Acts of dominion relied upon in creating title by adverse possession are questions of law. Whether such acts were really done, and the circumstances under which they were done, raise questions of fact. Mental intent alone not sufficient to create a possession which would ripen into adverse possession, but must be based on the existence of physical facts which openly evince a purpose to hold dominion over the land in hostility to the title to the real owner, and such as will give notice of such hostile intent. Occasional trespasses in cutting wood or timber not sufficient, nor attempts to keep off trespasses. *Webber* v. *Barker Lumber Co.*, 259.

AGENT.

In absence of agreement, power of an agent is restricted to acts beneficial to the principal. When parties deal with an agent in a matter effecting his principal, and know that the interests of the agent in the matter are adverse to those of his principal, they are charged with the duty of ascertaining that the acts of the agent are authorized by the principal, and they will not be heard to say that they were ignorant of the agent's want of authority.

Under such circumstances the duty is imposed upon them to make inquiry as a matter of law, and as a matter of law they are chargeable with knowledge which could have been obtained by inquiry.

Inquiry of the agent alone is not sufficient to justify failure to make further inquiry. The declarations of an agent, although accompanying his acts, constitute no evidence of the extent of his authority.
American Realty Co. v. *Amey*, 545.

To recover of A for services rendered at the request of B, it must appear that B was the duly authorized agent of A, or that the services enured to the benefit of A. *Puffer* v. *Soule & Son Co.*, 168.

As a usual rule, in industrial accident cases, foremen are included in the category of those whose knowledge is regarded as that of the principal. The foreman of a camp in the lumber woods was the employer's agent. As such agent he had, seasonably, a knowledge of the employee's injury.
Joseph Lachance's Case, 506.

Limitations upon the general and apparent scope of the authority of an agent who has been accredited to third persons, do not affect such third persons, unless they have knowledge thereof, as they have a right to presume that his agency is general and not limited. *Mitchell* v. *Canadian Realty Co.*, 512.

ANTE-NUPTIAL AGREEMENTS.

Ante-nuptial agreements will not be enforced in equity if the husband is guilty of constructive fraud by not imparting to his prospective wife a full knowledge and understanding of all the facts materially affecting her interests, unless the wife with full knowledge of all the conditions and circumstances subsequently acquiesced in the agreement and waived her rights, or is estopped from setting up constructive fraud as a defense. *Denison* v. *Dawes*, 402.

APPEAL.

In an appeal to the Law Court from a decree confirming the decision of the Industrial Accident Commission, the record should contain a sufficient amount of the evidence to make it possible to obtain therefrom the facts necessary to a proper decision of the issue involved. *Thomas Gagnon's Case*, 20.

After the expiration of the time within which an appeal may be taken from a final decree of the Chairman of the Industrial Accident Commission, under the Workmen's Compensation Act, a rehearing cannot be had on the merits of the case on the ground of newly-discovered evidence. An appeal upon questions of law may be had to a single Justice, and thence to the Law Court, and a review may be had within two years after decree on the ground that the incapacity of employee has subsequently increased, diminished or ended.
Conners' Case, 37.

ARSON.

The definition of "dwelling-house" as given by R. S., Chapter 121, governs in an indictment for arson and under such definition, a building which is connected with or occupied as a part of a dwelling-house is a part of the dwelling-house, though such connection may be by an intervening structure.
State v. *Meservie*, 564.

AUTOMOBILE.

An operator of a motor vehicle intending to cross the street in front of another car, should so watch and time the movements of the other car as to reasonably insure a safe passage, either in front or rear of such car, even to the extent of stopping and waiting, if necessary. Negligence of driver cannot be imputed to a passenger. Contributory negligence of defendant must be shown.
Fernald v. *French*, 4.

BANKRUPTCY.

A trustee in bankruptcy occupies a dual position. He represents the debtor and also the creditors. In an action brought by such trustee to set aside fraudulent conveyances or transfers, constructively fraudulent because in violation of the Bulk Sales Law, he is required to prove a deficiency of assets. In the instant case the question of value should have been submitted to the jury, as the alleged admission was ambiguous, and the price received for the stock was some evidence of value. *Conquest* v. *Goldman*, 335.

BILL OF LADING.

The stipulation contained in a bill of lading that as a condition precedent to recovery for non-delivery of interstate shipment of goods, claims in writing must be made to the originating or delivering carrier within six months after a reasonable time for delivery has elapsed, has been determined by the Federal Court as valid. A reasonable time for performing a given act is such time as is necessary conveniently to do what the contract requires to be done, and in any given case is a question of fact.
Hazzard Co. v. *M. C. R. R. Co.*, 199.

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See *Fales* v. *Winslow*, 207.
See *Westbrook Trust Co.* v. *Timberlake et als.*, 64.

BONA FIDE HOLDER.

In an action on a note if the plaintiff "is not a bona fide holder for value" all defenses may be raised that could be made as between the original parties.
Judkins v. *Chase et als.*, 230.

BREACH OF CONTRACT.

Whether given conduct can be legally held a breach of a certain contract, i. e., whether capable of being so held is a question of law. If at the time action is brought, the plaintiff has no grievance, in that the contract has not been renounced, or all future liability under it repudiated, it is exceptional error to hold that there was a breach, unless it appears that such error is harmless and that the excepting party must ultimately fail upon the facts admitted to be true. *Stachowitz* v. *Anderson Co.*, 534.

BROKER.

When a real estate broker has complied with the conditions of the contract with the owner, by producing to the owner a customer who is ready, willing and able to buy at a specified price, upon terms satisfactory to the owner, and the customer is accepted by the owner as such, he is entitled to his commission, whether the customer changes his mind and refuses to buy or not.
Jutras v. *Boisvert*, 32.

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See *Conquest* v. *Goldman*, 335.

CAVEAT EMPTOR.

In a lease of a furnished dwelling-house, if for a long term, there is no implied warranty that the dwelling is reasonably suitable for use and occupation, and the rule of caveat emptor applies. *Young* v. *Povich*, 141.

CIDER.

An indictment for selling intoxicating liquor includes cider, only when it is sold for tippling purposes, or as a beverage. *State* v. *Douglass*, 137.

CLAIM FOR JURY TRIAL.

It is within the discretion of the court to grant a motion requesting that a case be placed on the jury list for trial, where the plaintiff failed to write on the writ itself a claim for jury trial, which was filed with the writ before the return day. *Cooper* v. *Hamlen*, 80.

COLLATERAL AGREEMENT.

See *Hines & Smith Co.* v. *Green*, 478.

COLLATERAL TESTIMONY.

In the instant case plaintiff's counsel was bound by the answers made by the witness to his inquiries on cross examination concerning matters of a collateral nature, and could not contradict the answers by introducing other testimony. The evidence of Greeley could therefore properly have been excluded.
Bessey v. *Herring*, 539.

COMMON CARRIER.

A common carrier having without reservation received merchandise for transportation is a qualified insurer of safe carriage. Loss or injury caused by a strike is not a defense. Its duty in prompt transportation is that of reasonable diligence and care, not as an insurer. A strike terminates the relation of master and servant, and the doctrine of respondeat superior does not apply.
Warren v. *Portland Terminal Co.*, 157.

In absence of any agreement or direction as to how goods are to be sent or shipped, the seller should deliver them in good condition to a common carrier in the usual and common course of business. *Hoyt* v. *Tapley*, 239.

CONDITION SUBSEQUENT.

See *Whitmore* v. *Congregational Parish*, 391.

CONSIDERATION.

Total failure of consideration may be shown under the general issue, but partial failure must be specially pleaded. *Judkins* v. *Chase et als.*, 230.

CONSPIRACY.

Documentary evidence consisting of letters written by the three alleged conspirators, and two confessions or admissions purporting to have been made by two of the three charged, are admissible against all parties charged.
State v. *Trocchio*, 368.

CONSTITUTIONALITY OF STATUTE.

See *Mc Kenney* v. *Farnsworth*, 450.

CONSTRUCTION OF DEED.

In a description in a deed the following words, "the same being intended for a burying ground and to be used for no other purpose," import merely the purpose of the parties, and in no way legally limit or restrict the title, or constitute a condition subsequent. *Phinney* v. *Gardiner*, 44.

CONTRACT.

When a contract can be substantially executed, and its essential purpose accomplished, performance is not excused. *Hoyt* v. *Tapley*, 239.

The terms of a written contract, if the language is clear, definite, and free from ambiguity, are not to be varied, modified, or contradicted, in absence of proven fraud, except where convincing and cogent proof establishes the fact that a change or modification of such written contract was made by a subsequent agreement. *Spaulding* v. *American Realty Co.*, 493.

Whether given conduct can be legally held a breach of a certain contract, i. e., whether capable of being so held is a question of law. If at the time action is brought, the plaintiff has no grievance, in that the contract has not been renounced, or all future liability under it repudiated, it is exceptional error to hold that there was a breach, unless it appears that such error is harmless and that the excepting party must ultimately fail upon the facts admitted to be true. *Stachowitz* v. *Anderson Co.*, 534.

CONTRIBUTORY NEGLIGENCE.

An operator of a motor vehicle intending to cross the street in front of another car, should so watch and time the movements of the other car as to reasonably insure a safe passage, either in front or rear of such car, even to the extent of stopping and waiting, if necessary. Negligence of driver cannot be imputed to a passenger. Contributory negligence of defendant must be shown. *Fernald* v. *French*, 4.

In an action to recover damages to property resulting from a collision at a grade crossing of a railroad, alleging negligence, it is unnecessary to consider the alleged negligence of defendant, if it appears from the direct examination of the plaintiff that he was manifestly guilty of contributory negligence. *Crandall* v. *Hines*, 11.

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See *Harmon* v. *South Portland*, 1.

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For delivery to the carrier to constitute delivery to the vendee, "The seller must not sacrifice the buyer's right to claim indemnity from the carrier," unless conditions of delivery by seller to carrier are in accordance with instructions from vendee to seller. *Saunders* v. *Pratt*, 333.

DEMURRER.

The respondent was described in the complaint as "M. B. Striar whose full and correct name is to the complainant unknown, of Bangor." To this complaint the respondent, appearing in his own proper person, and not by attorney, demurred, describing himself in his demurrer, and subscribing it as M. B. Striar.

Held:

That having appeared in his own proper person and described himself in his demurrer, and signed it by the name of M. B. Striar, he must he held to have admitted thereby that either M. B. Striar is his full and correct name, or as to his surname and initials, he was correctly described in the complaint.

That upon such an admission, inasmuch as judgment must be rendered upon the whole record and not upon the complaint alone, the complaint must be adjudged good upon demurrer.

That if the respondent wished to raise the issue by pleading to the complaint that the name by which he is described is not his full and correct name, it should have been done by plea in abatement. *State* v. *Striar*, 519.

See *Stowell* v. *Hooper*, 152.

DILIGENCE.

If a party has knowledge of such acts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, make such person chargeable, as a matter of law, with notice of ascertainable facts by ordinary diligence, if he fails to make such inquiry.

American Realty Co. v. *Amey*, 545.

DIRECTED VERDICT.

Exceptions to a directed verdict necessarily bring up the whole record, though the bill itself is mute upon the particular point, or perchance in summarizing it speaks in this regard with inexactness. *Williams* v. *Sweet*, 118.

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DUE PROCESS OF LAW.

DWELLING-HOUSE.

The definition of "dwelling-house" as given by R. S., Chap. 121, governs in an indictment for arson, and under such definition, a building which is connected with or occupied as a part of a dwelling-house is a part of the dwelling-house, though such connection may be by an intervening structure.

State v. *Meservie*, 564.

EQUITY PRACTICE AND PROCEDURE.

On exceptions to a final decree entered by a single Justice after the Law Court has certified its decision upon an appeal or exceptions, it is

Held:

1. That such exceptions, under Equity Rule XXVIII must be taken within ten days from the filing of the decree and they must be filed in the office of the Clerk of Court in the County where the proceedings are pending, within that time.
2. That the exceptions in this case were not so filed and therefore must be dismissed as a matter of equity practice and procedure.
3. Disregarding this irregularity the plaintiff could take nothing by these exceptions. The only question to be determined by the court under this rule at this stage of the proceedings is whether the decree in form accords with the decision and certificate of the Law Court. If so it is sufficient. The merits of the controversy are no longer open.
4. The final decree in this case follows the mandate of the Law Court without attempting to modify, limit or enlarge it and therefore is unobjectionable.

Fenderson v. *Franklin L. & P. Co.*, 213.

The court ordinarily declines to answer questions, or give requested instructions, in an equitable proceeding, where there are no existing conditions, occasion, or emergency, set forth in the bill requiring an answer or instructions. Where questions and requested instructions are predicated upon a contingency, answers should not be given as a rule until such contingency arises, or is about to arise, or imminent.

McCarthy v. *McCarthy*, 398.

ESTATE TAIL.

In a will, where the real estate and personal property are given for the benefit of an adopted child by the same clause and in the same words, there being nothing to indicate a different intent on the part of the testator in relation to his personal estate, from that manifested respecting his real estate, a limitation over, on an indefinite failure of issue, is too remote, when applied to personal estate, because it cannot be construed to create an estate tail therein, and is therefore void.

Annie P. Simmons, Appellant, 97.

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EVIDENCE.

Evidence of statements by an intestate during his lifetime, that he intended to give his property to the defendant is admissible upon the question of intent, and evidence of statements that he had given his property to defendant is admissible as being against interest. *Peacock* v. *Ambrose*, 297.

An inventory of an estate duly sworn to and filed in the Probate Court is admissible to prove and is prima facie evidence of the amount of the estate which passes into the hands of the trust officer, but not conclusive, and may be offered to show the financial benefits which the widow of the deceased may receive from the estate. *Jones* v. *Grindal*, 348.

Documentary evidence consisting of letters written by the three conspirators, and two confessions or admissions purporting to have been made by two of the three parties charged, are admissible against all the parties charged.
State v. *Trocchio*, 368.

While it is true that on cross examination matters of a collateral nature thus testified to cannot be contradicted by the cross examiner, who thus makes such inquiries at his peril, by introducing other testimony, and the introduction of such other testimony in contradiction should be excluded; yet, if admitted and exceptions taken, the excepting party must go further and show that the admission of the evidence was prejudicial to his interest. Prejudicial errors only are reversible. Although admitted evidence is technically inadmissible, if it is harmless the exception must be overruled.
Bessey v. *Herring*, 539.

EXCEPTIONS.

Exceptions to a directed verdict necessarily bring up the whole record, though the bill itself is mute upon the particular point, or perchance in summarizing it speaks in this regard with inexactness. *Williams* v. *Sweet*, 118.

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Fraud is never presumed, but must be clearly proved, and whether it exists or not is an issue of fact, and vitiates a contract whatever its language, and no contractual limitation of remedy can oust the courts of jurisdiction. The issue of fraud should be submitted to the jury unless it is proved so clear and manifest as to justify the court in deciding that it is established as a matter of law. *Judkins* v. *Chase et als.*, 230.

See *Denison* v. *Dawes*, 402.

GIFT INTER VIVOS.

See *Savings Bank* v. *Welch et al.*, 49.

GUARANTY.

Whether a promise to pay the debt of another is that of an original debtor or a guarantor, depends upon the question as to whom credit was given. The obligation is original if the promise is made at the time or before the debt is created, and the credit is given solely to the promisor; but is collateral if the promise is merely super-added to the promise of another to pay the debt, he remaining primarily liable; if any credit whatever is given to the third person, so that he is in any degree liable, the oral promise is not valid.

The rules of construction relative to guaranties are the same as those applicable to other contracts; viz., in cases of ambiguity the language is construed most strongly against the guarantor; it is the duty of the court to ascertain and give effect to the intention of the parties; in order to arrive at the intention of the parties the circumstances under which, and the purposes for which, the contract was made, may be proved and must be kept in view in its construction. *Hines & Smith Co.* v. *Green*, 478.

HUSBAND AND WIFE.

A wife in order to be entitled to credit of her husband even for necessaries must be justified in leaving a home the husband provided for her. Yet in obtaining goods if she does not exercise that right, but obtains them on her own credit, the husband is not liable. If husband and wife are living apart through some fault of the husband, there is a presumption in case of necessaries that she pledged the husband's credit, and not her own, unless the husband has otherwise made reasonable provision for her support, even though the goods be charged to her, unless by her express direction. *Brown* v. *Durepo*, 226.

IMPLIED POWER OF TOWNS TO INDEMNIFY ITS OFFICERS.

A town has an implied power to defend and indemnify its officers for liabilities incurred in a bona fide discharge of their duties; otherwise when not acting in good faith. *Waugh* v. *Prince*, 67.

IMPLIED WARRANTY.

In a lease of a furnished dwelling-house for temporary purposes there may be an implied warranty that the dwelling is reasonably suitable for use and occupation. If the lease is for a long term there is no implied warranty, and the rule of caveat emptor applies. *Young* v. *Povich*, 141.

INDORSER.

See *Ingalls* v. *Marston et als.*, 182.

INHERITANCE FROM ADOPTED CHILDREN.

Parents by adoption do not have any rights of inheritance from adopted children. *Annie P. Simmons, Appellant*, 97.

INTENT.

See *Peacock* v. *Ambrose*, 297.

INTOXICATING LIQUORS.

The question as to whether alcohol is an intoxicating liquor is a question of fact for the jury, and the jury have a right to take judicial notice of the fact that it is an intoxicant. In a liquor indictment, no specific place being named, adjoining premises, one used for hiding intoxicants, the other for illegal sale, it follows that the illegal use of any part of the premises thus connected to form one place or tenement and constitutes a nuisance.
State v. *Wallace et al.*, 83.

An indictment for selling intoxicating liquor includes cider, only when it is sold for tippling purposes, or as a beverage. Hence, a respondent so indicted is furnished with knowledge of the offense charged. Cider sold for tippling purposes or as a beverage is an intoxicating liquor. The actual sale of intoxicating liquor under our statute is a malum prohibitum, and intent is not an ingredient of the offense charged. *State* v. *Douglass*, 137.

The interests of a guilty party in a vehicle used by him in the illegal transportation of intoxicating liquor are subject to forfeiture and sale, but the rights of an innocent claimant therein are protected provided he establishes his claim in court. *State* v. *Packard Motor Car Co.*, 185.

This is an indictment charging the respondent with unlawful possession of intoxicating liquor. The jury returned a verdict of guilty and the case is before the court on exceptions.

Held:

1. The State had the burden of proving that the liquor in question was intoxicating liquor. This was a question of fact for the jury. While there may be other means of establishing the intoxicating character of liquor, we think the most satisfactory testimony on the subject is that of persons who have used part of the liquors involved in the inquiry. This course was pursued in the instant case, and properly.
2. The State had the further burden of showing the respondent's possession of intoxicating liquors to be unlawful. Philip W. Wheeler, a deputy sheriff, was permitted to testify that while in respondent's store he saw the respondent sell to customers Florida water and witch hazel. This testimony was admissible with the other testimony in the case on the question of unlawful possession, and the intent accompanying such possession. What respondent's intention was would be fairly indicated by what he did with the liquors; what he did with the liquors may be shown by a witness who saw him dispose of them. The testimony was properly submitted to the jury.

State v. *Horowich*, 210.

Liquor may be intoxicating in fact, and yet not be intoxicating liquor within the purview of the law because not "capable of being used as a beverage." Whether any compound is so capable of use is a question of fact, and a sale of it for beverage purposes is some evidence that it is capable of such use.

State v. *Sayers*, 339.

Chapter 235 of Public Laws of 1919, so far as it purports to incorporate by reference into the section thereby amended, future enactments of Congress establishing a rule, test, or definition of intoxicating liquors, and declaring such liquors to be intoxicating within the meaning of Chapter 127 of the R. S., is invalid. *State* v. *Vino Medical Co.*, 438.

The Eighteenth Amendment to the Federal Constitution prohibiting traffic in intoxicating liquor provides that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

JUDICIAL NOTICE.

LEASE.

LICENSE.

LIEN.

LIFE ESTATE.

LOG DRIVING.

MARKET VALUE.

MARRIAGE AGREEMENT.

MISNOMER.

MOTION FOR NEW TRIAL.

NEGLIGENCE.

NEW TRIAL.

NOTICE.

NUISANCE.

ORAL AGREEMENT.

A, by oral agreement only, agreed to sell certain real estate and personal property to B at a certain price agreed upon, and executed a deed of the real estate and a bill of sale of the personal property in accordance with the trade, and left them with C to be delivered to B upon payment of the purchase price. The purchase price was never paid or tendered and no title passed. B entered into an oral agreement with D to sell the personal property and to lease the real estate, and D went into possession of both the real estate and personal property, but failed to perform any of his agreements and used, consumed, and disposed of some of the personal property. A is entitled to recover of D the damage sustained. *Wyman* v. *Lumber Co.*, 271.

PAROL CONTRACT.

A verbal contract, not enforceable under the Statutes of Frauds, is voidable only, and is a sufficient consideration for a note given by reason of the agreement, providing the payee of the note is ready and willing to be bound by the agreement. *Fletcher* v. *Lake*, 474.

PLEA IN ABATEMENT.

See *Stowell* v. *Hooper*, 152.

PLEADING.

A plea of non assumpsit puts in issue every fact included within the allegations of the declaration, incumbent on the plaintiff to prove in order to recover. *William* v. *Sweet*, 118.

Filing exceptions to the sustaining of a demurrer to a plea in abatement is not a waiver of the right to plead anew. Neither is the erroneous certification of a case to the Law Court. *Stowell* v. *Hooper*, 152.

The law is well settled in this State that when goods are ordered, and shipped to the one giving the order, but were never accepted by the one giving the order, the seller's remedy is not a suit for the price, but a special action for breach of the implied contract to receive and accept. To maintain an action for the price actual acceptance must be shown. *Chase* v. *Doyle*, 204.

In an action on an insurance policy under Sec. 38, Chap. 87, R. S., if the defendant relies upon the breach of any conditions of the policy by the plaintiff as a defense, it must be specially pleaded, or set up under a brief statement, at election of defendant; otherwise the breach of all conditions known to the defendant shall be deemed to be complied with by plaintiff. *Russell* v. *Insurance Co.*, 248.

PREJUDICIAL REMARKS BY THE COURT.

PRESCRIPTIVE TITLE.

PRESIDING JUSTICE.

PROTESTING NOTES.

PROXIMATE CAUSE.

See *Hoyt* v. *Fair Association*, 461.

PUBLIC UTILITIES COMMISSION.

The Public Utilities Commission is not a court, though clothed with certain judicial powers. Its functions are mainly legislative and administrative. Acting within its powers its orders and decrees are final except as a review by the regularly constituted courts is authorized by the act creating it, and which under the act only relate to questions of law. The law court will not review the evidence on which the findings of the commission are based unless it is claimed that a finding of the commission is without any substantial evidence to support it. *Hamilton* v. *Caribou Water, Light & Power Co.*, 422.

The Public Utilities Commission may order an increase of rates over those fixed in a contract between a water, light, or power company and the inhabitants of a town, consumers, which would not ipso facto amount to an impairment of the contract nor a taking of property "without due process" in violation of the constitutional provisions. In this State the Public Utilities Commission has no authority to measure in any part the rates that should be paid by a municipality, by the amount of taxes assessed upon the property of the utility company. *In Re, Caribou Water, Light & Power Co.*, 426.

QUESTIONS OF LAW AND FACT.

The question of the meaning of a written contract is ordinarily one of law and not of fact. *Hoyt* v. *Tapley*, 239.

Acts of dominion relied upon in creating title by adverse possession are question of law. Whether such acts were really done, and the circumstances under which they were done, raise questions of fact.
Webber v. *Barker Lumber Co.*, 259.

The findings on questions of fact by the chairman of the Industrial Accident Commission, in absence of fraud, and also provided that there is some legal evidence supporting such findings, are final. *Ballou's Case*, 282.

Ordinarily questions of law are not raised upon a motion for a new trial, unless an injustice would otherwise inevitably result. *State* v. *Meservie*, 564.

REMAINDER.

See *Lermond* v. *Hyler*, 54.

REVIEW.

An agreement for compensation made by employee and employer and approved by the Commission, under the Workmen's Compensation Act, is binding and final except that a review may be had if the petition therefor is filed within two years from the date of such approval, and within the time for which compensation was fixed under such agreement. *John Newell's Case*, 504.

After the expiration of the time within which an appeal may be taken from a final decree of the Chairman of the Industrial Accident Commission, under the Workmen's Compensation Act, a rehearing cannot be had on the merits of the case on the ground of newly-discovered evidence. An appeal upon questions of law may be had to a single Justice, and thence to the Law Court, and a review may be had within two years after decree on the ground that the incapacity of employee has subsequently increased, diminished or ended.
Frank M. Conners' Case, 37.

RIGHT OF POSSESSION.

The right of possession of a mortgaged chattel is in the mortgagee, before as well as after breach of condition, unless otherwise provided by agreement between the parties to the mortgage. *Gilpatrick* v. *Chamberlain*, 561.

SERVICE OF WRIT.

A writ of capias or attachment upon which an attachment has been made is properly served by summons. *Stowell* v. *Hooper*, 152.

SLANDER.

In a declaration for slander, unless the expressions and words alleged to be slanderous, can be interpreted as actionable with at least a reasonable certainty, they must be made certain by proper colloquium and averment. An innuendo is only explanatory of some matter already expressed, but cannot add to or enlarge or change the sense of the previous words, hence there must be an inducement stating such facts as will support an innuendo..
Bradburg v. *Segal*, 146.

STATUTE OF FRAUDS.

An agreement made in consideration of marriage not in writing is in violation of the statute of frauds and is void. *Roderick* v. *Paine*, 420.

STATUTE OF LIMITATIONS.

STRIKES.

SWORN WEIGHER.

TAXATION.

TESTAMENTARY DISPOSAL.

TITLE.

TOWNS.

TROVER.

UNDISCLOSED PRINCIPALS.

UNIFORM NEGOTIABLE INSTRUMENT ACT.

VARIANCE.

A marginal memorandum "and interest" on a note which is in conflict with the note itself, does not constitute a variance, and such note is admissible, it having been declared upon as without interest, as in the body of the note no interest is mentioned.

In the instant case the only question is, were the words "and interest" a part of the note, a part of the contract, and included in the promise of the maker.

The maker was bound by his promise. He promised to pay one hundred dollars, no more, and no less. The marginal memorandum contradicts the note, contradicts the promise to pay. Which shall govern, the deliberate, signed promise to pay, or a memorandum which may have been made by a person not a party to the note? It is the opinion of the court that the note should govern, and not the marginal memorandum or notation.

Fales v. *Winslow*, 207.

VERDICT.

The findings of a jury on a breach of contract, being a question of fact, is final, if there is any evidence to support it. *Peterson Oven Co.* v. *Fickett*, 413.

VOIDABLE CONTRACT.

A verbal contract, not enforceable under the Statute of Frauds, is voidable only, and is a sufficient consideration for a note given by reason of the agreement, providing the payee of the note is ready and willing to be bound by the agreement. *Fletcher* v. *Lake*, 474.

VOLSTEAD ACT.

See *State* v. *Vino Medical Co.*, 438.

WAIVER.

Filing exceptions to the sustaining of a demurrer to a plea in abatement is not a waiver of the right to plead anew. *Stowell* v. *Hooper*, 152.

See *Denison* v. *Dawes*, 402.
See *MacHatton* v. *Dufresne*, 221.

WAYS.

To recover damages against a town for personal injuries caused by an alleged defect in the highway, it must appear that one of the officials named in the statute had twenty-four hours' actual notice of such defect, and that plaintiff, or some person in his behalf, had given the fourteen days' written notice of the injury as required by statute. And if plaintiff had notice of such defect previous to the injury, it must appear that he had, previous to the injury, notified one of the municipal officers of such defect.

Harmon v. *South Portland*, 1.

WILLS.

A residuary clause in a will which provides one half of income for life to A, and the other half of income for life to B, and the whole income to the survivor of either for life; and further provides that at the death of the survivor of A and B, one half of the income to go to C for life, and the other half of the income to go to D for life, and the whole income to the survivor of C and D for life, and further provides that after the death of the survivor of C and D "I give, bequeath and devise all of my property to my then heirs, as provided by law," creates a remainder to take effect at the close of all the life estates.

Lermond v. *Hyler*, 54.

A devise of an absolute estate in clear and unmistakable language cannot be lessened or effected by subsequent words in the same paragraph inconsistent therewith. Real estate devised upon a condition subsequent, in case of reentry for breach, reverts to the heirs of the testator, not to the residuary legatee. A legacy absolute in terms, but suggesting a particular use, creates neither a condition nor trust. A grantor or his heirs only can take advantage of a breach of condition subsequent, and there is no forfeiture until entry or statutory equivalent. One who gives an estate on condition subsequent has no estate left that he can either alienate or divise. The same rule that appplies to devises, applies to bequests of personal property.

Whitmore v. *Congregational Parish*, 391.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

See *Conners' Case*, 37.
See *Thomas Gagnon's Case*, 20.

A petition for review where there has been an agreement for compensation made by employee and employer and approved by the commission, must be filed within two years from the date of such approval, and within the time for which compensation was fixed under such agreement.
Frank Lemelin's Case, 72.

Sec. 20, Chap. 238, Public Laws, 1919, which provides that proceedings for compensation are not barred by failure to give notice of the accident within thirty days, if such failure is due to accident, mistake or unforseen cause, is for the purpose of protecting the legal rights of parties in meritorious cases when the facts warrant it.

An unforseen cause in general is one which could not have been reasonably forseen as likely to arise or occur and yet is of such a nature as to have substantially interfered with the giving of the notice.

The facts in this case bring it within this definition and afford a reason for not giving the notice until twenty days after the expiration of the thirty-day limitation. *Wardwell's Case*, 216.

The findings on questions of fact by the Chairman of the Industrial Accident Commission, if based upon some competent evidence, drawing reasonable inferences from proven facts, are final. The written report by the employer to the Commission in accordance with the statute is admissible in so far and in so far only as it contains statements which are declarations against interest. *Jacque's Case*, 353.

A sudden and unexpected fall to the floor, producing an injury to the knee or leg, diagnosed as a strain or sprain of the knee, constitutes an injury received in the course of the employment. *Orlow Webber's Case*, 410.

Method "C" in the Workmen's Compensation Act properly adopted for computation. On the facts there was evidence competent to sustain the award as to amount. *Scott's Case*, 446.

Employment cannot be regarded as "casual" when one is hired to do a particular part of the service connected with the usual business of the employer, which part is sure to occur and reoccur from time to time, not perhaps on fixed dates, but with some degree of regularity in the usual and necessary conduct of affairs and when such contract of employment is entered into with a fair expectation on the part of both employer and employee that it shall continue for a reasonable period of time.

The determination of the question whether claimant was "an independent contractor" depends upon the question as to who had the right to control the work claimant was doing at time of injury. *Mitchell's Case*, 455.

Exceptions to a ruling directing a verdict necessarily bring up the whole record, and the record controls statements in the bill of exceptions. Whether the employer has exercised reasonable care to provide a reasonable safe place in which, and a reasonable safe machine upon which, the employee was to work, is a question for the determination of the jury. To recover damages for personal injuries against a non-assenting employer under the Workmen's Compensation Act, to exclude the defenses mentioned in Section two of the Act, it must be alleged that plaintiff belongs to the class of employees who are within the Act. An objection that the declaration failed to allege that the plaintiff was an employee within the statute, not made until after the evidence was closed, comes too late and should be overruled.

Charles v. *Harriman*, 484.

Maine Laws of 1919, Chap. 238, Secs. 30, 39; Sec. 36; Sec. 16; Workmen's Compensation Act.

If an employer and his employee do not reach an agreement respecting the compensation to be paid, or, if an agreement arrived at by them fails of the Labor Commissioner's approval, then, and in each of these instances, within two years of the day of the date of the injury, either employee or employer may make application that the amount of compensation be fixed. Proceedings of this nature are called original.

If there be an officially-approved agreement, or a fixing decree, then, within both, the time which the one or the other assigns for the payment of compensation and two years from the date of approval or entry of decree, there may be a reconsideration of the situation with regard to the question of whether incapacity for work has ended, increased, or diminished. A petition of this kind is known as one for a review.

Section 16 deals with what, in named instances, shall be deemed the duration of presumed total disabilities for working, reserving questions of partial disabilities, remaining after the presumed total ones, to be decided conformably to the provisions of another section. Section 16 lays down a prevailing definition as to those, and only those, cases which it definitely mentions.

James Graney's Case, 500.

An agreement for compensation made by employee and employer and approved by the Commission, under the Workmen's Compensation Act, is binding and final except that a review may be had if the petition therefor is filed within two years from the date of such approval, and within the time for which compensation was fixed under such agreement. *John Newell's Case*, 504.

As a usual rule, in industrial accident cases, foremen are included in the category of those whose knowledge is regarded as that of the principal.

WRITTEN CONTRACT.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

STATUTES OF MASSACHUSETTS.

STATUTES OF CONNECTICUT.

STATUTES OF MINNESOTA.

RESOLVES OF MAINE.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

In the 25th line on page 323, insert "516" for "416."

As title of case at top of pages 15 to 19 inclusive substitute "Clifford et als. v. Railroad" for "Clifford v. Scruton."

In the 27th line on page 256 substitute 260 for 26.